



June draws summer storms to Arizona. The sand swirls in the distance, with dark, menacing clouds, and streaks of lightning. Finally, it boils over the city, sometimes with wind and ruckus, sometimes with welcome rain, and other times with trees toppled, power lines snapped, and streets and washes flooded.

A storm squallied over state government last June, and it had punch. Facing a record \$3 billion shortfall in revenues, Governor Jan Brewer and the Arizona Legislature reached an impasse in negotiating the fiscal-year 2010 budget. On June 4, 2009, the Legislature passed a budget

A Supreme Conflict at the Summit of Arizona Government



BY JOSEPH KANEFIELD & DAVID CANTELME
PHOTOS COURTESY OF THE ARIZONA REPUBLIC

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The authors thank their respective co-counsel in *Brewer v. Burns* for their extraordinary work in representing our clients. Vanessa Hickman, the Governor's Deputy General Counsel, was instrumental in preparing the Governor's case, along with two University of Arizona law students, Jon Linford and Andrew Warmington, who had the summer of their lives. For the Legislature, Peter Gentala and Greg Jernigan, respectively counsel to the House and Senate, were invaluable, and Aaron Brown, as always, was superb.



but decided to hold the bills in an effort to negotiate the budget's terms. Without a budget in place by June 30, state government was at risk of shutting down when the clock struck midnight.

The Governor demanded that the Legislature present the bills to her without further delay. When the Legislature refused, she filed a special action in the Arizona Supreme Court seeking an order compelling the Legislature to present her with the bills, as required by Article 4, Part 2, Section 12 of the Arizona Constitution.

The Arizona Supreme Court scheduled oral argument, thereby bringing the three branches of government together in the same courtroom in dramatic fashion.

It was a case of first impression and immense importance. The Court heard arguments from counsel exploring the fine line that often separates the fundamental powers of one branch from another. The issues required the Court to examine the inner workings of the legislative process as well as the powers granted to the Governor in the Arizona Constitution,

which provides her a role in the lawmaking process. The Court held that the Legislature violated the Constitution by failing to present the finally passed bills to the Governor, but, surprisingly, it declined to order relief to the Governor.

Besides the substantive lessons learned in the matter, another remarkable fact is that the case was filed, briefed, argued and decided in seven days. The Governor's counsel filed the petition on June 16, the briefing occurred over the following week, oral argument occurred on June 23, and



Gov. Jan Brewer answers media questions following the hearing at the Arizona Supreme Court in Phoenix, June 23, 2009. To her left is General Counsel Joe Kanefield.

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Arizona Supreme Court Justice W. Scott Bales (right) and the other justices listen to arguments during the hearing.



Brewer v. Burns Online

To watch the oral argument in the matter between the Governor and Legislature, go to www.supreme.state.az.us/courtvideo (*Brewer v. Burns*, June 23, 2009). Read the opinion online: www.supreme.state.az.us/opin/filed2009.htm

the Court issued its order that afternoon.

What follows is a series of questions and responses regarding the case. We hope that it provides some insight as to how the case was navigated from each of our perspectives as counsel for the Governor and for the Arizona Legislature.

What was the background that led up to the Arizona Supreme Court's decision in *Brewer v. Burns*?

JOE KANEFIELD: After the Governor and the Legislature were unable to agree on a solution to balance the fiscal-year 2010 budget, the Legislature passed a budget on June 4, 2009, which the Governor declared to be unacceptable. She believed the proposed budget cut too deeply into essential state services, including basis education and health care. She also believed that it was necessary for her to take quick action on the budget to bring the Legislature back to the negotiating table well before the fiscal year ended on June 30, 2009. The Governor was surprised to learn that despite having passed the bills,

the legislative leaders declared they would not present them to her until they were able to negotiate “trailer” bills to address her concerns.

As a former legislator, it had always been the Governor's understanding that once bills are passed they must be presented to the Governor without delay. She asked me to review the law and advise her on how to proceed.

DAVID CANTELME: The storm began to build for the Arizona budget in 2007. The real estate bubble burst, home sales slumped, and falling property values began to suck the rest of the Arizona economy into the mire. Yet a year later in June 2008, Governor Napolitano signed a \$9.9 billion fantasy budget that was certain to collapse. The Legislature and Governor (Napolitano and then Brewer) spent the next year cutting and re-cutting to balance the budget, and Arizona government hobbled into June 2009, with no good options.

Good intentions do not pay bills. Money does, and the State didn't have much. The Governor wanted to cut the

budget and raise revenues. From very early in the session the Governor staunchly contended that it was essential to refer a temporary sales tax increase to the voters. This idea never took root. Democrats uniformly opposed the referral, and many Republicans expressed concerns that it would further damage the economy. The legislative leadership was prepared to bring the matter up for a vote, but wanted agreement on the rest of the budget with the Governor before committing to do so.

Both sides engaged in the art of politics to advance their positions. The Legislature passed a budget—the clearest of all indications where the actual votes really stood. The Governor, however, was certain to veto it, and so the leadership held it back until an overall agreement could be reached. As long as institutional memory ran across the years, the leadership controlled when to deliver a finally passed bill to the Governor. Thus, delaying presentation of the budget bills for effect and advantage stood on the shoulders of precedent. The Legislature never anticipated a Supreme Court lawsuit out of it.

Do you think the *Brewer v. Burns* decision will prove to be important in the future? What impact will it have on future governors and legislators?

KANEFIELD: From the Governor's point of view, this decision is important because it assures that neither she nor any future governor will be put in the awkward position of being denied the ability to act on finally passed legislation. Moreover, it will prevent legislative leaders from disenfranchising members of their own bodies who vote for a bill only to see the leaders prevent the governor from taking action.

The truth is that the legislative leaders have many tools at their disposal to stall a bill during the legislative process. For example, a bill can be held in committee or on the floor. Once that bill becomes final on a roll call vote of ayes and nays in both houses, the Constitution requires that it be presented to the governor without any delay beyond the ministerial process of physically delivering the bills to the governor. History shows this process takes only one to two days.

In the future, the Legislature may hold a controversial bill before final vote or simply wait until the evening of June 30 to pass a final budget and then present it to the governor shortly before midnight. It is not likely, however, that the public would stand for this behavior, which likely explains why this strategy has never been pursued in the past.

...tive leadership to suit their political needs.

From a separation of powers perspective, we were surprised to see the Court intervene. Grammatically, "when finally passed," the constitutional phrase at issue, can mean either "after" or "immediately." Given the alternative meanings, we anticipated that the Court would not have intervened in the workings of a coordinate branch of government.

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Your clients obviously felt strongly about the timing of the presentation of the budget bills; why was it so important to them?

KANEFIELD: The Governor believed that the Legislature's decision to hold the bills was nothing more than a strategy to force her to sign those bills without seriously addressing her concerns. The Legislature's strategy was to spring the bills on her on June 30, and then blame her for shutting down government if she exercised her constitutional right to veto them. Although budget negotiations could have gone on for as long as the Legislature wished, its decision to pass the bills ended that process, and the

CANTELME: The concern is that the decision might create an obstacle that future governors and legislators will have to work around. As Chief Justice Berch noted in her concurrence, there are times when governors may want to see a bill presentation delayed. In the past, governors have requested presentment delays from legisla-

Attorney David Cantelme makes arguments as Arizona Legislature members (right) listen.



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ball should have been in the Governor's court.

Had the Governor been presented with those bills on or shortly after June 4, 2009, as required by the Constitution, the Governor would have acted on the bills by use of her veto authority and forced the Legislature to continue working with her over the following 26 days on a timely budget solution that was acceptable to all the parties in the budget process.

CANTELME: Legislative leadership believed that delaying presentment as negotiations continued was the best option in a very difficult scenario. The votes for a sales tax referral were proving elusive, and continued negotiations paved the only course for a resolution.

The Arizona Constitution allows the Legislature to present a budget to the Governor any time on or before July 1 of each year, and the Legislature could have waited until that deadline to pass the budget. It had in the past. Intense negotiations took place between the Governor or her staff and the legislative leadership and its staff throughout June—with no time off for good behavior. There was no surprise and no trap baited to spring. Neither the Legislature nor the Governor was going to get everything they wanted in the budget this year. Compromise had to be achieved, but on what terms? Each side used the tools

the Constitution gave it to persuade or prevail. There was no constitutional crisis, though there was a budget crisis rooted in the bad economy and the bad budget passed in 2008.

A special action in the Supreme Court is not an ordinary case. Describe the jurisdictional and procedural issues, and how you resolved them.

KANEFIELD: The Governor had her work cut out for her. She had to convince the Court to accept its highly discretionary special action jurisdiction despite the Court's historic reluctance to enter the arena of political disputes between the executive and legislative branches. The Court accepted jurisdiction because it decided the two political branches had a good-faith dispute over their respective powers in the lawmaking process, and the issue was of first impression and statewide importance.

Initially, the Governor had to decide whom to name as respondents in the special action. To cover all bases, both leaders were named as respondents, along with their respective bodies, and the Senate Secretary Charmion Billington. Ms. Billington was named because she had physical possession of the bills—a fact known because of the Senate procedures

and a photo that appeared in the *Arizona Republic* the week before that showed the bills stacked high on a desk in her office.

The Governor also had to convince the Court to reject the Legislature's three procedural arguments: (1) she lacked standing to bring the case; (2) the case was not ripe; and (3) the case involved a "nonjusticiable political question." The latter was the most difficult, as disputes between the executive and legislative branches are political by nature, and the issue required an examination of the inner workings of the Legislature, an area that the Court has been reluctant to pass judgment upon in the past.

The Governor was able to convince the Court that this case did not require the Court to review internal legislative processes. Rather, unlike most legislative procedures that are left to the Legislature to decide as set forth in the Constitution, the procedure for voting on final bills is established in a separate provision of the Constitution. Therefore, the Court could interpret whether and when this finality had occurred.

CANTELME: The Supreme Court recoils from resolving disputes between the political branches of government. It is not well equipped to do so, and it avoids political thickets when it can. Thus, the first level of defense was to persuade the Court to punt

House Majority Leader John McComish (from left), Speaker of the House Kirk Adams, Senate President Bob Burns and Peter Gentala, general counsel for the House Republican caucus, speak before the hearing.



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and decline jurisdiction, which is always discretionary in special action proceedings.

The superior court has concurrent jurisdiction of special actions in most cases, and every petitioner has the burden of proving why the case should originate in the Supreme Court. The Governor was no exception. Thus, we framed the case first as one of whether the Legislature acted reasonably, because reasonableness, if in dispute, is a fact question and fact questions are the business of trial courts.

At the next level, we raised four variations on the theme of jurisdiction: standing, ripeness, legislative discretion, and political question. Any of these would have given the Court cause to kick the case out, as it had in the past in similar disputes. To create doubt about jurisdiction, we focused on when to present the bills and not whether to present them at all, which would have put an unconstitutional veto in the hands of leadership. We argued that the *when* as opposed to the *whether* was always discretionary with the Legislature, and thus not the business of courts.

In this case, what seemed to tip the balance to the Governor was the fact that the Court drew a bright line out of the presentment clause, holding that the Legislature had to present a finally passed bill to the Governor for action as soon as the staff had completed any clerical acts needed to put the bill into proper form. That bright line might let the Supreme Court avoid recurring fights over how much delay is reasonable or unreasonable.

This type of case comes on quickly and ends quickly, both for the parties and the court. Describe how you identified what you thought were the winning issues, and how you triaged the issues to focus resources and time on what you thought would win the case.

KANEFIELD: Clients often call upon lawyers to offer quick advice. This case was certainly no exception. From the beginning, we focused on the language of Article 4, Part 2, Section 12 of the Arizona Constitution, which directs, “Every measure when finally passed shall

be presented to the governor for [her] approval or disapproval.”

We also raised two additional arguments. We argued that the Legislature’s action violated the separation of powers doctrine by depriving the Governor of the ability to act on the finally passed bills in a

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timely manner as required by the Constitution and that the Legislature’s decision to hold the finally passed budget bills violated the principle of open and accountable government by depriving the public of a transparent budgeting process.

Given the simplicity of the language, we believed the case likely would be decided on the language alone. Thus, we spent a good deal of the short time we had researching the cases in other states addressing similar language and arguing the plain language of the Constitution. In the end, our initial instincts proved correct, as the Court only addressed the language itself.

We also anticipated that the Legislature would urge the Court to decline jurisdiction based on the political question doctrine. This we felt was the Legislature’s strongest argument. Thus, we spent a significant amount of time preparing to respond to this argument in the Governor’s reply brief and at oral argument.

CANTELME: The Governor had an advantage. As petitioner, she had time to sharpen her arguments to a fine point before filing her action. We had four days—Tuesday to Friday—to research, analyze and write the entire brief. You lead with your best arguments, but that tight time limit forced us to make quick decisions to sift the strong from the weak and to center our research and writing time on them. I’m not sure we would have done it much differently if we had more time to meditate over it, but time would have taken some of

the anxiety out of it.

The forum and jurisdictional arguments were obvious, but we still had to meet the substance of the Governor’s argument. Courts tend to find a way through the procedural arguments when they see merit on the petitioner’s side.

The more difficult argument was to take a sentence in the presentment clause and make it complex. Complexity was our friend and the Governor’s foe, and we wanted to make her case look like the Rube Goldberg contraption on the way into Chase Field in Phoenix.

The sentence in question was this: “Every measure when finally passed shall be presented to the Governor for his approval or disapproval.” The Governor argued “when finally passed” meant “upon” in this context; we argued that it meant “after.”

Case law from other states was helpful but not decisive. Presentment clauses varied in text among the state constitutions, and the Court had room to rely on such decisions or to distinguish them on their particular wording. The 1913 dictionary (the closest in time to the 1910 constitutional convention) naturally had several definitions—as it turns out, one favoring us, one favoring the Governor, and a few off point.

So we looked to the precedents of the two houses. There we had an advantage, because the institutional memory of the Legislature’s lawyers is monumental. They impressively could remember back to that case in 1970—something when Speaker So-and-So held up a bill on this-and-such. In the end we put together a long list of instances spanning over 30 years in which the leadership delayed presentment to the Governor of a finally passed bill—sometimes at a Governor’s request, sometimes with a Governor’s acquiescence, or sometimes over a Governor’s objection.

In the end, the Court chose the bright-line interpretation of “when finally passed.” A telling question from one of the Justices gave a peek into why they chose to intervene: What was to stop a rogue House Speaker or Senate President in the future from holding up a bill against the other chamber’s wish or the wish of his or her own chamber? The legislative reality is that no Speaker or President can frustrate a majority.

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What was the most unique thing about the *Brewer v. Burns* litigation?

KANEFIELD: The Court's decision to hold the Legislature's action unconstitutional but deny the Governor relief was the most unique thing about this litigation. This was an unpredictable outcome and one that left the Governor and many other constitutional lawyers perplexed. Of course, having all three branches of government in the same courtroom was indeed a unique experience that does not happen very often. The fact that a dispute at this level was able to be resolved in a civil manner is a testament to our founding fathers as well as our current state leadership.

CANTELME: On this Joe and I agree. It was unusual for the Court to side with one party on the merits but still deny relief. What seems to have compelled this result was the Court finding good faith on all sides in a political dispute.

You argued this case in front of the Arizona Supreme Court. What can you share about that experience? How did you prepare for it, and how did you respond to the Court's questioning?

KANEFIELD: Arguing this case before the Court was a real thrill. It was far from certain the Court would hear oral argument, so I was naturally pleased when the Court scheduled oral argument a week after we filed the Governor's petition. The fact that the Court asked each side to argue for 30 minutes (10 more minutes than the average case) also led us to believe the Court recognized the magnitude of the dispute and gave us hope that the Court was receptive to the Governor's position.

Preparing for this oral argument was a real challenge. Most appellate lawyers begin this type of preparation weeks in advance. Two or three moot courts are held to be sure the lawyer is at the top of his or her game. We had no such luxury. The Governor's special action petition was filed on Tuesday, the Legislature's response was due Friday at 5:00 p.m., and the Governor's reply was due on Monday at 3:00 p.m. The oral argument began at 10:00 a.m. the next day.

This schedule severely limited the time for oral argument preparation. We needed

the entire weekend and a good part of Monday to draft and file the reply brief. Once that brief was filed, I spent a couple of hours preparing my oral argument outline before a scheduled moot court took place, consisting of an impressive team of constitutional lawyers who were gracious enough to donate their time and expertise to put me through the paces the night before. Having worked a good part of the weekend (day and night) on the reply brief, I was pretty exhausted by the time the moot court rolled around on Monday evening. I would like to think the oral argument on Tuesday morning was substantially better than my performance the night before.

Despite the expedited schedule and short briefing period, the Justices were on top of their game at oral argument. The questions were insightful, challenging and difficult. I expected nothing less. The whole experience is somewhat a blur in my mind, and I have yet to find the courage to go back and watch the archived video of the argument that the Court has posted on its Web site.

CANTELME: Intense. This is a Court of five very smart Justices, probably one of the smartest in Arizona history. So you knew you were going to get one tough question after another—with no fat pitches in between—and that is what happened. I got about 30 seconds to state the issues before the questions came, and they didn't end until I sat down.

The key is to anticipate and prepare, and to roll around in your head an answer in advance until it gels. You don't want to sound canned, and you don't want to avoid a question, tiptoe around it, or do anything other than to meet it head on. This Court quickly spots tap dancing.

With all the buildup in the newspapers, we assumed we would get a question along the lines of, "Isn't the Legislature playing politics with the hold-up on presentment of the budget bills?" One of the things I learned from watching John Frank in my Lewis and Roca days was that a prudent lawyer yields ground he cannot defend. So we met the politics question head on—of course the Legislature was trying to gain an advantage, but so was the Governor. Politics is the stuff of which budgets are made. The Court

acknowledged the candor in its opinion.

Were you surprised by the Court's opinion?

KANEFIELD: Yes and no. The language of the Constitution is clear that finally passed bills shall be presented to the Governor. The language is mandatory and leaves the Legislature without discretion to hold the bills for any reason. I was not surprised the Court concluded the Legislature's decision to hold the bills was unconstitutional. But I was surprised by the Court's decision to deny the Governor immediate relief.

In a short order that was issued the afternoon following oral argument, the Court decided the Legislature acted in good faith when it decided to hold the bills and did not know its actions were unconstitutional until told so by the Court on June 23, 2009. Although the Governor prevailed on the overall legal question and helped establish precedent to bar future Legislatures from holding finally passed bills, she was denied a remedy. This outcome never entered into our calculation.

I also was surprised by the Court's decision not to address the Governor's argument that the Legislature's decision to hold the bills violated the separation of powers clause set forth in Article III of the Constitution. As part of the legislative process, the Governor argued that holding the bills prevented her from performing her constitutional duty to sign, veto or line-item veto the bills. The Court decided the case solely on its interpretation of the Presentment Clause in Article 4, Part 2, Section 12 of the Arizona Constitution.

CANTELME: When I filed the brief, I thought we could persuade the Court to pass. But when we finished argument, I suspected they would take jurisdiction. The questioning all headed that way. What I did not expect was a split decision. The Governor won the point of law, but the Legislature won the question of relief.

Thinking back, and trying to read the tea leaves, I think Joe is right that the Court recognized good faith all around in tough circumstances. It ultimately decided to lay out the point of law but not to apply it to the case before it. Maybe it was something having to do with the old saying of the better part of valor being discretion. 