STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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May 26, 2017

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155

Dear Ms. Holmes:

I thank you for your correspondence dated May 26, 2017. You raise the following issues:

1. How many days does the Governor have to veto bills that were passed during the last three days of the "special session" that ended on May 26, 2017 at approximately 3:45 a.m.?

2. Does the Governor have 14 days to veto bills that were received after the legislative adjourn[ment] Sine Die on May 26, 2017 at approximately 3:45 a.m., during a "special session"?

3. Please confirm that the Governor can only line item veto items of appropriations and not reductions.

You indicate that, as to the first two questions, you believe that the most cautious approach is to act within three days of the bills being presented and have so advised the Governor. We agree that this approach is prudent. As to the third question, you believe that the Governor can only line-item veto items of appropriation and not items of reduction. We agree with this conclusion.

I. Background

As you know, the Legislature passed some bills near the end of the regular legislative session that adjourned on May 22. My understanding is that some of these bills have yet to be presented to the Governor. Following adjournment of the regular legislative session, a special session began at 12:01 a.m. on May 23. During the special session, the Legislature passed several more bills before adjourning *sine die*.

II. Bills Passed During The Special Session

Although the Legislature adjourned on calendar day May 26, the House and Senate Journals reflect that each chamber adjourned on May 25, which was the fourth legislative day of the special session. A legislative day runs from 7:00 a.m. until 7:00 a.m. the following calendar day. Minn. Stat. § 3.012 (2016). The Legislature immediately adjourned after being called into session on May 23, and the activity that occurred throughout the calendar day on May 23 occurred over two legislative days. Similarly, while the Legislature adjourned on calendar day

May 26, it was still considered May 25 for purposes of legislative days. Regardless of whether legislative or calendar days are used, all bills passed during the special session were passed within the last three days of the session.

Previous correspondence from this Office to prior governors has addressed the timing for acting on bills passed at the end of a session that adjourned *sine die*. *See, e.g.*, Mem. from K. Eiden, Off. of Att'y Gen. to K. Yanisch, Off. of Gov. (May 14, 2003) (copy enclosed). The Minnesota Constitution provides that "[a]ny 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." Minn. Const. art. IV, § 23. Because the bills passed during the special session this year were passed during the last three days of a session that adjourned *sine die*, a persuasive argument can be made that the Governor has 14 days after the date of presentment to sign each bill, but there is no judicial authority directly on point. As you have advised the Governor, and given the absence of caselaw, acting within three days of presentment eliminates any question or potential challenge, such as that which occurred in *Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993).

III. Other Bills Received After Adjournment of the Special Session

The timing for acting on bills passed during the regular session but presented after the conclusion of the special session presents a closer question. Only a "final adjournment" triggers the 14-day time period. Minn. Const. art. IV, § 23. Previous correspondence from this Office to prior governors advised that the final adjournment that triggers the end-of-session presentment and veto procedures is the *sine die* adjournment, which usually occurs in the second, even-numbered, year of the biennium but may also occur at the end of a special session. *See* Mem. from K. Eiden to K. Yanisch; Mem. from K. Raschke, Off. of Att'y Gen., to D. Drewry, Off. of Gov. (May 10, 1999) (copies enclosed). An interim adjournment in an odd-numbered year to a date certain in the next year is not considered a final adjournment for veto purposes. *State v. Hoppe*, 215 N.W.2d 797, 392-94 (Minn. 1974).

The House and Senate Journals reflect that, on May 22, each chamber adjourned only until February 20, 2018. The May 22 adjournment therefore was not a final adjournment within the meaning of the constitution and would not trigger the 14-day time period for the Governor to act. Again, my understanding is that none of the bills passed during the regular session have yet been presented to the Governor. This therefore raises the question of whether the May 25 *sine die* adjournment applies to bills passed during the last three days of the regular legislative session. The constitution provides that the 14-day period applies to "[a]ny bill passed during the last three days of a session" that is presented within three days after the day of final adjournment. Minn. Const. art. IV, § 23. The most likely reading of "a session" is that it generally refers to the end of the second year of the two-year biennium session (which typically occurs in even-numbered years) and that the 14-day period does not apply. *See Hoppe*, 215 N.W.2d at 805 (holding that bill passed during last three days of odd-numbered year session that adjourned to a fixed date was not subject to pocket veto). No caselaw has addressed whether the

commencement of a special session immediately after the end of a regular session alters this analysis. As you have indicated, acting within three days eliminates any question or potential challenge like that which occurred in *Johnson*.[1]

IV. Items of Reduction

You believe that the Governor can only line-item veto items of appropriation and cannot line-item veto items of reduction. This is consistent with this Office has previously advised the Governor's Office. Mem. from K. Raschke to D. Drewry. We are not aware of any changes in the law that would affect this analysis. The Minnesota Constitution gives the Governor the authority to line-item veto only an "item[] of appropriation of money." Minn. Const. art. IV, § 23. Courts have narrowly construed this provision, and defined an "item of appropriation" as a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose." *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 194-97 (Minn. 1991); *see also Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993) (discussing what constitutes an appropriation). Further, not every legislative directive that entails an expenditure of funds necessarily constitutes an appropriation. *U.S. Fire Ins. Co. v. Minn. Zoological Bd.*, 307 N.W.2d 490 (Minn. 1981); *Butler v. Hatfield,* 152 N.W.2d 484 (Minn. 1967). As previously advised, it therefore appears that an item of appropriation must be a grant of spending authority and not a restriction or removal of such authority. At least one district court has held that this does not include the authority to line-item veto items of reductions. *Kahn v. Carlson*, Ramsey Cnty. No. C8-95-10131 (Minn. Dist. Ct. Jan. 26, 1996) (copy attached). Therefore, the law appears to support your position.

I thank you again for your correspondence.

Very truly yours,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General

(651) 757-1440 (Voice)
(651) 297-1235 (Fax)

Enclosure: Memo from Kristine Eiden to Karen Yanisch (May 14, 2003) (w/o Attachments)
Memo from Kenneth Raschke to Diane Drewry (May 10, 1999)
Kahn v. Carlson

[1] When counting the three days, Sundays are excluded but holidays are not. Minn. Const. art. IV, § 23.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO: KAREN YANISCH
Legal Counsel to
Governor's Office
130 State Capitol

DATE: May 14, 2003

FROM: KRISTINE L. EIDEN KLE
Chief Deputy Attorney General
102 Capitol
St. Paul, MN 55155-1002

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FAX: (651) 297-4193
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SUBJECT: **Governor Veto Procedures**

You have asked for an update and elaboration on certain points in the attached May 10, 1999 memorandum on gubernatorial vetoes.

1. You first ask whether there have been any changes in the applicable law since the memo was written. I have found no intervening amendments to the cited statutes or constitutional provisions, or any relevant Minnesota cases since the memo was written.

2. You have asked for a copy of Op. Atty. Gen. 213C, April 18, 1967, which deals with the counting of the three days permitted to return a vetoed bill to the house of origin. I have attached that opinion along with copies of the other opinions cited in the memo which might not be readily available to the Governor's Office. The manner of counting the three days is also supported by Op. Atty. Gen. 280-O, May 8, 1973 and *State ex rel Putnam v. Holm*, 172 Minn. 162, 215 N.W. 200 (1927).

3. You have asked for further discussion of the separate status of a special session as mentioned in footnote 1 on page 2 of the May 10, 1999 memo. The issue is discussed in Op. Atty. Gen. 280-0, May 17, 1967. The Constitution permits the governor to call a "special session" of the legislature on extraordinary occasions. Minn. Const. art IV, § 12. The constitutional language expressly distinguishes such a "special session" from the general session which is subject to specific limitations on when meetings can take place. *Id.* Special sessions have always been called at times when the legislature is constitutionally forbidden to meet in regular session. Therefore, they cannot be considered a part, or continuation of a general session, but must be treated as sessions unto themselves.

In Op. Atty. Gen. 280, May 8, 1973, this Office concluded that the 1972 "Flexible Session Amendment" to the Constitution did not prevent the calling of a special session during the interim between adjournment of the legislature in an odd-numbered year and the date of reconvening in the next even-numbered year. The result is that, while interim adjournment of

the legislature is not considered a final adjournment that prevents return of a vetoed bill or triggers the 14-day pocket veto procedure, final *sine die* adjournment of a special session must be treated as such. Therefore, if a special session were to be called in the interim, the rules governing veto or approval of a bill presented to the governor during that period will, in most cases, depend upon whether it was passed during the regular or special session. Since special sessions are usually adjourned *sine die* promptly upon passage of the measures that prompted their convening, those bills would generally be subject to the 14-day pocket veto rule.

4. You have asked for further discussion of the process for veto or approval of bills "passed during the last three days of a session." The pertinent portion of Minn. Const. Amend. IV, § 23 provides:

> 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.

(Emphasis added).

First, it is important to keep in mind that the "adjournment" referred to that prevents return of a bill and triggers the pocket veto procedure is final adjournment *sine die,* not temporary or interim adjournment. *See State v. Hoppe*, 298 Minn. 386, 215 N.W.2d 797 (1974). Therefore, assuming the legislature adjourns the current regular session to a date certain in 2004, all the 2003 regular-session bills will be under the normal three-day rule, *i.e.,* they become law unless they are returned with objections to the house of origin within three days after presentment.[1]

Second, there has been some uncertainty over the meaning of the phrase "passed during the last three days." As noted in the May 10, 1999 memo, there is authority for the proposition that the term "passage" for purposes of that provision includes "presentment" to the governor. *See Burns v, Sewell,* 48 Minn. 425, 51 N.W. 224 (1892); Op. Atty. Gen. 280, May 8, 1973 and April 17, 1939. Under that reading, any bills presented to the governor on or after the third day before adjournment would be vetoed if not signed and deposited with the secretary of state within 14 days after final adjournment.

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[1] As noted above, however any special session convened during the interim would be treated separately.

However, the Revisor of Statutes' Office has previously taken the position that passage refers only to approval by both houses. They point out that under the current constitutional language, the *Burns* interpretation presents a senseless contradiction -- any bill passed, *i.e.* "presented," to the governor during the last three days of a session may be presented to the governor during the three days following final adjournment.[2] I am not aware of any Minnesota cases supporting the Revisor's position. Nonetheless, because of this ambiguity, we have advised governors to sign and deposit bills received during the last three session days within three days of presentment if they wanted them to become law.

Third, the reason for that precautionary measure is to avoid the possibility of a three-day pocket veto. Under the ordinary three-day rule, a bill becomes law if it is not returned within three secular days after it is presented "unless the legislature by adjournment within that time prevents its return." Therefore if a bill is presented to the governor on a Tuesday and the legislature adjourns *sine die* at noon on Friday, the bill will not become law without the governor's approval because the legislature, by adjourning before the end of the third day (Friday) has prevented its return. Therefore, it would be treated as vetoed if it is not signed and deposited within the three-day period after presentment. *State v. Hoppe, State v. Holm,* Op. Atty. Gen. 280 May 8, 1973.

5. Finally, you have asked for a discussion of the appropriate mechanisms for presentment and return of vetoed bills to the house of origin.

Neither the Constitution nor case law is very specific on these points. Minn. Stat. § 3C.04, subd. 5 (2002) provides that the Revisor of Statutes, as agent for the legislature shall present enrolled bills to the governor and report the date of presentment to the house of origin. However, the requirements for effective presentment are not specified.

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[2] This contradiction appears less pronounced in the constitutional language in place before the 1972 constitutional restructuring:

> Bills may be presented to the governor during the three days following the day of the final adjournment of the legislature and the legislature may prescribe the method of performing the acts necessary to present bills to the governor after adjournment. The governor may approve, sign and file in the office of the secretary of state, within 14 days after the adjournment of the legislature, any act passed during the last three days of the session, and the same shall become a law. If any bill passed during the last three days of the session is not signed and filed within 14 days after the adjournment, it shall not become a law.

The restructuring amendment was not intended to make any substantive changes in the constitution 1974 Minn. Laws. ch. 409 § 2.

It seems clear that bills do not have to be handed to the Governor personally unless he insists on it. Rather, presentment can be made in any manner established by agreement or custom, absent notice to the contrary. In that regard, it is advisable for the Governor's Office to formalize agreed-upon presentment procedures to the extent possible. Whatever methods are established, however, the Governor must not purposely thwart reasonable legislative efforts to present a bill. *See* letter to Speaker Sviggum dated February 25, 2002 (copy attached).

The courts have held that a vetoed bill is not required to be returned to an originating house while it is actually convened. Rather, it can be returned to any officer or member if necessary. *See Putnam* and *Hoppe.* As with presentment, however, it is best to have agreed-upon procedures in place to accommodate the reasonable needs of both parties.

I hope this information is responsive to your questions. If you would like further information, please let me know.

Attachments

AG: #854055-v1

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO	:	DIANE DREWRY General Counsel Office of The Governor 130 Capitol Bldg.	DATE	: May 10, 1999
FROM	:	KENNETH E. RASCHKE, JR. Assistant Attorney General Public Finance/Opinions Division	PHONE	: 297-1141 (Voice) 282-2525 (TTY)
SUBJECT	:	**Matters Pertaining To Gubernatorial Vetoes**		

Chief Deputy Attorney General Al Gilbert asked me to prepare a memo for you concerning the legal framework for gubernatorial vetoes of legislative acts and items of appropriation of money.

CONSTITUTIONAL VETO PROVISIONS

The authority for gubernatorial veto of bills is contained in Minn. Const. art. IV, § 23 which provides in part:

> 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. . . . 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 dates after adjournment does not become a law.

This provision contains a number of complexities which require some in-depth discussion. For the sake of convenience, I have prepared a table of constitutionally specified actions in various circumstances in addition to the following discussion.

A. Procedures Under The Three-Day Veto Rule

During most of the biennial session the governor's veto authority is controlled by the "three-day rule." *I.e.*, If a bill is not returned by the governor with his objections to the house of origin within three days (Sundays, but *not* holidays, excepted) after it is presented to him it becomes law without his signature. Note that it is the return of the bill with objections and not execution of a veto message that accomplishes the veto in these circumstances. *See State ex rel Putnam v. Holm*, 172 Minn. 162, 215 N.W. 200 (1927), Ops. Atty. Gen. 213C, May 16, 1967 and April 20, 1949.

The three day period expires at the end of the third full day after presentment. The day of presentment and Sundays are excluded. Saturdays and legal holidays are *not* excluded. *See Putnam*, Op. Atty. Gen. 213C, April 18, 1967. Thus, a bill presented on a Thursday must be returned by 11:59 p.m. on the following Monday to effectuate a veto.

These procedures remain in effect until the legislature nears final adjournment when other constitutional requirements come into play. It is important to note that the adjournment that triggers the end-of-session presentment and veto procedures is the final *sine die* adjournment which normally occurs in the second, even numbered, year of the biennium. An interim adjournment in an odd-numbered year to a date certain in the next year is *not* considered final adjournment for veto purposes. *See State v. Hoppe*, 298 Minn. 386, 215 N.W.2d 797 (1974). Thus the three-day veto rule will remain in effect over the interim.[1]

Pursuant to Minn. Stat. § 3C.04 (1998), the revisor of statutes is given the responsibility to present bills on behalf of the legislature. However, I am not aware of any Minnesota authority that specifies what, exactly, constitutes presentment of a bill to the governor.

A federal court has noted that:

> "[T]he Constitution is not a code of administrative procedure, but a frame of government" (*United States v. Weil*, 29 Ct. Cl. 523, 546 (1894)), by utilizing the instrument the Constitution has provided through its concept of "presentation" though personal presentation to the President is not mandatory, either the Congress or the President can insist on such delivery. If personal delivery is not demanded by either side, presentation can be made in any agreed manner or in a

[1] Note, however, that any special session of the legislature that might be called would be considered a session of the legislature in its own right, and final adjournment of the special session would control veto of bills passed at that special session.

> form established by one party in which the other acquiesces; that has long been done, for normal occasions, by the continued understanding that delivery to the White House is effective presentation to the President.

Eber Bros. Wine & Liquor Corp. v. United States, 337 F.2d 624, 629 (1964) (footnote omitted). In my view, that principle also makes sense as applied to presentment of bills to the governor in Minnesota. Consistent with that process, it is my understanding that governors have traditionally worked with the revisor's office in specifying persons authorized by the governor to accept presentment of bills and, in many circumstances, arranging times when presentment can be made to accommodate the needs and schedules of the legislature and the governor.

Likewise, I know of no exhaustive authority that details all actions which may be considered effective return of a bill. The Minnesota Supreme Court has, however, established that an effective return may be made notwithstanding that the house to which return is made is in recess or interim adjournment. *See State v. Hoppe*; *State v. ex rel. Putman v. Holm, supra.* It has also been held that return may be made by delivering the bill with objections to a member or officer of the appropriate house. Furthermore, the place of return is not determinative. *Id.*

These cases do not clarify whether there may be other acceptable mechanisms of return, such as depositing a bill with a clerical employee of the appropriate body, for example. Some analogy might be drawn from the *Eber Bros.* case noted above. Thus, if there has been established a mechanism of return for vetoed bills other than delivery to an officer or member which has been acquiesced in over time, it might be argued that the governor may utilize that mechanism until formally notified otherwise. *Cf., Humphrey v. Baker*, 665 F. Supp. 23 (D.D.C. 1987), *aff'd* 848 F.2d 211 (D.C. Cir. 1988), which concluded, citing *Eber Bros.*, that transmittal of a Presidential message could be accomplished by delivery to the "office" of the Speaker of the House and to the "office" of the President of the Senate.

B. The Three-Day Pocket Veto

One exception to the requirement that a bill be returned to the house of origin is when "the legislature by adjournment within that time prevents its return." Prior opinions of our office have concluded that when a bill not passed during the last three days of a session, is presented to the governor, and the legislature adjourns *sine die* before the three-day veto period expires, then the bill will be considered vetoed by "pocket veto" if it has not been signed and deposited with the secretary of state within that three-day period. *See* Op. Atty. Gen. 280, May 8, 1973.

C. The Fourteen-Day Pocket Veto

Bills passed during the last three days of a session may be presented to the governor during three days following the day of final adjournment. For such bills, the governor must sign

and deposit them with the secretary of state within 14 days after final adjournment if they are to become law. Any such bill not signed and deposited within that time does not become law. (Pocket veto.)

There is some ambiguity concerning when a bill is deemed to be "passed" for this purpose. Case law and prior opinions of our office support the proposition that "passage" of a bill includes presentment to the governor. *See Burns v. Sewell*, 48 Minn. 425, 51 N.W. 224 (1892); Ops Atty. Gen. 280, May 8, 1973 and April 17, 1939. We recognize, however, that this position creates something of a contradiction under the current constitutional language (*i.e.* bills presented to the governor during the last three days of a session may be presented to him after adjournment). For this reason it would be prudent to look to the time a bill has been approved by both houses in determining whether it was "passed" during the last three days. To prevent uncertainty it would be best to sign and deposit within three days of presentment all bills that are presented to the governor within the three days prior to final adjournment if he wishes them to become law.

D. The Line Item Veto

Minn. Const. art. IV, § 23 further provides:

> 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.

A noted above, the affirmative act of vetoing an entire bill, other than by pocket veto, is accomplished by returning the bill with objections to the house of origin within the allotted time. Without such action, writing "vetoed" on the bill or drafting and signing a veto message are of no effect. In the case of an item veto, the veto is accomplished by appending to the bill, at the time of the signing, a statement of the particular items vetoed and, if the legislature is still in session, sending a copy of that statement to the house of origin within the three-day period. It has been our position that while it is customary for the governor to scribe a line through vetoed item and write "vetoed" or his initials beside it, it is the separate written statement, and not anything written on the bill that constitutes the veto. Thus, where the governor crossed out two separate amounts on a 1995 bill but only listed one of those items in his separate item veto statement, it was our view that only the item so listed was effectively vetoed.

While the constitutional language is not explicit, it is my view that, when the three day rule is in effect, an item veto must be effectuated within the three days permitted for other vetoes. It would also seem necessary to sign and deposit the bill with the secretary of state during that time. There cannot be a "pocket" line item veto.

E. Items Of Appropriation

Note that the item veto power only applies to individual items of appropriation of money in bills containing several such items.

Our office has long taken the position that this authority extends only to veto of appropriations of money, and that the governor may not veto other substantive provisos, conditions or limitations on spending apart from the appropriations themselves. *See* Memorandum of George Reilly to Governor Wendell Anderson, May 13, 1971 (attached). In that memorandum, we referred to a definition of an item of appropriation contained in the case *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120, 127 (1940).

> An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose. It is something different from a provision or condition and where conditions are attached, they must be observed; where none are attached, none may be added.

Since that time, the Minnesota Supreme Court has articulated a similar definition in *Inter-Faculty Organization v. Carlson*, 478 N.W.2d 192 (Minn. 1990):

> An item of appropriation of money is a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose.

Id. at 195.

In that case, the court concluded that the governor could not separately veto portions of lump-sum appropriations to the State University Board which were represented by specific "estimates" of noninstructional expenditures. According to the court, those estimates did not represent "identifiable" sums of money, since the amount of the estimates relating to the appropriations could only be ascertained by reference to "working papers" which had not been enacted by the legislature. Furthermore, the estimates did not purport to compel or limit expenditures of specific portions of the gross appropriations for any particular purpose. The court also held, that as an exception to the law-making power of the legislature, the governor's item veto powers should be narrowly construed. *Id.* at 194.

The definition was further explored in *Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993) wherein the court upheld the governor's veto of legislative language that provided for a redirection of funds collected pursuant to a specific tax increase, from two IRRRB programs to the IRRRB commissioner to be used to pay for the costs of a specified contract for education services. There the court indicated that an appropriation did not have to express a precise numerical sum so long as the sum could be identified from information contained within the bill itself. The court further concluded that the "transfer" was for a specific defined purpose, *i.e.,* the specific contract which could not have been implemented without such an "appropriation."

These formulations of definitions may also be considered in light of the constitutional directive that "[n]o money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const. art. XI, § 1. Thus, an item of appropriation may be said to be a separate authorization to expend an identified amount of state funds for a particular purpose. In our view, the concept would also likely apply to legislation that expands, extends, or redirects the scope or duration of an existing appropriation.

However it also appears that an "item of appropriation" must be a grant of spending authority and not a restriction or removal of such authority. Thus, the Ramsey County District Court in *Kahn v. Carlson* (file no. C8-95-10131, January 26, 1996) (copy attached) held that the governor could not separately veto a legislative *reduction* in spending authority contained within an appropriation bill. It is also important to remember that a legislative authorization or direction to undertake an activity that will entail an expenditure of funds does not, in itself, constitute an appropriation. *See, e.g., United States Fire Ins. Co. v. Minnesota Zoological Board*, 307 N.W.2d 490 (Minn. 1981); *Butler v. Hatfield*, 277 Minn. 314, 152 N.W.2d 484 (1967).

Our office has historically supported recognition of the so-called "*Brady*" rule, that the legislature may not evade the governor's item veto power by enacting a lump-sum appropriation followed by subdivisions calling for expenditure of specified portions of that sum for named purposes. In such situations the governor is permitted to veto the separate items individually. *See, e.g., Welden v. Ray*, 229 N.W.2d 706 (Ia. 1975); *People ex rel. State Board of Agriculture v. Brady*, 277 Ill. 124, 115 N.E. 204 (1917).

A common corollary of the *Brady* rule is the proposition that, when the governor vetoes one or more of the separate sub-items the stated total appropriation should be reduced accordingly. The rational for this result is related to the proposition, noted above, that the governor may not utilize the item veto power to strike conditions or restrictions on spending. For example, assume the legislature enacted an appropriation as follows:

For agency X

Subd. 1 - total appropriation	$1,000,000
The amounts that may be expended for each program shall be as follows:	
subd. 2 - general operations	500,000
subd. 3, - project a	250,000
subd. 4 - project b	250,000

Under the foregoing principles, the governor could veto the $250,000 for project b and the effect would be to reduce the "total appropriation" to $750,000.

STATUTORY REQUIREMENTS

Minn. Stat. § 4.034 (1998) provides:

> When the governor signs an enrolled bill to finally enact it into law as provided by the constitution, the governor shall note on the enrolled bill the date and time of day of signing. The governor shall then file the bill with the secretary of state.
>
> When the governor vetoes a bill, the governor shall file a notice with the secretary of state indicating the chapter number of the vetoed bill.
>
> When the governor neither signs nor vetoes a bill and legislative adjournment does not prevent its return, then the governor shall file the bill with the secretary of state with a notice that the governor is allowing the bill to become law without the governor's signature. If legislative adjournment does prevent its return, then the governor shall file a notice with the secretary of state indicating that the bill has been pocket vetoed. The notice must identify the enrolled bill by chapter number. The bill itself must be retained in the records of the governor's office.

Minn. Stat. § 645.01, subd. 2 (1998) provides:

> "Final enactment" or "enacted finally" for a bill passed by the legislature and signed by the governor means the date and time of day the governor signed the bill. For a bill passed by the legislature and allowed to become law without

> signature by the governor, it means the end of the last day on which the governor could have returned the bill with a veto to the legislature. For a bill passed by the legislature but vetoed and reconsidered and approved by the legislature after the veto, it means the day and time of the final legislative vote approving the vetoed bill.

These sections are, in my view, useful and important provisions which assist in creating and maintaining the official records that are needed to determine whether, and when, the acts amounting to approval or veto of a bill have occurred. They do not, however, effect the result required by the constitution itself. Therefore, for example, if a bill presented to the governor following final adjournment is not in fact signed *and deposited* with the secretary within the permitted period, it does not become law notwithstanding the definition of Section 645.01, subd. 2.

On the other hand, a bill that is presented to the governor before the last four days of a session will become law absent a timely return to the house of origin regardless of what, if anything, has been filed with the secretary of state.

This is not to say that the added requirements of Section 4.034 may be ignored. That statute does impose mandatory ministerial duties upon the governor. The statute, does not itself however, impose any specific time constraints. Thus the actions specified in the record and third paragraphs of Section 4.034 should be performed within reasonable time. What is a reasonable time would depend upon a number of factors, chiefly the effective date of a bill which is to become law. Thus, for example, if a bill which would take effect on August 1 is properly vetoed under the three-day rule on March 1, there would seem little reason to insist upon filing of the veto notice with the secretary of state immediately. On the other hand, if the same bill were due to take effect on March 2, the notice should be promptly filed so that the Secretary will have notice of the action.

Furthermore, the definition of "final enactment" in Section 645.01 which refers only to the time of signing can be problematic since this Constitution also requires depositing with the secretary of state. This issue is of particular importance in the case of bills specified to take effect "the day after final enactment." Therefore, we have always urged the governor to deposit bills with the secretary of state on the same day they are signed.

I hope this discussion is helpful to your office in dealing with veto issues. However, we realize that such issues arise in ever-changing forms and it is often easier to discuss these principles in the context of a specific example. Therefore, please feel free to contact our office if you have any questions.

AG:95088, v. 1

H

United States Court of Claims.

EBER BROS. WINE & LIQUOR CORPORATION
v.
The UNITED STATES.

No. 126--60.

Oct. 16, 1964.

Suit on private bill by plaintiff claiming that it became law when President failed to veto it within time prescribed by Constitution. The Court of Claims, Davis, J., held that where President during trip abroad had determined, with congressional acquiescence, that bills from Congress were to be received at White House only for presentation to him upon his return to United States, President's veto of bill more than 10 days after delivery to White House but less than 10 days from his return to country was timely.

Petition dismissed.

West Headnotes

[1] United States 28
393k28 Most Cited Cases

President's constitutional power can be physically exercised anywhere. U.S.C.A.Const. art. 1, § 7; 4 U.S.C.A. § § 71-73.

[2] Statutes 29
361k29 Most Cited Cases

President's limited time for considering a bill passed by Congress does not begin until measure is presented to him, and the initiation of that step of presentation to the President lies with Congress. U.S.C.A.Const. art. 1, § 7.

[3] Statutes 27
361k27 Most Cited Cases

If personal delivery of bills for presidential consideration is not demanded either by President or Congress, presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces, and for normal occasions, delivery to White House is effective presentation to President. U.S.C.A.Const. art. 1, § 7.

[4] Statutes 27
361k27 Most Cited Cases

President embarking on trip abroad may demand that Congress make personal presentation of bills to him abroad or delay presentation until his return, but if Congress is dissatisfied and cannot induce President to modify plan it has option of sending bills abroad and presenting them to the President who has to make himself reasonably available for that purpose. U.S.C.A.Const. art. 1, § 7.

[5] Statutes 27
361k27 Most Cited Cases

Both because Congress could not unilaterally establish a binding custom respecting time within which bills should be considered as having been presented to President for his action and because Congress had not followed a uniform policy with regard to presentation of bills, there had not been a practical construction so positive and consistent as to be determinative of issue as to when a bill delivered to White House during President's trip abroad might be considered as having been presented for President's approval. U.S.C.A.Const. art. 1, § 7.

[6] Statutes 27
361k27 Most Cited Cases

President was free to decide that during his absence on trip abroad bills from Congress would be received in the White House only for presentation to him upon his return to the United States within constitutional provision giving President 10 days to approve or veto bill after it has been presented to him, and Congress, informed of this arrangement, acquiesced therein by failing to send bill abroad by its own messenger, the one step which would have accelerated presentation. U.S.C.A.Const. art. 1, § 7.

[7] Statutes 29
361k29 Most Cited Cases

Where President during trip abroad had determined, with acquiescence of Congress, that bills from Congress were to be received at White House only for presentation to him upon his return to United States and bill delivered to White House by congressional messenger was so stamped, presidential veto of bill more than 10 days after delivery to White House but less than 10 days after

his return to country was timely. U.S.C.A.Const. art. 1, § 7.

[8] Statutes 27
361k27 Most Cited Cases
(Formerly 360k27)

White House legislative clerk who had been informed that bills from Congress would be accepted only for presentation to President upon his return from abroad had no authority to accept bill during President's absence for immediate presentation, and clerk's mistake in not originally accepting bill upon condition stated by President, a mistake corrected within three hours, did not prejudice Congress. U.S.C.A.Const. art. 1, § 7.

***625** Justin N. Feldman, New York City, for plaintiff. James M. Landis and Margaret Taylor, New York City, of counsel.

Irving Jaffe, Washington, D.C., with whom was Asst. Atty. Gen., John W. Douglas, for defendant. M. Morton Weinstein and Edna P. Goldberg, Washington, D.C., were on the brief.

Before JONES and WHITAKER, Senior Judges, and LARAMORE, DURFEE, and DAVIS, Judges.

DAVIS, Judge.

This is a suit on a private bill passed by both Houses which, the plaintiff says, became law when the President failed to veto it within the time prescribed by the Constitution. The defense is that the President validly returned the bill without his approval within the proper time, and that the Congress did not repass the measure. It is agreed that if the bill became law plaintiff is entitled to recover, otherwise not. The only issue is whether the President vetoed and returned the bill 'within ten days (Sundays excepted) after it' was 'presented to him.'

Having been refused (on limitations grounds) a refund of income tax overpayments for 1947 and 1948, plaintiff sought legislative relief. H.R. 2717 of the 86th Congress would waive the time-bar and permit the claims to be considered on their merits. [FN1] The bill passed the House of Representatives on March 17, 1959, and the Senate on August 27, 1959. It was signed by the Speaker and the presiding officer of the Senate and then delivered by a messenger of the House of Representatives to the White House on August 31, 1959.

FN1. It was highly probable that the elimination of the time-bar would result in a refund since the Internal Revenue Service had already acceded to refund claims raising the same point for non-barred years.

On that day President Eisenhower was abroad, on an official visit to nations of the North Atlantic Treaty Organization. He had departed the country on August 26th and he did not return until September 7th. In preparation for this trip, the President had told his staff that, so far as possible, he wanted Congressional bills to be held in Washington until his return. It was decided to stamp bills received at the White House during his absence with the legend, 'Held for presentation to the President upon his return to the United States.' The White House legislative clerks were instructed to use this stamp on all such bills, as well as on the receipts given to Congress. Before the President's departure, a member of his staff discussed the problem, including the use of this new stamp, with Congressional leaders, but we do not know whether they agreed to the procedure or expressed any view at all.

When H.R. 2717 was delivered to the White House on August 31, 1959, the legislative clerk inadvertently failed, at first, to follow his instructions and did not use the new stamp. He simply noted, in the customary form, that the White House had received the measure. About two-and-a-half hours later, when the oversight came to his attention, he attempted to amend the receipt by adding the words 'Held for presentation,' etc. This modification was shortly brought to the attention of the House. The new legend was also stamped on the enrolled bill. [FN2]

FN2. H.R. 2717 and 12 other bills were the first to be received from the House of Representatives after the President's departure (on August 26th). The legislative clerk made the same mistake as to the entire group and that mistake was soon corrected as to the entire group. Previously, the Senate had delivered four bills on August 27th and one bill on August 31st. The new stamp had been immediately used on these prior bills and their receipts. It was also used on the 54 measures which were

delivered, during the President's absence, after the group which included H.R. 2717.

***626** Upon the President's return to the United States on September 7th, the White House placed on H.R. 2717 a stamp showing that the bill was presented to him on that date. On September 14, 1959, while the Congress was still in session, the President returned the bill to the House of Representatives with a veto message. This was more than ten days (Sundays excepted) from the time the measure was delivered to the White House on August 31st, but less than ten days (Sundays excepted) from September 7th when the President returned to the country and the White House indicated that the bill had been presented to him. The House of Representatives did not reconsider H.R. 2717 and it was not published as a private law. The Congress remained in session until about daybreak of September 15, 1959.

The theory of President Eisenhower, and of the defendant here, is that in these circumstances the President had the power to direct postponement of presentation to him until his return from abroad. The plaintiff's position is that bills are customarily presented to the President through delivery to the White House and that practice cannot be altered without agreement by both the legislative and the executive branches. Since no such agreement has been shown, the President's time expired, plaintiff says, several days before his veto message, and accordingly H.R. 2717 became law without his signature.

I

The timeliness of the President's return of the bill must be adjudged under the constitutional provision (Art. I, section 7) that 'If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.' [FN3] Every President and every Congress have been governed by these words, but neither the naked language nor the vestments of history furnish, a definitive answer to the precise problem before us. [FN4] ***627** That problem lay latent until this century was well launched. President Taft was the first chief executive to leave the continental United States while Congress was in session, but the question was still dormant in his time since no bill was sent to the White House during his absence. Prior to the occasion (in 1959) leading to the present case, the issue of how to handle bills received at the White House during a President's absence abroad arose during the tenures of Presidents Wilson, Franklin D. Roosevelt, Truman, and Eisenhower. [FN5] If the recent past is indeed prologue, the question cannot be dismissed as transient. The combination of increased presidential mobility and concern with foreign affairs together with prolonged congressional sessions is likely to result in a recurrent pattern of presidential travel abroad even while Congress is sitting. The problem will doubtless endure.

FN3. The full text of the constitutional provisions on the President's veto power is as follows:
'Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.
'Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.'

FN4. For a general discussion of the presidential veto, see Zinn, The Veto Power of the President (1951), reprinted in 12 F.R.D. 207. Mr. Zinn was and is the Law Revision Counsel of the Committee on the Judiciary of the House of Representatives.

FN5. As shown below, the practice during those periods has not been uniform.

Like most of the Constitution, the simple words of the controlling clause carry the interpreter part way but do not automatically unlock all the doors. The ultimate solution must, as so often, be sought through the principles behind the language. In this instance, that policy has already been articulated by the Supreme Court. 'The constitutional provisions have two fundamental purposes; (1) That the President shall have suitable opportunity to consider the bills presented to him; and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.' Wright v. United States, 302 U.S. 583, 596, 58 S.Ct. 395, 400, 82 L.Ed. 439 (1938). See, also, Edwards v. United States, 286 U.S. 482, 486, 493, 52 S.Ct. 627, 76 L.Ed. 1239 (1932); The Pocket Veto Case, 279 U.S. 655, 677--678, 49 S.Ct. 463, 73 L.Ed. 894 (1929); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 454--455, 20 S.Ct. 168, 44 L.Ed. 223 (1899). 'The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. * * * The power thus conferred upon the president cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.' The Pocket Veto Case, supra, 279 U.S. at 677--678, 49 S.Ct. at 465--466 (footnotes and citations omitted). 'Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. This opportunity is as important as that of the President.' Wright v. United States, supra, 302 U.S. at 596, 58 S.Ct. at 401. The time limit is fixed 'so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President.' Edwards v. United States, supra, 286 U.S. at 486, 52 S.Ct. at 628. [FN6]

FN6. Under these postulates, the Supreme Court has ruled that the President can approve a bill (within the eleven or twelve days) during an interim recess of the Congress (La Abra Silver Mining Co. v. United States, supra) and after Congressional adjournment (Edwards v. United States, supra); that a 'pocket veto' is effective upon the adjournment of the first session of a Congress (The Pocket Veto Case, supra); and that the President can return a bill without his approval during a 3-day recess of one House (Wright v. United States, supra).

***628** These complementary policies interact, of course, with the precise words of the Constitution. The chief linguistic key is the requirement that every bill 'be presented to the President' and should be acted on within ten days (Sundays excepted) 'after it shall have been presented to him' (emphasis added). The Presidency may be an institution but the President is an individual. Constitutional power is vested in his person. Certain actions he can appoint others to take for him, but he alone can approve or veto legislation; that authority cannot be delegated. Whatever the help a President may have, the ultimate decision must be his. And to decide he must have time. He is neither a rubber-stamp nor an instantaneous computer. For many bills action may be easy, but there will always be a considerable number which call for consultation, deliberation, or the gathering of information.

[1] We think, too, that it is now settled that the President's constitutional power, unlike that of some governors of states, can physically be exercised

anywhere. See Corwin, The President: Office and Powers (4th rev. ed. 1957), pp. 55, 281, 346--347; Miller, Some Legal Aspects of the Visit of President Wilson to Paris, 36 Harv.L.Rev. 51, 57, 60, 61, 62, 72, 76--77, 78 (1922). The District of Columbia is the seat of government (4 U.S.C. § § 71--73), but our whole history demonstrates that the President does not lose his authority when he acts outside Washington or the White House; he can and does sign bills elsewhere, whether on official trips or working vacations. The President's official status is not even confined to the United States; many bills have been signed abroad (see findings 20--23). During his term of office the President is vested with his constitutional powers at all times and wherever he may be. [FN7] Although the District of Columbia is normally his post, he is free to perform his functions at the places he deems appropriate and desirable. He may go or be called anywhere in the country and he may serve abroad. [FN8]

FN7. The problem of disability presents different considerations and involves other constitutional texts and tests.

FN8. The last clause of Article I, section 5, of the Constitution seems to imply that the Houses of Congress can, by mutual consent, sit elsewhere than at the seat of Government. Section 27 of Title 2 of the U.S.Code (derived from the Act of April 3, 1974, c. 17, 1 Stat. 353) provides that when the President believes that, 'from the prevalence of contagious sickness, or the existence of other circumstances', it would be 'hazardous to the lives to health of the members to meet at the seat of Government,' he can 'convene Congress at such other place as he may judge proper.'

[2] It is also important that, under the careful words of the Constitution, the President's limited time for considering a bill does not begin until the measure is presented to him. That period does not mechanically commence at the end of the passage of the bill through the Congress. A further step is necessary, and the initiation of that step--presentation to the President--lies with the Congress. It has not been unknown for Congressional leaders to delay, for one or another reason, the presentation of bills to the President. See Miller, supra, 36 Harv.L.Rev. at 68, 76; Corwin, supra, pp. 281, 473--474. Conversely, the routine process of presentation can be accelerated if there be need. Always, however, the time for the President's deliberation runs from the bill's presentation to him.

From this review of the Constitution's phrasing and of the Constitution's policy there emerges a linked series of significant considerations: The President alone can approve or disapprove a bill. At any particular time, he can lawfully be at any place he deems appropriate, and ***629** he can lawfully take action there; in particular, it is inherent in his position that he can properly go abroad while and as President. In no case, however, does his time to evaluate a bill commence until it is presented to him. A 'fundamental purpose of the constitutional provision' is 'to provide appropriate opportunity for the President to consider the bills presented to him' (Edwards v. United States, supra, 286 U.S. at 493, 52 S.Ct. at 631) and the time given him by the Constitution cannot be 'lessened, directly or indirectly' (The Pocket Veto Case, supra, 279 U.S. at 678, 49 S.Ct. at 466). The President, for his part, is not to be free to override the Congressional will by delaying his action beyond the stipulated time or holding a measure in suspense at his own will. Within the constitutional scheme, there is large leeway, through mutual arrangement and understanding, for the President and Congress to accommodate each other's needs and interests. But the veto provisions of the Constitution were also designed to apply in eras of hostility, coolness, partisan tactics, or simple lack of concern. If the President feels the need of the full constitutional period, Congress should not be able to diminish it, deliberately or by accident, by delivering bills in such a way that the President would not have the full eleven or twelve days for deliberation and consultation. [FN9] On the other hand, when Congress affirmatively desires presidential action to be prompt, [FN10] the President should not be able to evade or prolong the constitutional span by absenting himself or refusing to receive the measure. Neither the President nor the Congress should be free to ignore the other's interests; but neither should be dependent on the other's grace.

FN9. On the constitutional plane it is no answer that, in modern times, Presidents have established systems under which reports on bills are routinely made by interested departments and agencies, and that this process can be begun and completed without the personal initiation or

even knowledge of the President (e.g., after delivery to the White House). There will always be bills for which a President feels that, despite all the aid he receives, he requires the full period for his personal consideration or consultation, or to resolve doubts. There is also no guarantee that future Presidents will maintain the current system.

FN10. To avoid, for instance, a pocket veto at the end of a session, or so that a bill can be put promptly into effect by repassage over a veto.

[3] We believe that these factors-in-contention are best harmonized, in the spirit of the aphorism that 'the Constitution is not a code of administrative procedure, but a frame of government' (United States v. Weil, 29 Ct.Cl. 523, 546 (1894)), by utilizing the instrument the Constitution has provided through its concept of 'presentation'--though personal presentation to the President is not mandatory, either the Congress or the President can insist on such delivery. If personal delivery is not demanded by either side, presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces; that has long been done, for normal occasions, by the continued understanding that delivery to the White House is effective presentation to the President.[FN11] But the right of either side of insist on personal presentation is the device-of-last-resort by which both can ultimately protect their respective interests as sanctioned by the Constitution. This primacy of the right of personal presentation is wholly fitting; it is a natural reading of the directive, that every bill shall before becoming a law 'be presented to the President of the United States', that it shall be delivered to him personally (or to an immediate aide)--unless the ***630** President is willing to receive it, and the Congress to present it, in some other fashion. See Corwin, The President, supra, p. 281.[FN12]

FN11. It is to this arrangement that the Supreme Court pointed when it referred to 'presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familar practice. The bill is sent by a messenger and is received by the President.' Wright v. United States, supra, 302 U.S. at 590, 58 S.Ct. at 398.

FN12. In the Legislative Reorganization Act of 1946, Rule XI of the Rules of the House of Representatives was amended to provide that the Committee on House Administration should present enrolled bills, 'when they shall have originated in the House, to the President of the United States in person, and report the fact and date of such presentation to the House.' 60 Stat. 812, 826 (emphasis added). The provision in the 1946 Act for the Senate Committee on Rules and Administration was the same (60 Stat. 812, 820), but apparently has since been changed. Section 106 of Title 1 of the U.S.Code directs that enrolled bills shall be 'sent to the President of the United States.'

To recapitulate, we see the operation of the constitutional scheme in this way: The President can, if he wishes, insist that bills be presented to him personally by an organ designated by Congress (i.e., through its messenger or committee) wherever he may be; as a corollary, the President must make himself reasonably available to the Congressional messenger or committee if he desires a personal presentation. The President can, however, dispense with personal presentation and accept bills through some other procedure. He has the choice of a method, short of personal presentation, which he is willing to accept at any particular time; the Congress has the right to rely on and follow such a procedure established by the President until it has been informed, in some manner, that a new system has been substituted. But at any time if the Congress desires a speedier presentation, it can reject a substitute procedure established by the President and insist on personal presentation, in reasonable circumstances, and the President has to make himself available (or offer an equally speedy acceptance). Conversely, the Congress (or the presenting House) can stand on personal presentation or its equivalent (delivery to an aide in the immediate vicinity of the President), or it can establish its own system of presentation, other than personal, in which the President can acquiesce so long as he wishes. When the Congressional system becomes inconvenient or burdensome to him, the President is free to proffer his own method or to demand personal presentation (or the equivalent). In any event, the President's time to consider the bill begins with its presentation to him under this scheme. The sum of it is that a President

who desires to do so can initially determine how and when bills are to be presented to him, but his choice is always subject to be overridden by a Congress which wishes to accelerate presentation by personal delivery to the President or his immediate entourage.

[4] For a President embarking on a trip abroad, there are various choices. He can, if he is adamant, demand that the Congress make personal presentation to him abroad or delay until his return. It is more likely that he will direct that bills be accepted at the White House as if he were present, or that they be forwarded by his staff for presentation to him overseas, or that they be held at the White House to await his homecoming. Presumably the last alternative will be used when the foreign journey is expected to occupy the President's full time so that consultation on legislative matters would be inconvenient or impossible. The Congress may well accede to the arrangement the President selects. But if Congress (or the presenting House) is dissatisfied with that plan and cannot induce the President to modify if, the Congress always has the option of itself sending the bill abroad and presenting it to the President (who has to make himself reasonably available for that purpose).

In this way there is full play to the overall constitutional mechanism of checks and balance as incorporated into the veto provisions. '(A)s bills multiply' (Edwards v. United States, supra, 286 U.S. at 493, 52 S.Ct. at 631) and legislative sessions lengthen, the Congress cannot forestall the President from ***631** enjoying the full span allowed him by the Constitution (if he wishes it) by employing a 'presentation,' not to him, but to his 'home office' while he is away and otherwise occupied. [FN13] On the other hand, Congress can, if it wills, prevent a President--insufficiently attentive to legislative needs or desirous of unduly delaying his action on a bill--from using the device of an absence from Washington or the country as an excuse for postponing action; Congress can start the constitutional period running by seeking out the President and presenting the bill to him wherever he is. The separate action of the President and of Congress need not wait upon agreement with the other; nor can the hostility of one deprive the other of rights. Each side can take independent steps to preserve the interests granted it by the Constitution. In a time of political or ideological combat between legislative and executive, the President need not curtail trips abroad which he considers necessary out of fear that the Congress will immediately deliver to the White House bills it feels he might reject if he had the time. Congress, on the other hand, need not worry that a hostile President will unnecessarily absent himself from Washington so as to delay, for unacceptable motives of his own, his action on bills or in order to await the end of the session (with its weapon of a pocket veto). [FN14] The President, when he feels it important, can set the time of presentation so that it will not interfere with other activities abroad (or outside of Washington) and thus require the Congress to take affirmative action to present the bill to him personally if it dislikes the arrangement he makes. Congress, when it desires earlier presentation, can always arrange, itself, to present the measure to the President wherever he is. [FN15]

FN13. Similarly, if the Congress were meeting outside of Washington, see footnote 8, supra, the President could not return a bill without his approval by sending it to the Capitol in Washington--unless there was an arrangement or understanding to that effect.

FN14. To avoid pocket vetoes, Congress can also prolong its sittings until the beginning of the next session. This was done during Reconstruction days. See McKitrick, Andrew Johnson and Reconstruction (1960), pp. 12, 277, 499.

FN15. We have noted above that it is a postulate of the constitutional provision regarding the veto that the President shall hold himself reasonably available for personal presentation, if that would be speedier than the method he himself selects. Delivery to an authorized aide in the President's immediate entourage would undoubtedly be equivalent to personal delivery to the President.

We are not barred from adopting this reading of the Constitution by the history of, or the practice under, the veto provisions. As with other problems in this area, the proceedings in the constitutional and ratifying conventions are of little aid in solving the particular problem before us. Cf. The Pocket Veto Case, supra, 279 U.S. at 675, 49 S.Ct. 463; Edwards v. United States, supra, 286 U.S. at 487, 52 S.Ct. 627. Nor is the teaching of presidential practice more helpful. When the President has been in the country,

the assumption of the White House staff seems to have been (at least in recent years) that delivery to the Executive Mansion necessarily constituted presentation, even though the President might be at a distant point and may have desired to postpone presentation until his return to Washington. See findings, 15, 17, 23. This assumption appears, however, to have sprouted without much testing or formal consideration. The routine method of presentation through delivery to the White House seems to have been accepted without question during presidential travels within the United States and, so far as we know, no efforts have been made at those times to limit or withdraw the authority of the legislative clerks at the White House to receive bills. This routine continuance of the regular procedure during the President's domestic travel, apparently because it did not ***632** cause any grave inconvenience, must be classed as a 'precautionary practice' (United States v. Weil, supra, 29 Ct.Cl. at 548) rather than a 'determinative' one (Edwards v. United States, supra, 286 U.S. at 487, 52 S.Ct. 627). 'The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation.' Wright v. United States, supra, 302 U.S. at 597--598, 58 S.Ct. at 401.

The practice during the overseas absences of Presidents Wilson, Franklin D. Roosevelt, Truman, and Eisenhower is inconclusive, but we think that it indicates, at the least, that each of those Presidents acted, at one or another time, contrary to the assumption that delivery of a bill to the White House necessarily constituted delivery to the absent President. [FN16] President Wilson signed four bills, of the five forwarded to him abroad, more than ten days (Sundays excepted) after their delivery to the White House. President Roosevelt vetoed one bill, and signed two, more than the constitutional period after their delivery to the White House; before one of his wartime trips he specifically informed the Vice President and the Speaker that 'the White House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution.' In addition, with respect to several bills received during President Roosevelt's absences he took pains to indicate that they had been presented to him later than the day they were received at the White House. President Truman signed four bills and vetoed one bill, and possibly three others, more than ten days (Sundays excepted) after delivery to the White House; in his case, too, many of the bills forwarded during his absences have a notation that they were 'presented to the President' on some date following that of the delivery of the bill to the White House. President Eisenhower's practice during his 1959 trip, involved here, shows that he considered the bills received during that period not to be presented to him until his return; on an earlier trip (in 1955) the White House received the bills 'for forwarding to the President'; on a later trip (in 1960) bills were also received at the White House 'for presentation to the President upon his return to the United States.' These instances do not prove any binding custom as to the precise meaning of 'presentation,' but they do show that there is no positive custom or practice that delivery to the White House amounts to presentation when the President has indicated otherwise. They also show that the Presidents have not always felt bound to make arrangements with Congress as to the form of presentation. Insofar as Presidents, while abroad, have attempted to pass on many bills within the constitutional period after delivery at the White House, their actions appear (in some instances at least) to indicate 'the existence of doubt and the desire to avoid controversy. See Edwards v. United States, supra, 286 U.S. at 487, 52 S.Ct. at 629.

> FN16. The details of the overseas practice of these Presidents, so far as we know it, are set forth in findings 12--23. We have no information on the practice during President Kennedy's administration or whether the problem was a 'live' one at that time.

[5] For like reasons we find nothing conclusive in the Congressional treatment of bills delivered to the White House during a President's absence. Even if Congress had consistently treated such bills as presented to the President, that handling would not create a binding custom or practice in view of the different presidential treatment of such bills. Neither Congress nor the Executive, alone, can create in this area a determinative practice. But the fact is that the Congressional handling of these ***633** measures has not been uniform. Sometimes the House has phrased its Journal or Congressional Record entries as reflecting the delivery of a bill to the White House for presentation to the President or for forwarding to the President or for the President's approval; sometimes the House phraseology indicated, as in the ordinary case, that the measure had been presented to

the President. The Senate seems to have used the latter phrasing consistently. Both because the Congress cannot unilaterally establish a binding custom on this point and because the Congress has not followed a uniform policy, we conclude that there has not been 'a practical construction so positive and consistent as to be determinative.' Edwards v. United States, supra, 286 U.S. at 487, 52 S.Ct. at 629.

II

[6][7] Under the principles discussed in Part I, there is no doubt that President Eisenhower's veto of H.R. 2717 was timely. He was free to decide, as he did, that during his absence bills would be received at the White House only for presentation to him upon his return to the United States. The Congress was informed of this procedure by a presidential aide before the President departed. It was also told of the change in practice via the stamps which were prepared for the bills themselves and for the receipts, on delivery of the bills to the White House. The Congress, if it did not agree, could have sent the bills to the President in Europe. But it did not take that course. Aware through its leadership of the President's new arrangement, the House sent its messenger to deliver H.R. 2717 at the White House. When it was again informed through the stamp that presentation would be delayed until the President's return, the House took no action to accelerate presentation. By failing to take the one step which would have had that effect--sending the bill abroad through its own messenger--the House must be taken to have acquiesced in the President's new arrangement. [FN17]

FN17. Plaintiff mistakenly relies on the holding in Wright v. United States, supra, 302 U.S. 583, 58 S.Ct. 395; that the President could return a bill to the Senate, during a three-day recess of that body, by delivering it to the Secretary of the Senate. In Wright, the Secretary was 'the accredited agent of the legislative body' (id. at 590, 58 S.Ct. at 398), authorized to receive such messages from the President, while the legislative clerk in the present case was neither accredited nor authorized. See Corwin, The President, supra, at p. 280; Building Commission v. Jordan, 254 Ala. 433, 48 So.2d 565 (1950); Cammack v. Harris, 234 Ky. 846, 29 S.W.2d 567 (1930).

[8] Nothing turns on the mistake of the White House legislative clerk in failing to use the new stamp on H.R. 2717, and the receipt therefor, when the bill was first delivered. The clerk did not have authority to accept the bill for immediate presentation to the President; his prior authority, used while the President was in this country, had been withdrawn and new instructions issued. Congress had earlier been informed of this change. Under the new directions the clerk was powerless to accept the bill on any terms other than for presentation to the President on his return. Moreover, the mistake was corrected within three hours and the House was in no way prejudiced. It is appropriate to note, again, that 'the Constitution is not a code of administrative procedure, but a frame of government.' United States v. Weil, 29 Ct.Cl. 523, 546 (1894).

Similarly, it is unimportant that the House Journal and the Congressional Record indicated that H.R. 2717 was presented to the President for his approval on the day the bill was delivered to the White House. Since the House had been informed of the President's special arrangement during his absence--in general, before his departure, and with specific reference to H.R. 2717, on the sams day it was delivered to the White House--the House could not unilaterally***634** declare that the routine procedure was nevertheless effective. Moreover, the habitual wording of these entries is counter-balanced by the habitual actions of the Congress upon receipt of the veto message. The House, the originating body, recorded the vetoes (105 Cong.Rec. 19697) and took no further action. The Senate later included H.R. 2717 in a list of vetoed measures. [FN18]

FN18. See 'Presidential Vetos: List of Bills Vetoed and Action Taken Thereon by the Senate and House of Representatives, First Congress through the Eighty-Sixth Congress, 1789--1961' (G.P.O. 1961).

For these reasons, we hold that plaintiff is not entitled to recover and that its petition is dismissed.

WHITAKER, Senior Judge (concurring):

I am in thorough agreement with the conclusion reached by the majority in this case, and with most that is said in justification of this conclusion. However, since there are some expressions and some

inferences and some reservations in it with which I am not wholly in accord, I file this concurring opinion. For instance, I think by long-continued usage, presentation to the White House constituted presentation to the President, and that this usage could not be set aside without prior notification to the Congress. Nor do I think it was necessary for Congress to acquiesce in setting it aside. The majority opinion does not so hold, as least not explicitly.

My discussion of the question follows:

We are presented with a novel situation in this case. There are no court decisions on the question presented. The question is, what constitutes presentation to the President of a Bill passed by Congress, within the meaning of Section 7 or Article I of the Constitution, which reads:

> 'Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. * * * If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.'

Presentation starts the running of the 10-day period, so the question is, what constitutes presentation to the President?

The purpose of the constitutional provision is to give the President a period of 10 days (Sundays excepted) within which to consider the legislation and, within that time, to express his approval or disapproval, if he cares to do so. Since a full 10 days (Sundays excepted) are allotted to him for consideration, it would seem to follow, necessarily, that he might require that the Bill be presented to him in person, in order that he might have the full time. [FN19] My conclusion in this case is based on that premise.

FN19. Edwards v. United States, 286 U.S. 482, 152 S.Ct. 627, 76 L.Ed. 1239 (1932).

Having that prerogative, it would seem also to follow that, in case he did not desire personal presentation, he had the right to determine the way in which substitute presentation should be made, provided only that this was not more onerous than personal presentation. His determination of the manner of presentation, of course, had to be communicated to Congress, so that that body might comply with its duty to present Bills to the President for his consideration.

***635** Having the right to prescribe the way in which presentation should be made in the first instance, he had the right to change the way from time to time, but, again, he was required to notify Congress of any change, in order that Congress might discharge its constitutional duty.

In the absence of formal notification to Congress of the substitute for personal service, established usage would seem to determine the method of presentation. [FN20]

FN20. The Pocket Veto Case, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929).

Presentation by Congress in the way prescribed marks the beginning of the 10- day period.

These propositions would seem to be fundamental and should guide us to a proper solution of the question presented in this case.

For at least 40 years, no doubt for a much longer time, enrolled Bills have not been presented to the President in person, except in the case of the Bank Holiday Bill of 1933 and Bills passed on the eve of sine die adjournment of the Congress. The usage has been for the Committee on Administration of either the House or the Senate, after the Bill has been signed by the Speaker of the House and the Presiding Officer of the Senate, to send a clerk to the White House with the enrolled Bill and deliver it to a legislative clerk in the records office of the White House, who signs a receipt for it. The Committee on Administration then reports to the House or Senate 'that this day they presented to the President of the United States, for his approval, the following Bills.'

For many years this has been understood to constitute presentation to the President. Usage requires us to hold that it complies with the constitutional requirement for presentation to the President, unless in the instance of any particular

Bill, including the particular Bill here under consideration, action was taken by the President to notify Congress that some other mode of presentation would be required, either personal presentation or otherwise.

Before he left the country on August 26, 1959, the President gave adequate notice to Congress that delivery of enrolled Bills to the White House would not constitute presentation of such legislation of him. H.R. 2717, the Bill involved in this case, was one of the Bills delivered during that period.

This was the second occasion on which President Eisenhower had considered the problem of presentation to him of enrolled Bills during his absence from the United States. Before he departed for the Geneva Conference on July 15, 1955, he had asked the advice of Attorney General Brownell on the proper handling of Bills passed by both Houses of Congress while he was away. The Attorney General had suggested that arrangements be made with Congress so that enrolled Bills would be held until his return or delivered to the White House 'for forwarding to the President.' The findings do not show whether the President, or his representative, discussed the matter with Congress, but they do show that all Bills delivered to the White House during this time were stamped 'Received for forwarding to the President.'

Prior to his departure on August 25, 1959, President Eisenhower instructed his staff of stamp all Bills delivered to the White House during his absence: 'Held for presentation to the President upon his return to the United States.' This decision was informally communicated to congressional leaders, at the President's direction, by his Deputy Assistant for Congressional Affairs.

Since the President had the right to require personal presentation to him, he had the right to notify Congress that during his absence the accustomed substitute would not be acceptable.

When he advised Congress that delivery of Bills to the White House would not be deemed presentation to the President, President Eisenhower followed the ***636** example of his predecessors. For example, when President Franklin D. Roosevelt was preparing to leave the country for an extended stay in 1943, he requested advice from his Attorney General as to the proper handling of Bills passed by Congress. The Attorney General advised him in part:

'The practice of receiving bills at the White House and forwarding them for presentation may also require a measure of cooperation. Probably the custom of treating delivery to the White House as presentation to the President should be negatived by informal Presidential advice to the Vice-President and the Speaker that persons at the White House will, during a given period, be authorized only to forward, and not to receive on behalf of the President, enrolled bills. Such directions should be reflected in the reports of the Committee on Enrollment to their respective Houses announcing the date of presentation of bills to the President.'

In rendering this advice, Attorney General Biddle adverted to a practice during President Wilson's administration of varying the form of the report of presentation in the Congressional Record, when the President was outside of the country, notifying the originating House that the Bill had been delivered to the White House, instead of to the President.

Upon receipt of this advice, President Roosevelt sent a memorandum to the Vice President and the Speaker of the House of Representatives, reading as follows:

'As I expect to be away from Washington for some time in the near future, I hope that insofar as possible the transmission of completed legislation be delayed until my return. The White House Office, however, in other cases of emergency has been authorized to forward to me any and all enrolled bills or joint resolutions. They will be forwarded at once by the quickest means. The White House Office will not receive Bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution. I suggest, therefore, that if any bill is forwarded to the White House, the entries on the House and Senate Journals show 'delivery to the White House for forwarding to the President'.

'For security reasons I hope that this can be kept confidential for as long as is necessary.' (Emphasis in original.)

Since the President had the right to require personal presentation, President Roosevelt was fully justified in notifying Congress that the customary usage of treating delivery to the White House as presentation to the President would not be allowed, and in prescribing a different procedure during his absence from the country. The essential element of notification to Congress of the change was fully complied with. Had this been omitted, I think the

change in procedure would have been ineffectual.

President Truman, who succeeded to the Presidency upon Mr. Roosevelt's death, did not, prior to his departure for the Potsdam Conference in 1945, take action similar to that of his predecessor in his memorandum to leaders of Congress. Nonetheless, President Truman acted on a number of Bills more than 10 days (Sundays excepted) after delivery to the White House but within 10 days (Sundays excepted) after his return. He may have done so with the understanding that the procedure to be followed during the President's absence, as set out in President Roosevelt's 1943 memorandum, would continue in force during his administration. The Roosevelt memorandum, however, seems to relate only to the particular absence then in contemplation and does not appear ***637** to have been intended to apply to any others. But the reasons for the procedure there prescribed would seem to be equally applicable to an absence of any future President, quite as much as to Mr. Roosevelt. In any event, it is clear that President Truman did not regard presentation to a clerk at the White House while he was absent from the country as presentation to him. The Congress appears to have been of the same opinion, for it gave the same treatment to Bills that Mr. Truman purported to veto as it did to all other vetoed legislation. They were referred back to Committee; Congress took no further action upon them, and they were not published as laws.

The record does not show that the procedure during the Truman administration was based on formal notification to Congress that the custom of treating presentation to the White House as presentation to the President would not be followed during his absence; however, we need not concern ourselves with this for it is indisputable that, with regard to the Bill presently before us, President Eisenhower advised Congress that, during his absence from the country, delivery to the White House would not be considered presentation to the President, and that, if Bills were delivered to the White House, they would be stamped, 'Held for presentation to the President upon his return to the United States.'

After that notification was given, H.R. 2717, the Bill here in question, was delivered to the White House on August 31, 1959. The President returned it to the House in which it originated on September 14, 1959, with his objections to it. He had returned to the United States on September 7, 1959.

No action was taken by Congress to present the Bill to the President other than delivery of it to the White House. But the President had notified Congress that he would not accept this as the equivalent of personal delivery to him. Since he had the right to insist on presentation to him in person, it must be held that it was not 'presented to the President' prior to his return to this country on September 7, 1959. He vetoed it within 10 days thereafter. In my opinion it never became law.

END OF DOCUMENT

Solicitor General

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
Civil Division

File No: C8-95-10131
Monahan, J.

PHYLLIS KAHN, et al.,

Plaintiffs,

v.

ARNE H. CARLSON, et al.,

Defendants.

ORDER

The matter was heard on 19 January 1996 on cross motions for summary judgment pursuant to Minn.R.Civ.P. 56. Thomas L. Fabel and Randy L. Gullickson of Lindquist & Vennum P.L.L.P. appeared for plaintiffs. Richard S. Slowes, Assistant Solicitor General, appeared for defendants.

Based on the files, records and proceedings:

IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment is granted.

2. Defendants' motion for summary judgment is denied.

3. The item veto exercised by Governor Arne H. Carlson on 1 June 1995 upon Act of June 1, 1995, ch. 254, art. 1, sec. 14, subd. 8, 1995 Minn.Laws 2517, is null, void, and of no legal effect.

4. The attached memorandum is a part of this order and

constitutes the court's findings of fact to the extent necessary to support the order.

5. The mailing of this order by the court to counsel is notice of its entry for all purposes including for the calculation of time for appeal.

Dated: 26 January 1996.

M. Michael Monahan
District Court Judge

MEMORANDUM

1. **Facts.** In this declaratory judgment action, plaintiffs, two respected members of the Minnesota House of Representative, challenge the constitutional validity of an item veto exercised by defendant Arne H. Carlson (the "Governor") on 1 June 1995. Plaintiff Kahn chairs the House Governmental Operations Committee. Plaintiff Rukavina chairs the State Government Finance Division of the Governmental Operations Committee. Defendant Laura M. King is the Commissioner of the Minnesota Department of Finance (the "Commissioner").

The case results from the fortuitous convergence of curious legislative drafting[1] and the exercise of an item veto.

For reasons known only to itself, the legislature elected to

[1] Given plaintiffs' impressive academic credentials and their extensive legislative experience, it is difficult to understand how the format used in the appropriation bill at issue here gained their approval.

express its 1996-1997 appropriation for the Finance Department in two ways. 1995 Minn.Laws 2516-17. The following table illustrates the approach:

Subdivision 1:	1996	1997	Total
Total Appropriation	20,583,000.00	20,651,000.00	41,234,000.00
Subdivisions 2-8			
Accounting Services	3,986,000.00	4,003,000.00	7,989,000.00
Account Receivable	4,127,000.00	3,877,000.00	7,904,000.00
Budget Services	2,026,000.00	2,026,000.00	4,052,000.00
Economic Analysis	299,000.00	308,000.00	607,000.00
Information Services	8,920,000.00	9,643,000.00	18,563,000.00
Management Services	1,525,000.00	1,594,000.00	3,119,000.00
General Reduction	(500,000.00)	(500,000.00)	(1,000,000.00)
Summary Subd. 2-8	20,583,000.00	20,651,000.00	41,234,000.00

Thus, the legislature appropriated: (a) $41.234 million; and (b) $42.234 million less $1 million for the Finance Department.

Confronted by this statute, the Governor vetoed the following:

> Subd. 8. General Reduction
>
> (500,000) (500,000)
>
> The commissioner of finance shall make reductions of $1,000,000 from the programs funded in this section. The reductions may be made in either year of the biennium.

If this veto is set aside, the parties agree that the resulting

appropriation is $41.234 million. If the veto is sustained, the appropriation is either $41.234 million, as set out in subd. 1, or $42.234 million, as set out in subds. 2-7. During oral argument, plaintiffs asserted that subd. 1 controls and defendants that subds. 2-7 control. Mercifully, the pleadings do not encompass this dispute. Likewise, the pleadings do not address the question of whether subd. 8 is an unconstitutional delegation of the legislature's exclusive appropriation power to the executive.

Asserting that subd. 8 is not "an item of appropriation of money", plaintiffs argue that the Governor exceeded his constitutional item veto authority. Minn.Const., art. IV, § 23. Plaintiffs also argue that this veto intrudes into the legislature's exclusive power over the public purse by permitting the Finance Department to spend $1 million more than the legislature intended[2]. Minn.Const., art. XI, § 1.

The Governor and Commissioner argue that subd. 8 is, in the unique context of this bill, "an item of appropriation of money", albeit a negative one. They also argue that sustaining the veto

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[2] The force of this argument is blunted by plaintiffs' contention, noted above, that without subd. 8 the legislature still appropriated only $41.234 million.

would not impinge on any legislative power because, without subd. 6, the legislature actually appropriated $42.234 million for Finance Department programs.

The legislature has not adopted any particular method for making appropriations or any uniform format for their final enactment. A review of Ch. 254, 1995 Minn.Laws 2505-2530, discloses that the legislature continues in the same haphazard approach noted five years ago in *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 195 n.3 (Minn.1991)("*IFO*")(invalidating item veto of estimated sum because the bill did not identify specific amounts). Thus, the Governor's scrutiny of this appropriation bill and the exercise of his item veto power was, and this judicial review of that exercise is, as unnecessarily complicated as ever.

2. Law.

Summary judgment is appropriate where the pleadings and any other evidentiary submissions show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Here, the parties have stipulated that there are no genuine issues of material fact and that one of them is entitled

to judgment as a matter of law.

Because the item veto is located within Article IV, the constitutional provision dealing with legislative power, it is considered as an exception to the legislature's powers and must be narrowly construed. IFO, supra. at 194. The relevant part of Art. IV, § 23 read:

> 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....

There is no constitutional definition of "items of appropriation of money".

The courts have shaped a definition. Anticipating that any definition and its application might expand or be limited in the future on a case by case basis, the Minnesota Supreme Court defined "an item of appropriation of money" as "a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose". IFO, supra. at 195. Most recently, this three part working definition was applied in *Johnson v. Carlson*, 507 N.W.2d 232, 233-34 (Minn.1993) ("*Johnson*")(sustaining item veto of transfer of all taconite tax revenue increases to new program). Thus, it is this court's task to seek a definition of the phrase "item of appropriation of money" with reference to, and within the context of, ch. 254,

sec. 14, and then to determine whether the item veto was properly exercised. *See IFO, supra.* at 195.

3. **Decision.** State government is organized pursuant to the notion that power is distributed between three equal branches of government. Minn.Const., art. III. As part of that distribution of power, the legislature has the sole authority to appropriate money. Minn.Const., art XI, § 1. That exclusive power includes the power to direct how and when the money will be spent. The appropriation power is subject to the governor's general veto power, Minn.Const., art. IV, §23, and to the governor's limited item veto, Minn.Const, art IV, §23. Should a governor exercise a veto, the legislature's constitutionally provided remedy is to over-ride by a 2/3 vote in both houses. Minn.Const. art. IV, §23.

This constitutional scheme does not provide for judicial participation in the appropriation process. Nevertheless, the judiciary has allowed itself to be drawn into the biennial political contests between the legislature and the governor. *See also, State ex rel. Putman v. Holm,* 172 Minn. 162, 215 N.W. 162 (1927); *State v. Hoppe,* 298 Minn. 386, 215 N.W.2d 797(1974); *Seventy-Seventh State Senate v. Carlson,* 472 N.W.2d 99 (Minn.1991). This participation has accelerated recently as legislators, apparently unable or unwilling to persuade their

colleagues to vote to over-ride, have turned to the courts for relief. This is yet another such case.

The central question here is whether subd. 8 is "an item of appropriation of money". The parties seem to agree that subds. 2-7 are items of appropriation of money. It is tempting, almost to the point of irresistibility, to conclude that, because the legislature formatted subds. 2-8 to resemble a list of items of appropriation, subd. 8 is an "item of appropriation of money" subject to a gubernatorial item veto. *See, Walden v. Ray*, 229 N.W.2d 706 (Iowa 1975); *People ex rel. State Bd. of Agriculture v. Brady*, 115 N.E. 204 (Ill.1917). After all, if it looks like a duck, quacks like a duck, and walks like a duck, it's a duck. *See AFSCME v. Sundquist*, 338 N.W.2d 560, 579 (Minn.1983)(Yetka, J., *dissenting*).

Resisting the temptation to invoke this ancient analytical approach, the inquiry must start with trying to determine whether the three part definition articulated in *IFO*, and applied in *Johnson*, is sufficiently flexible to apply here. Subd. 8 contains a "separate and identifiable sum of money", $1 million. There is no dedication to a specific purpose, only a general reduction of previously stated amounts. Finally, subd. 8 is not an "appropriation" as defined by statute or in case law. The

legislature has defined an "appropriation" as "an authorization by law to expend or encumber an amount in the treasury". Minn.Stat. §16A.011, subd. 5.

The statutory definition describes an appropriation as an authorization to "expend" an amount of money in the treasury. Minn.Stat. §16A.011, subd. 5. Subd. 8 does not authorize an expenditure. Just the opposite. It is a directive to the executive, performable over a two years, to adjust the amounts appropriated as it sees fit. Rather than an appropriation, it appears to be an abdication of the power to appropriate. As such, it differs fundamentally from the situation in *Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20, 25-26 (1992)(sustaining veto of reduction of previously enacted legislative appropriation).

The statutory definition also uses the term "encumber". Minn.Stat. §16A.011, subd. 5. Encumber means "to handicap or burden, as with obligations or legal claims". Am. Herit. Dict. at 430 (1981). One can conceive of using a negative form to encumber some amount within the treasury. For example, if the legislature had enacted subd. 2 through 7 appropriating $42.234 million for the Finance Department's programs and in subd. 8 required that $1 million of that amount be held for contingencies, subd. 8 would

be an item of appropriation of money. But subd. 8 does not do this; it merely reduces previously stated amounts. Because subd. 8 neither authorizes an expenditure from, nor encumbers an amount in, the treasury, it is not an appropriation.

Accordingly, subd. 8 is not subject to a item veto power because it is not an item of appropriation of money as that term is used in Minn.Const., art. IV, § 23.

M.M.M.

COPY OF ORDER SENT
DATE: 1-26-96
BY: NJB