

OPINION NO. 71-088

Syllabus:

The language in Amended Senate Bill No. 456, quoted in your letter, is distinct and severable from the remainder of the bill, and that, under Article II, Section 16 of the Constitution of the State of Ohio, you are empowered to disapprove it.

To: John J. Gilligan, Governor, State of Ohio, Columbus, Ohio
By: William J. Brown, Attorney General, December 6, 1971

I have your request for my opinion as to the extent of your authority, under the Constitution of the State of Ohio, to disapprove certain language in Amended Senate Bill No. 456, passed by the General Assembly on December 1, 1971, to make supplemental appropriations for the month of December. Your letter reads in pertinent part as follows:

"I would like to request a formal opinion from you as to whether I can exercise the powers given to me in Article II, Section 16, of the Ohio Constitution, to disapprove any item in any bill making an appropriation of money by vetoing the language in this bill which appears at line 62a and continues to line 62w. That language reads as follows:

"Notwithstanding Chapter 109. of the Revised Code, so much of the foregoing appropriation as provides operating expenses for the Attorney General shall, to the extent necessary but not to be construed as a separate appropriation item, be additionally available beyond the purposes specified in Am. H.B. 986 and Am. S.B. 424, as extended by Am. S.B. 430, Am. S.B. 43E and S.B. 448, for the following purpose:

"Whenever the Secretary of State, in his official capacity, is a party in any court in a lawsuit, begun before or after the effective date of this Act, involving construction, interpretation, implementation or execution of any part of Article XI of the Constitution of the State of Ohio or any part of Title 2, Section 2, 2a, or 2c of the United States Code, he may, at the expense of the State of Ohio, employ legal counsel of his own choosing to represent him as Secretary

of State, and counsel so chosen shall, with respect to such lawsuit and any other lawsuit related thereto or derived therefrom, act in the place of, and with the powers of the Attorney General for the duration of such lawsuit or lawsuits, and be compensated in such reasonable amount as the Secretary of State shall determine. On application of the Attorney General, the Emergency Board created by Section 127.01 of the Revised Code, shall reimburse the appropriated funds of the Attorney General to the extent they are diminished through operation of this authority.'"

The language you quote appears in Section 3 of the bill which appropriates a lump sum of \$151,000,000 from the General Revenue Fund in the state treasury to meet all necessary expenses for the month of December.

As your letter notes, the power of the Governor to disapprove any particular item or items in an appropriation bill is derived from Article II, Section 16 of the Constitution of the State of Ohio. That Section reads as follows:

"Every bill shall be fully and distinctly read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending, shall dispense with the rule. No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed. Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass it, it shall become a law notwithstanding the objections of the governor, except that in no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all such cases the vote of each house shall be determined by yeas and nays and the names of the members voting for and against the bill shall be entered upon the journal. If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it shall become a law in like manner as if he had signed it, unless the general assembly by adjournment pre-

vents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him, with his objections in writing, in the office of the secretary of state. The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner herein prescribed for the re-passage of a bill." (Emphasis added.)

It has long been recognized that the Governor has the power to disapprove any part of a separate appropriation item, so long as the disapproved part is distinct and severable from the rest of the bill. One of my predecessors, who later sat for a decade as a member of the Supreme Court, faced that problem in 1915. The General Assembly had included, as part of its biennial appropriations bill for the fiscal years 1916 and 1917, an item of \$140,000 for the construction of two cottages at the Columbus State Hospital. 105-106 Ohio Laws, 666, 670, 753. The Governor, in addition to other items which he vetoed, reduced this item to \$70,000 for one cottage. 105-106 Ohio Laws, 829, 831. He then sent a message to the General Assembly enumerating the items he had disapproved, approved the remainder of the bill, and filed it in the office of the Secretary of State. 105-106 Ohio Law, 829-834. When my predecessor's opinion was asked as to the authority of the Governor to disapprove a part of an item, he responded that the Governor "had the power to veto the whole item had he so chosen and it should hardly be said, in the absence of judicial decision in this state to the contrary, that he did not have the power to veto part of the item". In answer to arguments to the contrary, my predecessor said that to accept them would be

"* * * to disregard the plain intention of the executive whose acts in this respect are entitled to the same presumption of validity as is accorded the acts of the general assembly and unless clearly unconstitutional it would be the duty of the courts to uphold same. * * * No private rights whatever are involved in the matter, the question is purely a public one involving a public policy only." (Opinion No. 566, Opinions of the Attorney General for 1915, pp. 1154-1155; see also Opinion No. 492, *ibid.*, pp. 1007-1008.)

This same Attorney General was asked for an opinion on a similar question during a later term in office. The General Assembly had passed an appropriations bill including \$3,000 to pay for reporting services for a six month's period and \$6,000 for the succeeding year. The Governor approved the \$3,000, but disapproved the \$6,000. It was argued that the "item" was the entire \$9,000 and that the veto was improper. My predecessor rejected the argument (Opinion No. 1467, Opinions of the Attorney General for 1927, page 2667), and, in so doing, quoted with approval the following passage from Fairfield v. Foster (Ariz.), 214 Pac. 319:

"But the conclusive argument to my mind against the construction contended for by plaintiff is that it renders utterly nugatory the attempt of the constitutional convention to meet the very definite evil above referred to. If we follow that line of reasoning, the

Legislature may simply make a separate appropriation in any lump sum for each department, or, by proper language in the general appropriation bill, consolidate the funds for almost the entire state government, and, under guise of 'directing' the expenditure of the money, limit its application to matters and amounts which the Governor believes to be highly injurious in part to the best interests of the state, practically compelling him to choose between abandoning the veto power, or suspending the operation of the government, thus nullifying the provisions of the Constitution under consideration, and going back to the very conditions its makers sought to avoid.

"The form of the appropriation bill under consideration, if we take the view of plaintiff, is a step in that very direction. Like the bill in *Regents, etc. vs. Trapp, supra*, (28 Okla. 83; 113 Pac. 910) it endeavors to make a lump appropriation for a certain department of the government, and then to determine exactly to the last dollar just how that money shall be spent; yet, according to plaintiff the Governor must either take the nauseous dose to the last drop, or stop the operation of the Corporation Commission for two years. If this construction be upheld, obviously the next step for a Legislature hostile to a future Governor will be a further consolidation of the 'items' of the appropriation bill, with a 'direction' of how the money shall be spent, until the special veto is practically abolished.
* * *

Opinion No. 1467, *supra*, was cited with approval by another of my predecessors in Opinion No. 2411, Opinions of the Attorney General for 1961. In that instance the General Assembly had passed an appropriation bill for the biennium of 1961-1962 and 1962-1963 with the amounts for the two years in parallel columns. The Governor disapproved all the amounts for the second year in the right-hand column, and my predecessor held that this was a proper exercise of the constitutional power to veto items in an appropriation bill. See pages 418-425. Furthermore, the Governor had disapproved of one item in the bill which did not involve an appropriation. As to this my predecessor said (pages 412, 419)

"This disapproval differs from those considered earlier in that the language concerned does not make an appropriation while the other subjects of disapproval so do. I do not believe, however, that an appropriation is necessary to constitute an item which may be disapproved by the Governor. Section 16 of Article II, *supra*, states that items 'in any bill making an appropriation of money' may be disapproved. Amended Substitute House Bill No. 390, *supra*, is obviously a bill making an appropriation of money. Thus, under the definition previously adopted, if the language concerned is distinct and severable from the remainder of the bill, it is an item in such a bill.

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"Section 16 of Article II, supra, clearly contemplates that the Governor shall have the right to disapprove complete bills and to disapprove items in bills which make appropriations of money. If language such as here concerned were not subject to the disapproval of the Governor as an item veto, this right could be defeated. Any language which the General Assembly wished to pass without being subject to veto could be inserted in a bill making an appropriation. In order to veto such language the Governor would be forced to veto the entire bill even though he might desire to veto only certain items of the bill. I do not believe that this is the intent of said Section 16, and I am of the opinion that any detail of a bill making an appropriation of money, which detail is distinct and severable from the remainder of the bill, is an item in a bill making an appropriation within the purview of Section 16 of Article II, supra."

It goes without saying that the General Assembly may not deprive the Governor of his constitutional power to disapprove items in an appropriation bill by the simple expedient of proclaiming that a particular item is "not to be construed as a separate appropriation item."

In specific answer to your question it is, therefore, my opinion, and you are so advised, that the language in Amended Senate Bill No. 456, quoted in your letter, is distinct and severable from the remainder of the bill, and that, under Article II, Section 16 of the Constitution of the State of Ohio, you are empowered to disapprove it.