

STATE OF MICHIGAN

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GOVERNOR: Force and effect of gubernatorial
statements made in line item veto
LEGISLATURE: transmittal letters

SEPARATION OF POWERS:

LINE ITEM VETO:

Upon returning to the Legislature an appropriation bill in which certain line items have been vetoed, the Governor may include in her transmittal letter an expression of her views regarding the unconstitutionality of various boilerplate provisions contained within that bill. The views so expressed however, do not satisfy the requirements for enacting a law, do not amend substantive law, and do not render the identified boilerplate provisions unconstitutional or void.

Opinion No. 7225

February 27, 2009

Honorable Mark C. Jansen
State Senator
The Capitol
Lansing, MI 48909

You have asked two questions relating to gubernatorial line item veto authority. Paraphrasing your questions, you ask whether statements made by the Governor in a veto transmittal letter that certain boilerplate¹ provisions contained within an appropriation bill are "unenforceable" have the legal effect of rendering the boilerplate provision void.²

¹ In the context of appropriations legislation, "boilerplate" refers to the conditions imposed in the appropriations act on the expenditure of the funds appropriated. See *Detroit Policemen & Firemen Retirement System Bd of Trustees v Detroit*, 143 Mich App 651, 659; 373 NW2d 173 (1985).

² In your question, the particular appropriation bill you cite is 2008 PA 251, regarding which the Governor declared in her transmittal letter to the Legislature that sections 337 and 355 are "unenforceable" as amendments by reference. Because your questions refer to the legal effect of the declaration and do not ask whether the cited sections of the public act are constitutional, this opinion does not consider the constitutionality of sections 337 and 355 of 2008 PA 251.

Under America's republican system of government, the power of the federal government is broken into three distinct and equal branches.³ To ensure a balance of power, the executive is charged with the execution of the laws as passed by the legislative branch and as limited by the interpretation of the courts.⁴

Consistent with each of Michigan's prior Constitutions, the people have incorporated the separation of governmental powers into Michigan's current Constitution. See Const 1963, art 3, § 2; Const 1908, art 4, §§ 1 and 2; Const 1850, art 3, §§ 1 and 2; and Const 1835, art 3, § 1. Under Const 1963, art 3, § 2:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

As under the Federal Constitution, the executive is charged with the proper execution of the laws. This concept is embodied in Const 1963, art 5, § 8, where the Governor is enjoined to "take care that the laws be faithfully executed." The Governor takes an oath of fealty to conform her actions to constitutional requirements or confine them within constitutional limits identical to that taken by the judiciary and the members of the

³ "For this reason that [Constitutional] Convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." The Federalist No. 48 (James Madison).

⁴ "But the great security against a gradual concentration of the several powers in the same [branch], consists in giving to those who administer each [branch], the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51 (James Madison).

legislative branch. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999), citing Const 1963, art 11, § 1.⁵

Whereas Const 1963, art 5, § 1 vests "[t]he executive power" in the Governor, under Const 1963, art 4, § 1, "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." The Governor has no general power to legislate or make laws. See *Wood v State Administrative Bd*, 255 Mich 220; 238 NW 16 (1931), and *People v Dettenthaler*, 118 Mich 595, 602; 77 NW 450 (1898).⁶ The Legislature's right to control the public treasury, to determine the sources from which public revenues shall be derived and the objects upon which they shall be expended, and "to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system." *Civil Service Comm v Auditor General*, 302 Mich 673, 682; 5 NW2d 536 (1942), quoting *Colbert v State*, 86 Miss 769; 39 So 65 (1905). The Legislature generally can attach to an appropriation any condition it may deem expedient and wise, but this extends only to those conditions the Legislature has the power to make and may lawfully impose. *State Bd of Agriculture v Auditor General*, 226 Mich 417, 425; 197 NW 160 (1924).

⁵ This provision requires "[a]ll officers, legislative, executive and judicial" to take and subscribe to the following oath: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability."

⁶ Exceptions exist where limited legislative power has been expressly conferred on the Governor. See, e.g., *House Speaker v Governor*, 443 Mich 560, 576-577; 506 NW2d 190 (1993) (explaining the scope of the Governor's express "legislative authority" under Const 1963, art 5, § 2 to effectuate executive reorganization plans).

The courts, meanwhile, are charged with the final determination of whether a particular statute is unconstitutional. Const 1963, art 6, § 1. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803). Under Michigan's Constitution, the ultimate duty to determine the validity of a statute rests with the courts. *Regents of the Univ of Michigan v Michigan Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218 (1973). Therefore, only the courts may render a law unenforceable by declaring it unconstitutional.⁷

Your question involves a practice that has evolved in connection with the exercise of the Governor's veto powers. Under Const 1963, art 4, § 33, every bill passed by the Legislature must be presented to the Governor for consideration. If the Governor exercises her veto power, then the vetoed bill must be returned to the Legislature:

If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. [Const 1963, art 4, § 33.]

Const 1963, art 5, § 19 affords the Governor line item veto power in connection with any appropriation bill:

⁷ Consistent with his common law duties, MCL 14.32 makes it the Michigan Attorney General's duty "to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer." The courts have recognized that, among the primary missions of a state Attorney General is the duty to give advice, including concerning the constitutionality of statutes. *East Grand Rapids School Dist v Kent County Tax Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982). Attorney General opinions are binding on state agencies and are entitled to respectful consideration by the courts, but they are not binding on the judiciary. *Williams v Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000).

The governor may disapprove any distinct item or items appropriating moneys in any appropriation bill. The part or parts approved shall become law, and the item or items disapproved shall be void unless repassed according to the method prescribed for the passage of other bills over the executive veto.

Governors have employed the practice of using transmittal letters to communicate their veto actions and objections to the Legislature under these provisions. In addition, Governors recently have used transmittal letters to express their concerns regarding the legality of a particular provision contained within a bill that the Governor signs into law, such as boilerplate language found within an approved appropriation bill.⁸ Unless a boilerplate provision appropriates money, rather than merely imposing a condition on an appropriation, it would not be a distinct item appropriating moneys and, therefore, would not be subject to gubernatorial veto under art 5, § 19. See OAG, 1987-1988, No 6544, p 410 (October 27, 1988).

In the particular transmittal letter described in your request, the Governor advised that she signed the appropriations bill for the Department of Labor and Economic Growth for the fiscal year ending September 30, 2009.⁹ She also disapproved one item, explaining her reasons for doing so. In the part of her communication that you inquire about, the Governor identified two reinstated boilerplate sections that she indicated "remain unenforceable." The Governor's letter explained:

⁸ See, e.g., 2001 Journal of the Senate 1558-1559 (message from the Governor stating that a section of the Fiscal Year 2002 appropriation bill for the Department of Military and Veterans Affairs "attempts to amend, by reference, the requirements for sale of property under the Michigan Military Act and is, therefore, unconstitutional. I have directed the Department to follow the provisions of the Michigan Military Act in its efforts to dispose of the [property].")

⁹ 2008 Journal of the House 1953.

Section 337 attempts to amend by implication powers and duties vested in the Commissioner of the Office of Financial and Insurance Regulation under Michigan law in contravention of Section 25 of Article IV of the Michigan Constitution of 1963. Similarly, Section 355 improperly attempts to amend by implication provisions of the Michigan Occupational Safety and Health Act, 1974 PA 154, MCL 408.1101 to 408.1094.

Transmittal letters effectuate compliance with Const 1963, art 4, § 33 by operating as the vehicle by which a bill is returned to the Legislature and objections are identified. While any line item vetoes that are discussed in a transmittal letter are exercised and marked on the actual bill that is physically returned to the originating house and ultimately filed with the Secretary of State if not overridden, the transmittal letter is distinct and is not a part of the actual bill. There is no restriction in the Constitution barring the Governor from using a transmittal letter or signing statement to convey to the Legislature the executive's views regarding legislation and to state reasons for concluding that a particular provision within that legislation is unenforceable.

As noted above, the Legislature unquestionably has the power to attach conditions to an appropriation bill – but only such conditions as are within its power to impose lawfully. *State Bd of Agriculture*, 226 Mich at 425. Moreover, where two laws are regarded as conflicting with each other, such as where an appropriations act imposes a condition or mandate on executive action but the corresponding substantive law grants broader discretion, it is for the courts to decide on the operation of each. *Regents of the Univ of Michigan*, 389 Mich at 103. But the Governor also has the duty to take care that the laws be faithfully executed and that constitutional mandates be followed consistent with the oath of office subscribed to by all public officers, judicial, legislative, and executive. See Const 1963, art 5, § 8 and art 11, § 1. In reconciling the competing

interests involved with this issue, therefore, it is instructive to recall the observation made by the Michigan Supreme Court that, while matters such as these may ultimately remain one of power and politics, "[i]t is fundamental to effective and efficient government that the three branches of government make every effort to harmonize their activities and responsibilities." *Regents of the Univ of Michigan v Michigan*, 395 Mich 52, 70; 235 NW2d 1 (1975).

To repeat, you ask whether, when the Governor sends to the Legislature a transmittal letter in which she communicates her views that a particular boilerplate provision in an appropriation bill fails to comply with the Constitution and is, therefore, unenforceable, such an expression of views concerning unenforceability has any binding legal effect or renders the boilerplate provision void.¹⁰

It is worth observing that gubernatorial statements concerning the unenforceability of laws have historically represented the Governor's position that a particular provision of a bill presented to the executive is unconstitutional and that a court would so rule, but such statements do not by their own terms purport to carry the force and effect of law. In order for a law to be enacted, it must be embodied in a properly styled bill and progress through the Legislature in accordance with the many requirements of article 4 of the Michigan Constitution. See Const 1963, art 4, §§ 22, 23, 24, 25, 26, and 33. In contrast, a statement made by the Governor in a transmittal letter has not been enacted by the Legislature, follows none of the requirements in Const 1963,

¹⁰ Your question relates to the particular factual scenario in which the Governor's statement regarding unenforceability is directed to a provision that is not otherwise subject to line item veto.

art 4 for passing laws, and is not exercised as a veto under Const 1963, art 5, § 19. Thus, statements regarding unenforceability made in transmittal letters do not carry the force and effect of law.¹¹

It is my opinion, therefore, that, upon returning to the Legislature an appropriation bill in which certain line items have been vetoed, the Governor may include in her transmittal letter an expression of her views regarding the unconstitutionality of various boilerplate provisions contained within that bill. The views so expressed however, do not satisfy the requirements for enacting a law, do not amend substantive law, and do not render the identified boilerplate provisions unconstitutional or void.

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¹¹ However, the Governor or the Legislature could secure a definitive determination concerning the enforceability of a boilerplate provision in an appropriation bill by, for example, seeking an advisory opinion of the Michigan Supreme Court under Const 1963, art 3, § 8 or seeking an opinion of the Attorney General in accordance with MCL 14.32.