

SUPREME COURT OF ARIZONA

ARIZONA INDEPENDENT REDISTRICTING
COMMISSION, an Independent Constitutional
Body,

Petitioner,

and

COLLEEN COYLE MATHIS,

Petitioner-Intervenor,

vs.

JANICE K. BREWER, in her official capacity as
the Governor of the State of Arizona; ARIZONA
STATE SENATE; RUSSELL PEARCE, in his
official capacity as Senate President,

Respondents.

Arizona Supreme Court
No. CV-11-0313-SA

**RESPONDENTS' JOINT MOTION TO RECONSIDER
ORDER OF NOVEMBER 17, 2011**

November 21, 2011

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Respondents Janice K. Brewer, Governor of the State of Arizona (“Governor”), and the Arizona State Senate and Senate President (the “Senate”) pursuant to RPSA 9¹ and ARCAP 22, jointly move for reconsideration of this Court's Order of November 17, 2011 (the “Order”). The Court should grant reconsideration and revise its Order for the following reasons:

1. This Court’s Order effectively prevents the Governor and Senate from exercising their constitutional authority to remove a member of the Arizona Independent Redistricting Commission (“IRC”) by determining that the November 1, 2011 removal letter does not “demonstrate ‘substantial neglect of duty, gross misconduct in office or inability to discharge the duties of office’” but without stating any reasons for that determination.

2. This Court’s decision to grant jurisdiction and to conclude that the issues presented are not political questions improperly confused this Court’s role in reviewing the removal of a member of the IRC textually committed to the Governor and Senate with this Court’s authority to review the exercise of statutory authority to remove a public officer.

¹ A motion to reconsider is appropriate because this Court’s Order of November 17, 2011, does not state that the writ shall become effective immediately or that the mandate shall issue immediately. Accordingly RPSA 9(1) governs this motion to reconsider.

ARGUMENT

I. Without immediate clarification of its Order, this Court has unilaterally repealed the constitution's removal provision.

The immediate problem created by the Court's Order is that the Governor and the Senate are effectively paralyzed from removing any member of the IRC until this Court's opinion is issued "in due course." Experience teaches that "in due course" may be two or more months from now. The Governor has the constitutional power of removal with the concurrence of two-thirds of the Senate. This Court's Order strips the Governor of her removal authority—and strips the Senate of its role in concurring in removal of an IRC member—by stating only that the November 1, 2011 removal letter does not "demonstrate" grounds for removal. The Governor and the Senate have an immediate right to know what this Court intended by using the word "demonstrate." Is this Court simply concerned with the format of the November 1, 2011 letter? Was this letter deficient because it did not reference and cite the October 26, 2011 notice letter and six responses from the IRC and its commissioners? Was the letter deficient because this Court has determined that the conduct complained of can never be grounds for removal? Did this Court simply substitute its judgment on what constitutes grounds for removal for the judgment constitutionally committed to the Governor with the concurrence of the Senate?

In fact, the Court's singular focus on the November 1, 2011 letter is perplexing because that letter cannot be considered in isolation from the Governor's October 26,

2011 letter of written notice (the only document specifically required by the Constitution) and the various responses received from the Commissioners. It is indisputable that the Arizona Constitution does not require the Governor to provide a removal letter, let alone a removal letter with any “findings” that “demonstrate substantial neglect of duty or gross misconduct in office.” But the Court’s rush to issue its Order in just over two hours following oral argument appears to have prevented it from considering, in response to questions it raised at oral argument, that the Senate was provided and did consider (1) the Governor’s October 26, 2011 letter of *specific actions* the Governor set forth as demonstrating substantial neglect of duty and gross misconduct and (2) *all* responses and supporting materials submitted by the IRC and its Commissioners. *See* Motion to Supplement Appendix to Respondents Arizona State Senate and Senate President Russell Pearce’s Consolidated Response to Petition for Special Action (filed at approximately 5:40 p.m. on November 17, 2011) and this Court’s Order granting same on November 18, 2011.

Should the Governor determine that removal is appropriate, the Governor and Senate are entitled to know enough about this Court’s reasoning to allow them to conform the exercise of their constitutional authority to this Court’s ruling. In addition to the Governor’s and Senate’s concerns about this Court upending the delicate balance of ordered democracy, this Court’s usurpation of the Governor’s and Senate’s authority is exacerbated by its failure to provide any meaningful information sufficient to guide their future conduct. This Court is effectively barring the

Governor and Senate from using their constitutional authority before a more detailed opinion is published.

The Governor and Senate assume that this Court did not intend to paralyze the executive and legislative branches of government by issuing its cursory Order. But the failure to grant this motion to reconsider to provide adequate reasons for this Court's determination will make it most difficult to mitigate the sense of outrage resulting from what is viewed as this Court's disregard and disrespect for the Governor's determination and the Senate's exercise of its collective judgment in the concurrence textually committed to it in the removal process.

II. To the extent this Court's decision was based on its authority to review a statutory removal, it should be reconsidered.

It is improper for the Court to conflate statutory and constitutional removal, thereby adding a role for this Court that the constitution unequivocally does not provide. As this Court has concluded: “[C]onstitutional specifications are exclusive” and “[p]ositive directions in a constitution contain an implication against anything contrary to them.” *Whitney v. Bolin*, 330 P.2d 1003, 1005 (1958). The IRC itself noted in other judicial proceedings² that the removal provision constitutionally entrusted to the Governor and a super-majority in the Senate is the exclusive

² Appendix 17 to Governor's Consolidated Response to Amended Petition for Special Action.

mechanism to enforce the constitution's "openness" provision.³ Yet, inconsistent arguments before two different courts apparently had no import in the ultimate decision of the Court to seize the Governor and Senate's constitutional authority.

During oral argument, this Court appeared not to quarrel with the first prong of the political question test: the existence of a "textually demonstrable constitutional commitment of the issue to a coordinate political department."⁴ Concerns seemed reserved for whether there is a "lack of judicially discoverable and manageable standards" for resolving the issue.⁵ More than once, questions alluded to this Court's authority to define terms in other contexts and drew parallels to cases governing the exercise of statutory powers of removal.

The sparse case law regarding statutory removal is not controlling or instructive. The very case relied upon by Petitioners, *Humphrey's Ex'r v. United States*,⁶ clearly instructs why statutory removal is significantly different from constitutional removal and why judicial review of statutory removal does not run afoul of separation of powers. In *Humphrey's Ex'r*, the Supreme Court concluded that judicial review was appropriate because the other two branches were disputing removal authority conferred by a statute. Accordingly, the issue was whether the executive had power to remove an officer in spite of a congressional limitation within

³ Ariz. Const. art. 4, pt.2, § 1(12).

⁴ *Kromko v. Arizona Board of Regents*, 216 Ariz. 190, 192, 165 P.3d 168, 170 (2007) (citations omitted).

⁵ *Id.*

⁶ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

the statute granting the executive's power of removal. The Court's role in deciding the limits and constraints imposed by the statute was permissible because there was no subsequent legislative check on that statutorily created removal authority.⁷

The Court's questioning often sought to suggest that there must be a role for judicial review of a Governor's determination to remove an IRC Commissioner if a Governor removed a Commissioner for something absurd like wearing a purple dress, even though the grounds for removal here were most serious, indisputably legitimate and specified in the October 26, 2011 notice letter. But where a political question exists, there is never a role for the Courts. In *Kromko*, the Court cited the political question doctrine and abstained from determining whether university tuition rates had been set "as nearly free as possible" as required by the constitution.⁸ A political question existed because tuition rates depend upon a litany of judgments entrusted to the Legislature and the Board of Regents.⁹ Therefore, the Court could not intervene because to do so would involve the Court impermissible substituting its judgment for that of these other branches of government. But what if the tuition had been set at \$100,000 per student in light of greatly diminished legislative appropriations? What if it was \$1 million per student? The answer is that it does not matter. The decision

⁷ See *Holmes v. Osborn*, 57 Ariz. 522, 115 P.2d 775 (1941) (where the Governor's authority to remove members of the Industrial Commission of Arizona were governed by statute and there was no check by the legislature regarding the Governor's decision).

⁸ 216 Ariz. 190, 191, 165 P.3d 168, 169 (2007).

⁹ *Id.* at 194, 165 P.3d at 172.

is one from which the Court must abstain even if the decision is one that is ridiculous. The analysis does not depend upon the hypothetical absurdity of the action taken by the other branch of government. That is particularly true when—despite concerns about an absurd basis for removal—the constitution provides that a supermajority of the Senate serves as a check on the Governor’s removal determination.

There is no basis for a court to intervene in constitutional removal proceedings when the constitution textually commits a check on the Governor’s removal authority exclusively to another branch by requiring concurrence in the removal decision. However, when a coordinate branch is not vested with any reviewing authority, yet nonetheless takes it upon itself to intervene, this “disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.”¹⁰

The Court’s questioning suggested that *Powell v. McCormack* serves as the touchstone for judicial interpretation even when there is a constitutionally committed decision entrusted to another branch. But that case also is inapposite. In *Powell* the issue was whether the House of Representatives could bar a duly elected individual from being seated for misdeeds that occurred before he was to be seated. The House of Representatives could not muster the two-thirds vote to expel Adam Clayton Powell Jr. if he was sworn in as a member of Congress but, instead, wanted to

¹⁰ *Morrison v. Olsen*, 487 U.S. 654, 695 (1988) (citations omitted).

prevent him from being sworn in.¹¹ The Court carefully analyzed the matter and said that because this was not constitutional removal expressly committed to the House of Representatives, the issue was whether the House of Representatives could prevent a duly elected individual from being sworn in if the standing qualifications in the U.S. Constitution of age, citizenship, and residence contained in Art. I, § 2, of the U.S. Constitution. The Court only reviewed the objective facts; much like the removal principles flowing from impeachment case law, the Court is only permitted to review to make sure the objective procedural steps were followed, not whether a coordinate branch has made the appropriate demonstration – a requirement not found in the constitution. The Court’s role is to make sure the constitutional removal procedures set forth in the Arizona Constitution are followed.¹² “Once that is ascertained, this Court *has no jurisdiction* to review the proceedings . . . to examine for error of fact or law, or to prescribe or reject rules to be followed.”¹³

To casually conflate statutory and constitutional removal is not an academic exercise, but instead erodes constitutional democracy and does great harm to the relationship of the coordinate branches. It is for these reasons that the Court should reconsider its decision and rule that this matter is a non-justiciable political question.

¹¹ *Powell v. McCormack*, 395 U.S. 486, 510-11(1969).

¹² *Mecham v. Ariz. House of Rep. (Mecham II)*, 162 Ariz. 267, 268, 782 P.2d 1160, 1161 (1989).

¹³ *Id.* (emphasis added).

Relief Sought

The Governor and Senate respectfully request that this Court grant reconsideration and rule that this matter was in fact non-justiciable. At a minimum, the Court should, on an expedited basis, clarify its Order of November 17, 2011 to provide the Governor and Senate with the reasons that the November 1, 2011 letter does not “demonstrate 'substantial neglect of duty [or] gross misconduct in office.’”

Respectfully submitted,

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