STATE OF KANSAS

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June 9, 1976

ATTORNEY GENERAL OPINION NO. 76-168

Ms. Elizabeth L. Young
Executive Director
Kansas Public Television Commission
Suite 508
503 Kansas
Topeka, Kansas 66603

Re: Statutes--Appropriation Acts--Item Veto

Synopsis: The item veto power of the governor under Article 2, § 14(b) of the Kansas Constitution extends only to items of appropriation of money and no further. The approval granted by the 1976 Legislature in section 23(a) of 1976 Senate Bill 1034 of the recommendations of the Public Television Commission concerning a statewide public television system, pursuant to K.S.A. 1975 Supp. 75-4904, is not an item of appropriation. In purporting to disapprove that grant of approval, the governor sought to exercise his item veto power beyond the limits prescribed by the Kansas Constitution and to invade the province of the legislature thereby. The Public Television Commission may, within whatever funds are lawfully available for that purpose, proceed to implement its recommendations as approved by the 1976 Kansas Legislature.

* * *

Dear Ms. Young:

K.S.A. 1975 Supp. 75-4904 states thus:

"The public television commission shall, subject to approval of its recommendations by

> the legislature, establish and administer a statewide public television system."

In Senate Bill 1034, enacted by the 1976 Legislature, the legislature granted approval of the recommendations of the commission concerning a statewide public television system. This approval was included in section 23(a) of the bill, and in that part of the section which Governor Bennett purported to veto in his message dated May 4, 1976. You inquire whether the item veto power of the governor, defined in Article 2, § 14(b) of the Kansas Constitution, may constitutionally be extended to veto this approval.

Section 23(a) provided in pertinent part as follows:

> "There is appropriated for the above agency from the state general fund for the fiscal years specified, the following:
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> * * *
>
> Operating expenditures and capital improvements, special assistant secretary of administration and public television commission $249,400
> Provided, That from such appropriation not to exceed the sum of $34,400 may be expended for the salary expense of a special assistant secretary of administration who may be appointed by the secretary of administration to a position within the unclassified service under the Kansas civil service act, notwithstanding the provisions of K.S.A. 1975 Supp. 75-2935: Provided, however, That such salary expense for such special assistant secretary of administration shall be paid from this account only: Provided further, That not to exceed $40,000 may be expended for operating expenditures of the public television commission and not to exceed $175,000 may be expended for construction of and equipment for a public television station in southwest Kansas and for matching of federal moneys which are available for this capital improvement project, and the receipt and expenditure of any such federal moneys by the public television commission are hereby authorized: *And provided*

> *further, That this shall constitute approval of the recommendations of the public television commission concerning a statewide public television system as contemplated by K.S.A. 1975 Supp. 75-4904, which recommendations were submitted to the governor and the legislature."* [Emphasis supplied.]

In his veto message, the governor undertook to veto all of the quoted appropriation and the accompanying proviso, including the underscored language.

Under article 2, section 14(b) of the Kansas Constitution, the item veto power of the governor extends only to one or more "items of appropriation:"

> "If any bill presented to the governor contains several items of appropriation of money, one or more of such items may be disapproved by the governor while the other portion of the bill is approved by the governor."

There is little difference in the reported authorities concerning the meaning of the term "item of appropriation" in its narrowest sense, *i.e.*, a provision of a legislative enactment appropriating or setting aside a stated and indivisible sum of money for a stated purpose. *See, e.g., Green v. Rawls*, 122 So.2d 10 at 15 (Fla. 1960). Thus, language appropriating $249,400 for "operating expenditures and capital improvements, special assistant secretary of administration and public television commission" is clearly an "item of appropriation" which the governor may constitutionally disapprove by use of the item veto power.

There remains, however, the question whether the provisions of the lengthy proviso following the appropriation are themselves subject to the item veto power. In *Bengzon v. Secretary of Justice*, 299 U.S. 410, 57 S. Ct. 252, 81 L. Ed. 312 (1937), the Court discussed what constituted an "item of appropriation" subject to the item veto under section 19 of the Organic Act of the Philippine Islands, which provided that the "Governor General shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object." The bill in question in that case contained 12 sections, only one of which related to appropriations. The governor-general vetoed another of the provisions of the bill, prescribing eligibility of certain officials for retirement gratuities authorized by the bill.

The Court quoted with approval from *Fulmore v. Lane*, 104 Tex. 499, 140 S.W. 405 thus:

> "'Nowhere in the Constitution . . . is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes non-effective.'" 299 U.S. at 413-414.

Similarly, in *Commonwealth v. Dodson*, 11 S.E.2d at 120 (Va. 1940), the court concluded that the power to veto items of appropriation "does not carry with it the power to strike out conditions or restrictions." 11 S.E.2d at 127.

Where an appropriation enumerates lesser sums included therein to be paid to designated officers or classes of employees, the lesser sums have generally been held to be separate items of appropriation subject to veto. *See, e.g., Green v. Rawls*, 122 So.2d 10 (Fla. 1960); *Fairfield v. Foster*, 214 Pac. 319 (Ariz. 1923).

The first proviso of the section in question here, limiting to $34,400 the amount of the appropriation which may be expended for salary expense for a special assistant secretary of administration, may be characterized in different ways. On the one hand, it may be viewed as an appropriation or setting aside of not to exceed the designated amount for the stated salary expense purpose. It may be viewed as not merely an appropriation, but indeed a provision of substantive law, creating the position of special assistant secretary of administration, authorizing the secretary of administration to fill the position, declaring such position to be in the unclassified service under the Kansas civil service act, and prescribing the maximum salary therefor. Thirdly, it may be viewed merely as a limitation or qualification upon the appropriation of $249,400. The second proviso is clearly not an item of appropriation, but instead

substantive legislation, forbidding payment of salary expense for a special assistant secretary of administration from any funds except the appropriation of $249,400. The third proviso is nearly as ambiguous as the first. It may be argued to be, on the one hand, an appropriation or setting aside of the sums enumerated therein, $40,000 and $175,000 for operating expenses of the public television commission and for construction of a public television station in southwest Kansas, respectively, *i.e.*, item appropriations which are subject to veto. On the other, the proviso may be argued to constitute merely a qualification or restriction upon the expenditure of a portion of the total appropriated sum, limitations on the portions which may be expended for the stated purposes, and thus not items of appropriations subject to veto. It is unnecessary to resolve these questions, for they are not at issue here, for your question concerns the last proviso, which states thus:

> "And provided further, That this shall constitute approval of the recommendations of the public television commission concerning a statewide public television system as contemplated by K.S.A. 1975 Supp. 75-4904, which recommendations were submitted to the governor and the legislature."

Clearly, this provision is neither an item of appropriation of any money whatever for a designated purpose, subject to item veto, nor is it a condition, qualification or limitation upon the expenditure of any money appropriated in section 23(a). The language of the proviso conveys no more than it purports to, *i.e.*, approval of the recommendations of the Public Television Commission to the Legislature.

If it is not an item of appropriation, as I conclude, it is not subject to the item veto power of the governor. The question further remains, then, if the proviso is neither an item of appropriation nor a qualification or limitation on the expenditure of appropriated money, whether it may constitutionally have been included in Senate Bill 1034.

Article 2, § 16 of the Kansas Constitution formerly contained a very salutary provision that "[n]o bill shall contain more than one subject, which shall clearly be expressed in its title." This provision was designed to forestall the pernicious practice known as "logrolling," whereby,

> "by joining a number of different subjects in one bill the governor was put under compulsion to accept some enactments that he

> could not approve, or to defeat the whole, including others that he thought desirable or even necessary. Such bills, popularly called "omnibus bills," became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. A still more objectionable practice grew up, of putting what is known as a 'rider' (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious legislation, or bring the wheels of government to a stop for want of funds." *Commonwealth ex rel. Attorney General v. Barnett*, 48 Atl. 976 at 977 (Penn. 1901).

In 1974, Kansas voters approved a revised legislative article, article 2, which includes a provision opening the way for a revival of this latter practice. Article 2, § 16 as amended now permits "appropriation bills" to include more than one subject. It remains necessary that the subjects included be expressed in the title of the bill. In *Bengzon v. Secretary of Justice*, 299 U.S. 410, 57 S. Ct. 252, 81 L. Ed. 312 (1937), the Court discussed what constituted an "appropriation act" under the Philippine Islands Organic Act:

> "The term 'appropriation act' obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident." 299 U.S. at 413.

Considered even within the generality of this language, Senate Bill No. 1034 is clearly an appropriation act. It is titled in pertinent part thus:

> "AN ACT making and concerning appropriations for the fiscal years ending June 30, 1976, and June 30, 1977; authorizing certain transfers, imposing certain restrictions and limitations, and directing or authorizing certain disbursements *and acts incidental to the foregoing*. . . ." [Emphasis supplied.]

The underscored language is designed to refer, presumptively, to provisions of substantive law included in the bill, in addition to appropriations, transfers, expenditure limitations and restrictions, which are deemed by the legislature as incidental thereto, by reason of the subject matter involved or for other appropriate reasons. The legislature might reasonably have concluded that section 23(a), in which it made appropriations for the purpose of public television, was an appropriate vehicle for expression of its approval of the recommendations of the Commission concerning a statewide public television system, and included its expression of approval therein for that reason. The approval might properly be deemed allied with and incidental to the appropriation, and included therein, although neither is necessarily conditioned by nor dependent upon the other.

Lastly, it may be argued, as a somewhat technical matter, that the term "this" contained in the proviso granting approval refers to the appropriation of $249,400, and that if the appropriation fails, as it must, by virtue of the governor's veto, the approval fails also. The argument is not persuasive. The item veto power cannot constitutionally extend beyond items of appropriation. The approval is not an item of appropriation, and cannot constitutionally be disapproved by the governor in the exercise of the item veto power.

To reiterate, it is my opinion that the item veto power of the governor under Article 2, § 14(b) of the Kansas Constitution extends constitutionally only to items of appropriation of money and no further. It is my further opinion that the approval granted by the Legislature in section 23(a) of 1976 Senate Bill 1034 of the recommendations of the Public Television Commission concerning a statewide public television system, pursuant to K.S.A. 1975 Supp. 75-4904, is not an item of appropriation, and that accordingly, in purporting to disapprove that expression of approval, the governor sought to exercise his item veto power beyond the limits prescribed by the

Kansas Constitution. The purported veto of the approval is thus ineffectual and void. The Commission may, within whatever funds are lawfully available to it, proceed to implement its recommendations which were approved by the legislature.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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