

# **Veto Power of the Governor of Minnesota**

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## **I. Veto of a Bill**

### **A. The Minnesota Constitution**

The President of the United States and the governors of most states have the power to veto an entire bill. The veto power of the Governor of Minnesota is set forth in the Constitution, article IV, §§ 23-24.<sup>1</sup> Its essential elements are that:

- 1) all bills must be presented to the governor;
- 2) he has a certain number of days to make up his mind whether to sign or veto a bill;
- 3) if he does not sign the bill or return it to its house of origin within the prescribed number of days, it becomes a law without his signature, unless the legislature by adjournment within that time prevents its return;
- 4) if he vetoes the bill, he must return it to the house of origin with his objections;
- 5) if two-thirds of each house repass the bill, it becomes a law notwithstanding his veto.

### **B. Constitutional Issues**

#### **1. How Much Time Does the Governor Have to Make Up His Mind?**

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<sup>1</sup> Sec. 23. Approval of bills by governor; action on veto. Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign it, deposit it in the office of the secretary of state and notify the house in which it originated of that fact. If he vetoes a bill, he shall return it with his objections to the house in which it originated. His objections shall be entered in the journal. If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house, which shall likewise reconsider it. If approved by two-thirds of that house it becomes a law and shall be deposited in the office of the secretary of state. In such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered in the journal of each house. Any bill not returned by the governor within three days (Sundays excepted) after it is presented to him becomes a law as if he had signed it, unless the legislature by adjournment within that time prevents its return. Any bill passed during the last three days of a session may be presented to the governor during the three days following the day of final adjournment and becomes law if the governor signs and deposits it in the office of the secretary of state within 14 days after the adjournment of the legislature. Any bill passed during the last three days of the session which is not signed and deposited within 14 days after adjournment does not become a law.

If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.

Sec. 24. Presentation of orders, resolutions, and votes to governor. Each order, resolution or vote requiring the concurrence of the two houses except such as relate to the business or adjournment of the legislature shall be presented to the governor and is subject to his veto as prescribed in case of a bill.

While the President of the United States has ten days to sign or veto a bill, Const. art. I, § 7, the Governor of Minnesota has only three days.

## **2. How are the Three Days Computed?**

The general rule for computing time limits in civil cases is to exclude the day the time begins to run and include the day the time expires. *See, e.g.*, FED. R. CIV. P. 6(a); MINN. R. CIV. P. 6.01; Minn. Stat. § 645.15. Under this general rule, if the last day is a Saturday, Sunday, or legal holiday, the time limit is extended to the next working day.

In 1927, the Minnesota Supreme Court had occasion to decide whether this general rule applied to the return of a vetoed bill. A Senate bill had been presented to the Governor on the Wednesday before Easter. The Senate adjourned for Easter weekend at the end of business on Thursday (Good Friday was then a legal holiday). The Governor executed a veto message bearing the date of Saturday, but retained the bill and the veto message until it was delivered to the president of the Senate on Monday morning. In the suit that challenged the validity of the Governor's veto, the Minnesota Supreme Court held that the constitutional phrase "(Sundays excepted)" meant that only Sundays were to be excluded, and that Saturdays and other legal holidays, such as Good Friday, were not to be excluded. Therefore, the Governor's time to return the bill had expired at midnight on Saturday, and the bill had become law without the Governor's signature. *State ex rel. Putnam v. Holm*, 172 Minn. 162, 215 N.W. 200 (1927).

## **3. Where and To Whom Must the Return be Made?**

The *Putnam* court said that "the place where the return is made is not important," 172 Minn. at 170, 215 N.W. at 203, and that the return could have been made to the presiding officer, to the Secretary of the Senate, or to any member of the Senate, since they were all authorized representatives of the Senate. 172 Minn. at 169, 215 N.W. at 203.

## **4. Must the Return be Made When the House of Origin is in Actual Session?**

In 1917, the Minnesota Attorney General had issued an opinion that said that the return of a vetoed bill could only be made while the house of origin was in actual session, and that the Governor could retain the bill in his possession until the opening of the next session of that body. Op. Att'y Gen. 213C, April 6, 1917.

In the *Putnam* case, however, the Minnesota Supreme Court held that an adjournment over the weekend was not an adjournment that prevented the bill's return; therefore, the bill had become law without the Governor's signature when he failed to return it by midnight Saturday, even though the Senate was not then in session. The Court held that only a final or sine die adjournment would be considered to prevent a bill's return. 172 Minn. at 168, 215 N.W. at 203.

The 1917 Attorney General’s opinion was thus overruled, and subsequent Attorney General’s opinions advised the Governor to return the bill within three days, even when the house of origin was not in actual session. *See, e.g.*, Op. Att’y Gen. 213C, April 18, 1967.

**5. Does an Adjournment at the End of the First Year of a Biennial Session Prevent the Return of a Vetoes Bill?**

In 1972, the Minnesota Constitution was amended to allow the Legislature to meet in both years of the biennium, rather than having to adjourn sine die at the end of the first year. Several test cases were initiated by the Legislature to clarify the meaning of the new “flexible session” amendment.<sup>2</sup> One of those cases involved a bill that was presented to the Governor on the day the Legislature adjourned from the last day of the 1973 session to the first day of the 1974 session. It was never signed by the Governor, but was filed by him with the Secretary of State eight days later. The question was whether the bill had become law without the Governor’s signature three days after it was presented to him, or had been pocket vetoed because the adjournment of the Legislature had prevented its return. The Minnesota Supreme Court, in the consolidated case known as *State v. Hoppe*, 298 Minn. 386, 215 N.W.2d 797 (1973), held that the adjournment was not a final or sine die adjournment that would have prevented the bill’s return, and that therefore it had become law without the Governor’s signature. 298 Minn. at 395-99, 215 N.W.2d at 803-05.

**C. *Seventy-seventh Minnesota State Senate v. Carlson***

Thus, the law in Minnesota regarding the return of a vetoed bill was clear when our new Governor, Arne Carlson, began a campaign to establish himself as the new veto champion of Minnesota.

Governor Carlson, an Independent Republican, had gotten his name on the general election ballot when the endorsed candidate of the Independent Republican Party, who had also defeated Carlson in the primary, had withdrawn from the race just ten days before the general election amid charges that he had made improper sexual advances to some teenage girls while skinny-dipping with them in his home swimming pool some nine years earlier.

But at the same time as the voters of Minnesota had elected an Independent Republican governor, they elected Democratic Farmer Labor (DFL) Party majorities in both the state Senate and the House of Representatives. So the new Governor decided to establish himself as a player in the legislative game by threatening to veto bills he didn’t like, especially bills dealing with taxes, workers’ compensation, appropriations, and redistricting.

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<sup>2</sup> I am confident the cases were properly decided, since the Office of Senate Counsel had helped to write the language of the constitutional amendment, select the bills to be used as test cases, choreograph the procedural steps leading toward their enactment, prepare the stipulation of facts, and write the briefs for both sides at both the trial and appellate level.

Before the Legislature adjourned at the end of the 1991 session, he had vetoed the first omnibus tax bill presented to him, Laws 1991, ch. 127, and four other bills.<sup>3</sup> After the legislators had gone home for the summer, he vetoed a major workers' compensation reform bill, Laws 1991, ch. 247; the legislative redistricting bill, Laws 1991, ch. 246; a health care access bill, Laws 1991, ch. 335; and 19 other bills.<sup>4</sup> He also vetoed 86 items in 16 bills containing appropriations.<sup>5</sup> This was more vetoes in five months than any of his predecessors had done in an entire career.

Unfortunately for the Governor, 15 of those bills, including the legislative redistricting bill, were not returned to their house of origin within three days. On August 2, 1991, a district judge ruled that 14 of the bills, which were the subject of a lawsuit, had become law without the Governor's signature.<sup>6</sup> *Seventy-seventh Minnesota State Senate v. Carlson*, No. C3-91-7547 (2nd Dist. Aug. 2, 1991). A week later, using what William Safire calls the "past exonerative" tense, Governor Carlson acknowledged that "a mistake had been made," and announced his intention not to appeal the district court's decision.

Contrary to the claims of the Governor's office at the time the mistake was discovered, the district court had found that there was "absolutely no evidence in the record to support" the Governor's contention that the Legislature had acted to thwart the Governor's attempts to veto the bills. *Seventy-seventh Minnesota State Senate v. Carlson*, No. C3-91-7547, slip op. at 26 (2nd Dist. Aug. 2, 1991). Further, the court found "no evidence in the record which indicates that anyone in the legislature or their staff members acted improperly or misled the Governor's staff as to the return of vetoed bills." Slip op. at 26-27. In fact, the Governor's staff had met

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<sup>3</sup> Laws 1991, chs. 41 (amending the definition of "high pressure piping"), 46 (providing an evidentiary presumption in cases alleging a restraint of trade), 87 (membership and standards for the Minneapolis park and recreation board reapportionment committee), and 91 (increasing the penalty for an assault on a public employee engaged in mandated duties).

<sup>4</sup> Laws 1991, chs. 132 (state land exchanged for private property); 145 (changing distribution requirements for charitable organizations); 185 (conveyance of state land in St. Louis county); 213 (extending ban on use of biosynthetic bovine somatotropin (BST)); 216 (building and contracting exceptions for state agricultural society); 218 (lengthening statute of limitations for violations of Human Rights Act); 222 (lump-sum postretirement adjustment for Duluth and St. Paul teachers); 236 (clarifying that automobile engines may be replaced under certain conditions); 239 (prohibiting employers from hiring permanent replacement workers during a strike); 255 (licensing psychologists); 261 (reorganizing the Department of Trade and Economic Development); 262 (requiring executive reorganization orders to be filed with the legislature before taking effect); 284 (regulating limousine services); 289 (tightening supervision of inspections conducted by the state Board of Electricity); 303 (regulating disposal of problem materials and hazardous waste); 307 (sale and exchange of state land); 320 (advancing the deadline for withdrawal of a candidate from the general election ballot); 348 (establishing a regional international trade service center pilot project); and 349 (campaign finance reform and redistricting deadlines).

<sup>5</sup> Laws 1991, chs. 178, 179, 208, 233, 235, 254, 265, 270, 286, 291, 292, 298, 302, 345, 355, and 356.

<sup>6</sup> The fifteenth bill, chapter 213, relating to a ban on the chemical BST, was a Senate file first returned to the House of Representatives by mistake and not returned to the Senate until five days after presentment (Sundays excepted).

with the Revisor of Statutes early in 1991 and been given detailed written procedures to follow when bills were presented to the Governor. The Revisor told the Governor's staff that the enrolled bill should be hand-delivered to the body where it was intended to go after the Governor took action on it, and that this must be done within three days after presentment. Slip op. at 16, 27. In a later conversation initiated by the Governor's staff, the Revisor told them that when they had to return an enrolled bill after normal office hours, they should make arrangements with the appropriate body to keep their offices open. *Id.*

The Governor, however, failed to designate an individual to oversee return of the bills. Slip op. at 16, 27. The constitutional mandates simply were not followed. Slip op. at 27. When the Governor executed his veto messages after 4:30 or 5:00 at night, instead of making special arrangements to return them to legislative staff after hours, the Governor's staff simply returned the bills the next working day. As the clerk who received and delivered the bills said, "At the time that I was actually doing the paperwork and returning these bills to the Legislature, I wasn't always aware of what each bill contained or what those bills were, especially at the end. The last week that we were processing bills, they had been reduced to nothing but numbers and times and dates to me." *Seventy-seventh Minnesota State Senate v. Carlson*, No. C3-91-7547, deposition of Denise Stephens at 46-47 (2nd Dist. July 24, 1991). A classic case of information overload.

There is no task so simple it can't be made impossible by allowing too little time to complete it. Even returning a bill within three days becomes impossible if you ask your staff to return it while doing too many other tasks as well. The Governor's staff simply lost the ability to distinguish between bills whose return was time-sensitive and bills that could be handled as part of the normal crush of work at the end of the session. Having attempted to veto all or parts of a record-setting 43 bills, the Governor failed on 15 whole bills. He also failed on at least three of his 86 item vetoes, which I shall describe in the next section of this paper.

## **II. Item Vetoes**

### **A. The Minnesota Constitution**

The President of the United States may veto an entire bill, but he may not veto parts of the bill he doesn't like and keep the rest. Governors, however, do have that power, at least in the case of omnibus appropriations bills.

In the early years of the 19th century, in order to evade a governor's veto power, state legislatures and Congress developed the practice of combining many appropriations into a single omnibus appropriations bill and adding to the bill other legislation unrelated to the appropriations. By the use of these two techniques, logrolling and attaching riders, the legislative body was able to present the chief executive with a bill he could not veto, since its necessary and desirable parts so far outweighed its objectionable ones.

After the Civil War, one state after another amended its constitution to give its governor the power to veto items in an omnibus appropriations bill, so there are now 43 governors with item veto authority.

The Minnesota Governor's item veto authority was added by constitutional amendment in 1876. 1876 Minn. Laws ch. 1. It provides that:

If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.

Const. art. IV, § 23.

## **B. Constitutional Issues**

### **1. What is an “Item of Appropriation”?**

#### **a. Minnesota Law**

One of the first issues to arise in trying to interpret this constitutional language is, what is an “item of appropriation”?

The Minnesota Supreme Court has said that “[a]n ‘item of appropriation of money’ is a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose.” *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 195 (Minn. 1991). The *Inter Faculty* case dealt with appropriations from the general fund, but the same concept applies to appropriations from any other fund — an appropriation sets aside an identifiable sum of money and dedicates it for a specific purpose.

This definition flows from the Minnesota Constitution, which says that “No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.” Minn. Const., art. XI, § 1. Minnesota’s statutes on state finances define an appropriation as “an authorization by law to expend or encumber an amount in the treasury.” Minn. Stat. § 16A.011, subd. 2 (1994). Thus, appropriations are the means by which the Legislature authorizes the expenditure of money from the state treasury, while at the same time controlling the amount spent.

To exercise that control, the Legislature has created the Department of Finance. The Commissioner of Finance uses an allotment and encumbrance system to insure that all expenditures are within their appropriations. *See* Minn. Stat. §§ 16A.14 and 16A.15. Under that system state agencies must submit a spending plan to the Commissioner of Finance at the start of each fiscal year. The commissioner must approve or modify the spending plan and allot money from an appropriation for the plan before the agency may spend it. Minn. Stat. § 16A.14, subd. 3. The commissioner makes sure the allotments are within the amount appropriated. Minn. Stat. § 16A.14, subd. 4. Once the allotments are approved, but before an agency may incur an obligation to spend the allotment, the commissioner must encumber a portion of the allotment sufficient to cover the anticipated obligation. Minn. Stat. § 16A.15, subd. 3. An employee who spends money that has not been properly allotted and encumbered is personally liable for the amount paid and is subject to removal from office. *Id.* An employee who spends money in excess of an appropriation, Minn. Stat. § 10.17, or for a purpose other than the purpose for which it was appropriated, Minn. Stat. § 10.31, is guilty of a misdemeanor, and may be sent to jail for up to 90 days or fined up to \$700, or both. Minn. Stat. § 609.02, subd. 3 (1994).

### **b. Court Decisions from Other States**

Courts that have confronted this issue in other states have developed similar definitions of what constitutes an “item of appropriation.”

The California Supreme Court in *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 742 P.2d 1290, 1295, 240 Cal. Rptr. 569 (1987), defined it this way: an item of appropriation is “a specific setting aside of an amount, not exceeding a definite sum, for the payment of certain particular claims or demands . . . not otherwise provided for in the appropriation bill.” *Harbor*, 742 P.2d at 1295, quoting *Wood v. Riley*, 192 Cal. 293, 303, 219 P.966 (1923). Other courts have employed similar definitions. *See, e.g., Jessen Associates, Inc. v. Bullock*, 531 S.W.2d 593, 599 (Tex. 1976) (“the setting aside or dedicating of funds for a specified purpose”); *State ex rel. Stephan v. Carlin*, 230 Kan. 252, 631 P.2d 668, 672, (1981) (“the designation of specific sums of money which the Legislature authorizes may be spent for specific purposes”); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120, 127 (1940) (“an indivisible sum of money dedicated to a stated purpose”); and *Henry v. Edwards*, 346 So. 2d 153, 157 (La. 1977) (“a sum of money dedicated to a specific purpose, a separate fiscal unit”). Each of these definitions involves dedicating or setting aside a sum of money for a specific purpose.

### **2. Must the Amount of the Item be Stated in the Bill?**

In Minnesota, most appropriations are direct appropriations, stating a specific dollar amount for a specific purpose for a specific fiscal year. However, appropriations for tax aids and credits are often stated as “a sum sufficient” to pay the aids according to a statutory formula. And, fees collected by state agencies are often made available to them by open appropriations of dedicated receipts, stated as “money received from fees is appropriated to the commissioner for the purposes for which the fees were collected.” The sum is not stated in the biennial

appropriation bill or in the permanent statute, but the amount appropriated can be determined by reference to objective facts, such as how much the formula requires or the amount of fees collected.

A governor may veto one of these appropriations. *Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993). In the *Johnson* case, the Legislature provided that:

In 1992 and 1993, the amount of tax attributable to the rate increase under section 298.24, subdivision 1, paragraph (b), since production year 1990, shall be paid to the commissioner of iron range resources and rehabilitation to be used to pay the cost of providing higher education services in the taconite tax relief area under the contract provided for in section 1.

Ch. 356, art. 4, § 5, 1991 Minn. Laws 2895.

The governor item-vetoed this language, claiming it was an appropriation, even though the dollar amount was not stated in the law. The Minnesota Supreme Court agreed, saying that the dollar amount need not be stated in the law, so long as the dollar amount is “readily identifiable from the terms of the bill itself.” 507 N.W.2d at 234.

On the other hand, a governor may not create an item of appropriation by assigning his own dollar amount to the language of a bill. *House of Representatives v. Martinez*, 555 So. 2d 839 (Fla. 1990). In *Martinez*, the governor of Florida had selected several provisos in an appropriation bill, unilaterally assigned a dollar value to them, and vetoed the provisos under his item veto authority. The Florida Supreme Court invalidated the vetoes and said that:

[B]efore the Governor may veto specific proviso language, that language, *on its face* must create an identifiable integrated fund—an exact sum of money—that is allocated for a specific purpose.

555 So. 2d at 844 (emphasis in original).

### **3. What if the Amount Can be Determined by Reference to “Working Papers”?**

In 1988, Governor Martinez had attempted to veto various items that appeared, not in the bill itself, but in legislative documents known as “the summary statement of intent and computerized working papers.” *Martinez v. Florida Legislature*, 542 So. 2d 358 (Fla. 1989). In striking down these vetoes, the Florida Supreme Court said:

We find the statement of intent and working papers to be what they appear to be, a manifestation of how the legislature thinks, in its considered opinion as a representative of the people, appropriations should be spent. Those documents



have not been enacted into law, however, and, thus, cannot have the force of law. Unless a specific appropriation is in a general appropriations bill or a specific legislative act, it is unenforceable. . . . Because the statement of intent and the working papers are not part of the appropriations bill, items in them cannot be vetoed.

542 So. 2d at 362.

#### 4. May the Governor Veto a “Part” that is Not an Appropriation?

In 1915, the Minnesota Legislature proposed to the people an amendment that would have given the Governor the ability to veto a *part* of an item of appropriation. The proposed amendment read:

If a bill presented to the governor contains several items of appropriation of money, he may object to one or more of such items *in whole or in part*, while approving of the other portion of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items *and parts of items* to which he objects, and *the part of any appropriation* so objected to shall not take effect.

1915 Minn. Laws ch. 383, § 1.

The amendment received more “yes” votes than “no” votes at the 1916 general election, but did not receive a majority of all persons voting at the election as required by article IX, § 1, of the Constitution, so it was not adopted. LEGISLATIVE MANUAL, MINNESOTA (1917).

The defeat of the amendment left Minnesota in the majority of states whose governors are recognized to have a narrow item veto authority, limited to items of appropriation of money. Other states with narrow item veto authority include Arizona, Connecticut, Delaware, Idaho, Kansas, Mississippi, Missouri, Texas, Virginia, and Wyoming. *See, e.g., Black and White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 218 P. 139 (1923); *Caldwell v. Meskill*, 164 Conn. 299, 320 A.2d 788 (1973); *Opinion of the Justices*, 306 A.2d 720 (Del. Supr. 1973); *Cenarrusa v. Andrus*, 582 P.2d 1081 (Idaho 1978); *State ex rel. Stephan v. Carlin*, 631 P.2d 668 (Kan. 1981); *State ex rel. Teachers and Officers of Industrial Institute and College v. Holder*, 76 Miss. 158, 23 So. 643 (1898); *State ex rel. Cason v. Bond*, 495 S.W.2d 385 (Mo. 1973); *Jessen Associates, Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1976); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120 (1940); *State ex rel. Jamison v. Forsyth*, 133 P.521 (Wyo. 1913).

On the other hand, in states where the constitution does authorize the governor to veto a “part” of an appropriation bill, rather than an “item,” a quite different, and broader, veto authority has emerged. One of the broadest is in the state of Wisconsin.

In 1988, in *State ex rel. Wisconsin Senate v. Thompson*, 424 N.W.2d 385, the Wisconsin Supreme Court discussed the broadening impact of the word “part” in that state’s item veto clause. The Court said:

[T]his Court in [*Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935)] indelibly set the broad scope of the Wisconsin governor’s partial veto authority under Art. V., Sec. 10. The *Henry* court specifically drew a distinction between the “item” veto authority granted governors in other states and the “broader” term “part” veto authority granted the governor of this state.

424 N.W.2d at 388.

Other states whose governors have broad item veto authority, that is, not limited to items of appropriation of money, include Iowa, Louisiana, Massachusetts, New Mexico, North Dakota, and Ohio. *See, e.g., State ex rel. Turner v. Iowa State Highway Commission*, 186 N.W.2d 141 (Iowa 1971); *Henry v. Edwards*, 346 So. 2d 153 (La. 1977); *Opinion of the Justices to the House of Representatives*, 428 N.E.2d 117 (Mass. 1981); *Dickson v. Siaz*, 308 P.2d 205 (N. Mex. 1957); *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979); *State ex rel. Brown v. Ferguson*, 32 Ohio St. 2d 245, 291 N.E.2d 434 (1972). In these states, the governor may veto language that is not connected to an appropriation, so long as it is severable from the other language in the bill.

#### **5. May the Governor Veto a Restriction Without Vetoing the Appropriation?**

Even in states where a governor may veto language not connected to an appropriation, most courts have said that the governor may not veto language that is connected to an appropriation without vetoing the appropriation itself. *See, e.g., Opinion of the Justices to the House of Representatives*, 428 N.E.2d 117 (Mass. 1981); *Henry v. Edwards*, 346 So. 2d 153 (La. 1977); *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N. Mex. 1974). *Contra, State ex rel. Klecza v. Conta*, 264 N.W.2d 539 (Wis. 1978).

#### **6. May the Governor Reduce an Item of Appropriation?**

Where a state constitution grants the governor authority to veto part of an appropriation bill or part of an appropriation item, the courts have generally held that this gives the governor authority to reduce the amount of an appropriation, rather than only to eliminate it entirely. For example, in the 1988 *Thompson* case from Wisconsin, the court distinguished between constitutional authority to veto an item and constitutional authority to reduce an item, as follows:

We recognize that the majority of the jurisdictions that have considered this issue—under an “item” veto constitutional provision—have concluded that the governor has no such authority [to reduce an item] on the rationale that a reduction in an appropriation is, in effect, a veto of part of an item, and thus a type

of veto not authorized. See Committee Print, *supra*, at 157, *et seq.* See also, *Wheeler v. Gallet*, 43 Idaho 175, 249 P.1067 (1926). Contrarily, in Wisconsin, where the veto authority is phrased in terms of disapproving *parts* of an appropriation bill, we conclude that the governor has the power to reduce appropriations by striking the numbers or digits he deems appropriate as well as to eliminate the appropriation entirely.

*State ex rel. Wisconsin Senate v. Thompson*, 424 N.W.2d at 396 (court's emphasis).

Indeed, in Wisconsin the governor's authority to reduce an appropriation is not limited to striking out digits in the bill. The governor may also write in a new amount, so long as it is less than the amount in the original bill. *Citizens Utility Board v. Klauser*, 534 N.W.2d 608 (Wis. 1995).

## **7. What if the Item is Also Part of a Larger Lump-Sum Appropriation?**

In Oklahoma, the court has said flatly that an item within a larger lump sum cannot be vetoed, since it is in the nature of a proviso or restriction on the larger appropriation. *Regents of State University v. Trapp*, 28 Okla. 83, 113 P.910 (1911). The *Trapp* case involved a lump sum appropriation of the entire amount made available to the University of Oklahoma, which was then broken down into numerous items for the various purposes. The Governor's veto of certain of the items was found to be of no effect. No other states have used the Oklahoma approach.

In Virginia, the court has considered whether an item within a larger lump sum could be severed without doing any damage to the remainder, and where the Governor vetoed amounts specified for certain officers and other expenses in the Division of the Budget, the court found the veto to be of no effect, since the salaries and expenses for the specified officers could not be eliminated without an adverse impact on the remainder of the Division of the Budget. *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120 (1940). But where the court found that an item was severable from a larger appropriation, a veto of the item was upheld. *Brault v. Holleman*, 217 Va. 41, 230 S.E.2d 238 (1976).

Outside of Florida, Oklahoma, and Virginia, the courts have always found an item within a lump sum to be severable from the lump sum, have upheld the Governor's veto of the item, and have upheld the state auditor's or comptroller's refusal to pay out money for the vetoed purpose. *Fairfield v. Foster*, 25 Ariz. 146, 214 P.319 (1923); *People ex rel. State Board of Education v. Brady*, 277 Ill. 124, 115 N.E. 204 (1917); *State v. Jones*, 99 S.C. 89, 82 S.E. 882 (1914); *Fullmore v. Lane*, 104 Tex. 499, 140 S.W. 405, 1082 (1911); *Strong v. People ex rel. Curran*, 74 Colo. 283 220 P.999 (1923) (dictum).

The primary reason the courts have given for rejecting the Oklahoma approach is to prevent the legislature from using the lump sum device to evade the item veto. If the legislature could evade the item veto simply by making one appropriation in each bill and then subdividing

it into tens or hundreds of smaller items, the Governor could never effectively veto any items. He would have to veto the entire bill. *Green v. Rawls*, 122 So. 2d 10 (Fla. 1960); *Fairfield v. Foster, supra*; *Brady, supra*; *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975) (dictum). Instead, they have left to the legislature the choice of how much detail to specify in an appropriation bill, but said that each dollar amount specified becomes subject to an item veto.

. . . Whenever the legislature goes to the extent of saying in any bill appropriating money that a specified sum of money raised by taxation shall be spent for a specified purpose, and that alone, while other sums mentioned in the bill are to be used otherwise, no matter what language it may be disguised under, it is, nevertheless, within both the spirit and the letter of the constitution, an “item” within the bill, and may be disapproved by the Governor without affecting any other items of appropriation contained therein.

*Fairfield v. Foster*, 25 Ariz. 146, 214 P.319, 323 (1923), quoted in *Green v. Rawls*, 122 So. 2d 10, 16 (Fla. 1960).

#### **8. May the Governor Veto a Transfer?**

Sometimes an appropriation bill authorizes the transfer of money within the state treasury, rather than authorizing the payment of money out of the treasury. For example, there might be separate appropriations from two different funds. The Legislature transfers money from one appropriation to the other. The Governor vetoes the transfer. May the money be spent under the first appropriation, the second appropriation, or neither? In the case of *Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993), the Minnesota Supreme Court held that the Governor may veto a transfer, and the effect of the veto is to permit the money to be spent under the first appropriation. There is no reduction in overall government spending, only a reduction in the amount spent for the purpose authorized by the Legislature.

#### **9. May the Governor Veto an Appropriation Reduction?**

Most appropriations are made for one or two years at a time. They need to be renewed every year or two. But, sometimes the Legislature finds it necessary to reduce an existing appropriation when revenues fall short. If the item veto is intended to be a negative power, and allows the governor to reject the Legislature’s spending proposals, may it also be used when the Legislature proposes to reduce an appropriation? In Arizona, the answer is “yes.” In the case of *Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992), the Arizona Supreme Court reasoned that the Legislature’s power to appropriate included the power to amend an appropriation, such as by reducing it, and that the governor’s power to veto an appropriation must include the power to veto an amendment to an appropriation. Otherwise, the Legislature could enact an appropriation in a form that the governor approved and then amend it into a form he did not approve, free of the threat of a veto. Even though the veto meant that more money would be spent than the Legislature had intended, the veto was valid.

## 10. Separation of Powers

Courts that have considered the issue have recognized that the veto power is itself an exercise of legislative authority, and as such, an exception to the normal allocation of all legislative authority to the legislature. Therefore, it must be strictly construed. *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1380-83 (Colo. 1985). *See also, Harbor v. Deukmejian*, 43 Cal. 3d 1078, 742 P.2d 1290, 1295, 240 Cal. Rptr. 569 (1987); *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. 1973).

## 11. What is the Effect of an Invalid Attempt to Veto an Item?

In Delaware, an attempt by the Governor to veto a rider to an appropriation, after being found invalid, was found to have invalidated the entire section containing the appropriation, since it showed that the Governor had not given his unqualified approval to the appropriation section in question. *Opinion of the Justices*, 306 A.2d 720 (Del. Supr. 1973). Oklahoma follows this rule where the bill contains only one item of appropriation, *Regents of State University v. Trapp*, 28 Okla. 83, 113 P.910 (1911); but allows the appropriation to take effect notwithstanding the invalid attempted veto if the bill contains more than one item of appropriation. *Peebly v. Childers*, 95 Okla. 40, 217 P.1049 (1923). States other than Delaware and Oklahoma have invariably treated an appropriation as unaffected by an invalid item veto. *See, e.g., Bengzon v. Secretary of Justice*, 299 U.S. 410 (Philippines 1937); *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120 (1940); *In re Opinion of Justices*, 294 Mass. 616, 2 N.E.2d 789 (1936); *Fullmore v. Lane*, 104 Tex. 499, 140 S.W. 405 (1911).

## III. Conclusion

I hope that this review of Minnesota law has enlightened you on the veto power of our Governor. I think you will see that, while the Governor's veto power serves as a significant check on the Legislature, it must be exercised with care if his vetoes are to stand up in court.