

Opinion No. 85-02

April 18, 1985

OPINION OF: Paul Bardacke, Attorney General

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SUMMARY OF QUESTIONS AND ANSWERS

QUESTIONS

A. QUESTIONS CONCERNING CONTINUING EFFECT OF 1984 APPROPRIATIONS

1. Did the Governor have constitutional authority to veto the legislative repeal of the 1984 appropriations?

CONCLUSIONS

Yes, because under the doctrine of **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974), the Governor may veto any part or item in any act appropriating funds, so long as that part or item is not a necessary condition of the appropriation.

QUESTIONS

2. If the Governor acted within his constitutional authority in vetoing the legislative repeal of the 1984 appropriations, does the continuing resolution language contained in the 1984 General Appropriations Act operate to revive the 1984 line items in place of the similar line items vetoed in the 1985 Act?

CONCLUSIONS

No, the 1984 items of appropriation would only come forward in 1985, pursuant to 1984 Laws, ch. 7, § 3(J), if there were no 1985 General Appropriations Act.

QUESTIONS

B. QUESTIONS CONCERNING THE ITEM VETO OF INTERIM LEGISLATURE APPROPRIATIONS

3. As a matter of statutory construction, what is the effect of the line item veto of the appropriation to the Legislative Council Service for interim activities contained in the 1985 General Appropriations Act?

CONCLUSIONS

The result is a zero appropriation for the functions covered by that line-item.

QUESTIONS

4. Is the answer to the foregoing question any different given the specific provisions of the constitution and statutes which refer specifically to some of those functions (Art. III, § 1, Art. IV. §§ 9, 10 and 30, Sections 2-3-1 **et seq.**; **2-5-1 et seq.**; 2-10-1 **et seq.** NMSA 1978), and the previous vetoes of funding for legislative activities contained in H.B. 1, H.B. 150, and S.B. 499, and S.B. 222?

CONCLUSIONS

While the statutes and constitutional provisions listed above might be construed to constitute continuing appropriations, the better is that they are not specific enough to act as authorization for the drawing of a warrant against the state treasury for interim activities.

QUESTIONS

5. Do general separation of powers principles preclude giving effect to the Governor's veto of the line item for interim legislative activities, continued in the General Appropriations Act, especially in light of his vetoes of other earlier attempts by the legislature to fund interim activities?

CONCLUSIONS

To answer this question calls for Hobson's choice between two equally important and fundamental constitutional principles. It is therefore impossible to say what the judicial outcome might be. Indeed, a decision either way might so threaten the fabric of government, that the Court might find no alternative but to invoke the "political question doctrine" to avoid having to choose sides in this fundamental clash between the two political branches of government.

QUESTIONS

QUESTIONS CONCERNING THE VETO OF HIGHER EDUCATION TUITION LEVELS

6. Are the specific tuition schedules for institutions of higher education, contained in § 4(K)(19) of the General Appropriations Act, proper subjects of an appropriations act?

CONCLUSIONS

Yes. Tuition schedules are non-substantive matters which relate and are germane to the setting of appropriations for higher education. As such, they are proper subjects for inclusion in the Appropriations Act.

QUESTIONS

7. If the tuition schedules are proper subjects for inclusion in the General Appropriations Act, did the Governor have the constitutional authority to veto those schedules?

CONCLUSIONS

Yes. Since the appropriations for higher education were only predicated, and not conditioned on the fee schedules, the Governor could exercise his item veto on those schedules.

QUESTIONS

8. If the Governor did have the authority to veto the tuition fee schedules, what is the effect of those vetoes? --i.e., do the vetoes have the effect of reviving the tuition schedules contained in the 1984 Appropriations Act?

CONCLUSIONS

No. The vetoes do not revive the tuition schedules contained in the 1984 Act for two reasons. First, even without the tuition schedules, there are appropriations "otherwise provided by law," in the 1985 Act and second, the schedules are not items of appropriations.

QUESTIONS

9. If the Governor's veto of the tuition schedules is valid, but does not revive the 1984 schedules, is there other legal authority, outside the legislative appropriation process, by which tuition levels may be set for the 74th Fiscal Year?

CONCLUSIONS

Yes. Absent a statute setting the tuition schedules, authority to set tuition schedules lies with the Boards of Regents of the respective institutions, or the Santa Fe Community College Board, so long as they act in accordance with the specific requirements of law on the subject.

QUESTIONS

MISCELLANEOUS

10. Are there any legal impediments to the legislature's accepting staff support services for interim activities from a nonprofit corporation?

CONCLUSIONS

There is no impediment as long as the nonprofit corporation does not attempt to contribute funds directly to the legislature and the provision of staff support services by contract is consistent with the requirements of the New Mexico Procurement Code. If staff services were to be contributed in the form of a gift, however, the conflict of interest laws would have to be carefully scrutinized.

QUESTIONS

11. Are there any legal impediments to the legislature's encumbering current year budget prior to the end of the fiscal year (July 1, 1985) in order to obtain items of tangible property and non-professional services to support interim legislative activities in the subsequent fiscal year?

CONCLUSIONS

The current practice of the Department of Finance and Administration (DFA) provides some guidance in this area. There are no statutes or regulations which mandate that encumbrances of supplies be treated differently from the encumbering of current year funds for professional services which are, in part, rendered in the subsequent fiscal year. There is a difference in treatment for rent, utility and similar services. The wholesale nature of year-end encumbrances may also be limited by current practices.

QUESTIONS

12. What are the necessary legal steps by which the legislature can challenge the item vetoes of the governor with respect to the 1985 Appropriations Act, who or what body would be the appropriate party, and what particular legal barriers might they have to overcome?

CONCLUSIONS

The Attorney General respectfully declines to answer these questions because they do not appropriately relate to his opinion function. They touch upon matters of litigation tactics and strategy and are more appropriately addressed to prospective litigation counsel. This office would decline to represent either side in any potential litigation because this office represents both the executive and legislature on various matters. It

is therefore particularly inappropriate for this office to give such advice to one of the prospective parties.

OPINION

Since the Governor took action on the 1985 General Appropriations Act, 1985 Laws, Ch. 7, this office has received numerous requests for opinions on the validity of various vetoes exercised by him. Determining the validity of the vetoes requires the resolution of complex legal issues involving the doctrine of separation of powers in general, and the constitutional limits on the item veto power of the Governor in particular. Furthermore, many of the specific item veto questions that have been asked cannot be answered without reference to other provisions of our constitution which impact on the exercise of legislative power under our tripartite system of government. Although our Supreme Court has had occasion to address a number of item veto questions in the past, the current controversy between the Executive and Legislative branches over the General Appropriations Act is truly unprecedented. As a result, there are no court rulings directly on point which provide easy answers to these most vexing and fundamental questions.

The requests for opinions came from various sources and were, to some extent, duplicative. In order to address the issues in a non-repetitive manner, we have reworded the questions so that they can be addressed in a logical sequence. After setting forth a summary of the questions and answers, this opinion outlines the constitutional considerations which are important to our understanding of the questions presented. It then states the various questions asked, and seeks to provide the answers in the context of the applicable constitutional principles. Where definitive answers are not possible, the opinion seeks to set forth various arguments which would have to be weighed by the courts in providing those answers.

I. THE CONSTITUTIONAL FRAMEWORK

The New Mexico Constitution contains an express separation of powers section which provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. Article III, § 1.

The purpose of separation of powers, as a constitutional doctrine "was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." **Myers v. United States**, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). However,

from the earliest days of our nation, it was recognized that the doctrine was never intended to hermetically seal off the departments of government from one another:

[T]he legislative, executive and judiciary powers ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

The Federalist No. 47 (Random House ed.) at 316; **see Buckley v. Valeo**, 424 U.S. 1, 120-24 (1976). It is well recognized that principles of separation of powers protect against the tyranny which would come from one branch hegemony over the other two branches. However, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The New Mexico Supreme Court has been aware of both the historical underpinnings of the separation of powers doctrine and the non-absolutist nature of the separation it commands. These principles were recognized early in the seminal case of **State v. Roy**, 40 N.M. 397, 60 P.2d 646 (1936), which first established the inherent power of New Mexico courts to establish their own rules of procedure, irrespective of legislative action on the subject. As stated by the Court, "there never was and never can be a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called co-ordinate government powers. As a matter of fact, they are and always have been overlapping." **Id.** at 418, 60 P.2d at 659. Even though our constitution contains an express rather than an implied separation of powers provision, **see** N.M. Const. Art. III, § 1, our Court has been ever mindful of the fact that "[o]ur constitution . . . contemplates in unmistakable language that there are certain instances where the overlapping of power exists." **State ex rel. Holmes v. State Board of Finance**, 69 N.M. 430, 433, 367 P.2d 925, 928 (1961).

The separation of powers doctrine is important when analyzing the validity of specific exercises of item veto authority by the Governor of this State. **See** N.M. Const. Art. IV, § 22. The item veto provision in the New Mexico Constitution, like similar provisions in forty-four other states which provide for gubernatorial item veto authority is "an exception to the general rule of approval or disapproval in toto, designed "to safeguard the public treasury against the pernicious effect of . . . 'log rolling' . . ." **Bengzon v. Secretary of Justice**, 299 U.S. 410, 414 (1937).

The item veto provision is an express exception to the traditional prohibition against the executive exercising legislative authority. **See** 1979 Op. Att'y Gen. No. 79-13. The placement of the Governor's item veto authority in the Legislative article of the Constitution indicates that the exercise of that power is a legislative act which the Governor is specifically authorized to undertake. The question, therefore, in most item veto cases, is not whether the governor has performed a non-executive act, in violation

of the separation of powers doctrine, but whether in performing the admittedly legislative act of item veto, he has exceeded the limits which inhere in the specific grant of item veto authority conferred on him by the constitution. **See State ex rel. Segó v. Kirkpatrick**, 86 N.M. at 364, 524 P.2d 980. The Governor "may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation. **Id.** at 364, 524 P.2d at 980.

Furthermore, the **Segó** Court made clear that the gubernatorial item veto power is a limited one, which is negative in nature, and may not be used to create new and expanded laws that the legislature did not intend to pass:

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or item. It is not the power to enact or create new legislation by selective deletions.

Id. at 365, 524 P.2d at 981.

The difficulty is that while the **Segó** principles may aid our conceptual understanding of the limits on the item veto power, they often do not aid in the principled resolution of a given dispute. The exercise of a negative veto power always alters or amends something, and it often enlarges that which remains. **Compare Stopczynski v. Governor of the State**, 92 Mich. App. 191, 285 N.W.2d 62, 66 (1979) (Governor's veto of zero appropriation for nontherapeutic abortions is valid and allows for funding because that veto was not an affirmative legislative act, but only a negative one which maintained the status quo). Similarly, action which voids legislation inevitably creates something new which is necessarily inconsistent with the intent of the legislature which passed the vetoed language. **Compare** 1981 Op. Att'y Gen. No. 81-12 (test of validity is more than whether legislative intent defeated; "determination must be made whether the remaining language is so distorted by the veto as to create legislation inconsistent with that enactment by the legislature").

The mere fact that the Governor is given authority to perform a legislative act does not mean separation of powers principles are never implicated when item vetoes are questioned. Indeed, the effect of an item veto, or the effect of several item vetoes taken together, might seriously trench on separation of powers principles, especially where the item veto or vetoes, or their collective effect, limit the ability of another branch to function. See **State ex rel. Brotherton v. Blankenship**, 207 S.E.2d 421 (W.Va. 1973) (veto of judicial appropriation violates separation of powers).

Further complicating this sensitive area of the law is the fact that specific questions often implicate constitutional provisions other than the separation of powers and the gubernatorial item veto authority provisions. Indeed, there are a number of constitutional provisions which address the power of the Legislature to function. **See, e.g.**, N.M. Const. Art. IV, §§ 9 and 10. It is also critical to these questions that the Legislature, as

an institution, retains the same ultimate power to overrule an item veto it has over a total veto. N.M. Const., Art. IV, § 22.

Most item veto questions, therefore, call for a most delicate balancing of constitutional values which is rendered all the more difficult because they inevitably go to the heart of the essential powers of two political branches of government. An error by a Court on either side of the controversy could give to one branch an indelible advantage over the other, thereby creating the kind of one branch hegemony which the doctrine of separation of powers was designed to prevent.

II. THE NATURE OF THE QUESTIONS

Most of the questions presented to this office regarding the Governor's vetoes can be logically grouped into three major clusters. The first group involves the Governor's power to veto the 1985 legislative repeal of the 1984 appropriations, and the effect of such a veto in light of the fact that the 1985 legislature failed to provide for the continuation of present levels of funding for state government in the absence of new appropriations. The second group of questions involves the validity of the item veto of the appropriation for legislative interim activities, in light of (1) specific constitutional and legislative authority for those activities, and (2) the earlier gubernatorial vetoes of appropriations for interim legislative activities. The third group of questions involves the validity of the item vetoes of tuition levels for institutions of higher education contained in the General Appropriations Act and the effect of those vetoes. The remaining inquiries have been collected into a fourth group of miscellaneous questions.

III. QUESTIONS, ANSWERS AND DISCUSSION

Question: 1

Did the Governor have constitutional authority to veto the legislative repeal of the 1984 appropriations?

Answer: 1

Yes, because under the doctrine of **State ex rel. Segó v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974), the Governor may veto any part or item in any act appropriating funds, so long as that part or item is not a necessary condition of the appropriation.

Discussion:

The 1985 New Mexico General Appropriations Act provided that "Laws 1984 (SS), Chapter 7, Section 4 is repealed effective July 1, 1985." 1985 Laws, Ch. 22, § 3(L). Inclusion of that clause repeated the accepted pattern of repealing the appropriations in the past general appropriation act (traditionally contained in § 4 of the Act) as part of the new general appropriations act. However, it has also been traditional that the act creating the new general appropriations contains a "continuing resolution" clause which

continues its appropriations forward into subsequent fiscal years "unless otherwise provided by law." **See e.g.** 1984 Laws, Ch. 7, § 3(J). The 1985 General Appropriations Act contained the repealer, but did not contain a "continuing resolution" clause.

In this situation the Governor exercised his item veto authority on the repealer clause. His intent was made clear in his veto message:

I . . . am vetoing the repealer . . . and am ensuring that the continuing resolution language of the General Appropriations Act of 1984 survives. Its survival is a requisite of responsible government by guaranteeing the future continued funding of the essential services of government in those instances where the Legislature may fail to provide adequate appropriations.

House Executive Message No. 10, March 14, 1985 at 1. Before it can be determined whether the veto has the intended effect, **see** Question 2, **infra**, it must first be determined whether, under the provisions of Art. IV, § 22, the Governor had the authority to item veto the repealer.

The landmark case in New Mexico on the matter of gubernatorial vetoes is **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974). **Sego** definitively resolved the question of the scope of the item veto power under the constitutional provision which grants the Governor authority to "approve or disapprove any part or parts, item or items, of any bill appropriating money. . . ." N.M. Const. Art. IV, § 22. **Sego** specifically held that this language "was incorporated in our Constitution with the intent to give it a broader meaning than merely 'items of appropriation.'" **Id.** at 364, 524 P.2d at 980. The **Sego** court made clear that the Governor's item veto authority extends as well to items or parts of a general appropriations act, and to items or parts of any other act containing an appropriation, **id.** at 365, 524 P.2d at 980, so long as by the exercise of such veto he does not "distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand." **Id.** at 366, 524 P.2d at 982. Such action by the Governor would violate the limitation imposed by **Sego** that he "may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation." **Id.** at 364, 524 P.2d at 980. The issue presented by Question 1 is, therefore, whether the § 3(L) repeal of the 1984 appropriations is a "condition, restriction, limitation or contingency" which is so inextricably linked to the appropriations found in § 4 of the 1985 General Appropriations Act, that its veto would undermine the legislative intent in making those appropriations.

It is clear that in seeking to repeal the 1984 appropriations, without adopting continuing resolution language in connection with the 1985 appropriations, the legislature intended to foreclose the carrying forward of prior appropriations in the event that new appropriations failed to become law in subsequent years. Thus, in some sense the Governor's veto may have thwarted the will of the legislature. But that is true every time the Governor exercises the veto power. By definition a veto eliminates something that a

legislature intended to do. It could be argued that every part of an appropriations act is conditional in the limited sense that the legislature obviously intends the law to take effect as a whole. However, such a broad and sweeping definition of a "condition or limitation" is inconsistent with the clear import of **Sego** and would read out of the constitution the Art. IV, § 22 power of the Governor to exercise the veto on a "part or item" in any act making an appropriation. Settled principles of statutory construction compel the conclusion that the repealer language of § 3(L) is not conditional in the **Sego** sense.¹

First, § 3(L) is not stated in conditional language. A plain reading of that section does not suggest that if the language were stricken the legislature would not want the items of appropriation which follow in the next section of the Act to take effect. Indeed, there is no language suggesting any legislative purpose of restriction, limitation, or condition with respect to the items of appropriation that follow. Furthermore, the Act must be read in light of the fact that the legislature is adept at using clear and unequivocal conditional language when that is its intent. **Compare, State ex rel. Sego v. Kirkpatrick**, 86 N.M. at 365, 524 P.2d at 281 (veto of language stating "This contingent appropriation shall be disbursed only upon a certification in writing . . ." held an invalid attempt to strike a necessary contingency thereby violating constitutional limitation on Governor's item veto authority); Op. Att'y Gen. No. 70-18 (appropriation expressly made contingent upon repeal of prior year's appropriation).

Second it is significant that the repealer is contained in a section of the Act which is separate from the section which contains the items of appropriation. The fact that the repealer is contained in a separate section is particularly significant in light of the fact that the entire act contains a severability clause, 1985 Laws, Ch. 22, § 9, which evidences a legislative intent that the sections of the Act ought to be construed separately. **See, e.g., Romero v. Tilton**, 78 N.M. 696, 437 P.2d 157 (Ct.App. 1967). **See also State v. Spearman**, 84 N.M. 366, 503 P.2d 649 (Ct.App. 1972).

Finally, even if the Act were subject to an interpretation which would render the actions of the Governor unconstitutional, our courts would, to the extent possible, avoid such a construction in an attempt to avert any unnecessary clash between co-equal branches of government. **See, e.g., Huey v. Lente**, 85 N.M. 597, 514 P.2d 1093 (1973); **Seidenberg v. New Mexico Bd. of Medical Examiners**, 80 N.M. 135, 452 P.2d 469 (1969); **Peyton v. Nord**, 78 N.M. 717, 437 P.2d 716 (1968).

For the foregoing reasons, it is the opinion of this office that § 3(L) is an "item or part" of an appropriation act, which does not condition the appropriations contained therein. It was, therefore, within the constitutional prerogative of the Governor to veto that section repealing the 1984 appropriations.

Question 2:

If the Governor acted within his constitutional authority in vetoing the legislative repeal of the 1984 appropriations, does the continuing resolution language contained in the

1984 General Appropriations Act operate to revive the 1984 line items of appropriations in place of the similar line items vetoed in the 1985 Act?

Answer:

No, the 1984 items of appropriation would only come forward in 1985 pursuant to 1984 Laws, ch. 7, § 3(J), if there were no 1985 General Appropriations Act.

Discussion:

The effective veto of the repealer of the 1984 appropriations raises the question of whether another provision of the 1984 Act has any prospective effect after the expiration of the 73rd Fiscal Year on June 30, 1985. The relevant language of the 1984 Act provides:

The same appropriations, with the same extensions and limitations as are indicated in the General Appropriations Act of 1984 . . . shall continue every fiscal year subsequent to the seventy-third fiscal year [1984-85], unless otherwise provided by law.

1984 Laws (SS), ch. 7, § (3(J). Initially, then, this question involves a matter of statutory construction to determine whether this continuing authorization language is meant to operate to bring forward the 1984 Appropriations, only if there is no subsequent General Appropriations Act or whether it operates to bring forward particular items of the 1984 appropriations when counterpart items in the 1985 Act are vetoed.² In our view it is the former rather than the latter interpretation which ought to predominate. Although the language of § 3(J) contained in the 1984 Act is less than clear, it is best read as appropriating "the same appropriations . . . in the General Appropriations Act of 1984" only in the event that there is no subsequent applicable General Appropriations Act "otherwise provided by law." We believe that is the better reading of the Act and are compelled to that conclusion for three reasons.

First, such a view--that the continuing resolution language only comes into play when there is no General Appropriations Act in place--is the most sensible reading of the language of § 3(J). Principles of statutory construction caution the courts to avoid interpreting a statute in a way which does not make sense or is unreasonable. **See, e.g., Gutierrez v. City of Albuquerque**, 96 N.M. 398, 631 P.2d 304 (1981); **State ex rel. Newsome v. Alarid**, 90, N.M. 790, 568 P.2d 1236 (1977). A contrary construction of the § 3(J) language would not make sense because it would create serious problems of real and practical concern whenever a repeal of a prior year's appropriation did not become law. If § (3)J were read to revive 1984 line items wherever 1985 line items had been vetoed, utter confusion concerning the applicable level of appropriation would result when the line items did not match from one year to the next. Such an interpretation might compel an additional nonsensical result. The legislature would be unable to defund a non-statutorily mandated program which was contained in a line item one year, by the elimination of that line item in the subsequent year.³ Thus, the better and more sensible reading of § 3(J) is that its continuing authorization only comes into

play when and if there is no subsequent General Appropriations Act "otherwise provided by law."³

Second, the reading of § 3(J) which triggers its provisions only in the absence of a general appropriations act is consistent with the history which gave rise for the need of such language in the first place. **See Bradbury & Stamm Const. Co. v. Bureau of Revenue**, 70 N.M. 226, 372 P.2d 808 (1962) (statutes ought be construed in light of historical background which led to their enactment). The earliest version of the continuing resolution clause was passed in 1915. While not perfectly clear on the matter, the somewhat more specific language used in that Act,⁴ suggests that the purpose of the Act was to insure that, even though the legislature had provided appropriations for two years,⁵ those appropriations would continue forward, in the absence of a subsequently enacted general appropriations act.

At the time the continuing resolution clause was enacted, the Legislature met in regular sessions only once every two years. (N.M. Const. Art. IV, Sec. 5 was amended in 1964 to provide for regular sessions of the Legislature during both odd and even-numbered years).

Similar clauses have been enacted in subsequent years, in conjunction with language repealing the prior appropriations, so that the new act appropriates and is carried forward, while the old and unnecessary appropriations are jettisoned by way of a repealer. **See, e.g.**, 1949 Laws, ch. 179, § 8, 1921 Laws 1921, ch. 206, § 5. Indeed, some later versions of the continuing resolution made clear by their title that the purpose was to maintain the "continuity" of government. **See, e.g.**, 1971 Laws, ch. 327, § 2(H); 1963 Laws, ch. 28, § 13.

Thus, it is the need to maintain the continuity of government which underlies the continuing resolution language contained in § 3(J). That purpose is adequately served by construing the clause to apply only if there is no subsequent general appropriations act. Absent that eventuality, it is quite likely that government, in its essential details, can continue to function, without the necessity of continuing authorization.

Third, and most critical, is the fact that our interpretation of § 3(J), which would revive the 1984 appropriations only when there is no general appropriations act in effect, avoids serious and troublesome constitutional problems. The law is well settled that a court must, if at all possible, choose an interpretation of a statute which would render it constitutional. **See, e.g., State ex rel. Norvell v. Credit Bureau of Albuquerque**, 85 N.M. 521, 514 P.2d 40 (1973); **Huey v. Lente, supra**. That principle of statutory interpretation serves to constrain the exercise of the awesome power of judicial review, see **Rescue Army v. Municipal Court of Los Angeles**, 331 U.S. 549 (1947), and is invoked by the courts out of respect for the actions of the co-ordinate branches of government, **see e.g. State ex rel. Whittier v. Safford**, 28 N.M. 531, 214 P. 759 (1923), which are charged with the ultimate responsibility of acting consonant with the wishes of the electorate. If § 3(J) were interpreted to revive 1984 line items of appropriation in place of similar line items vetoed in the 1985 Act, an otherwise valid

exercise of the item veto to invalidate the repealer of the 1984 appropriations, might operate in an unconstitutional manner.

An analysis of this problem must begin with the essential purpose of the item veto in the constitutional framework. The item veto provision provides for greater executive incursion into the legislative role of lawmaking than the more limited right of total veto allowed for on the federal level. **See** U.S. Const. Art. II, § 7. Most state constitutions, however, have allowed that enlarged gubernatorial role as a necessary device "to safeguard the public treasury against the pernicious effect of . . . 'log rolling' . . ." **Bengzon v. Secretary of Justice**, 299 U.S. at 414. **See** Section I, *supra*. Nonetheless, the item veto is not an unrestrained incursion by the executive into the legislative function. Even though the Governor, in exercising item veto authority, is acting in a "quasi-legislative" capacity, **Dickson v. Saiz**, 62 N.M. 227, 308 P.2d 205 (1957), that authority is limited by general principles of separation of powers. The Governor's authority must, therefore, be narrowly construed. **See** 1979 Op. Att'y Gen. No. 79-13 (general veto power).

The sensitive balance required when item vetoes are challenged requires an evaluation of whether the Governor has exercised the item veto by striking words of condition, restriction, or limitation such that the purpose of the remaining appropriation is altered, amended or enlarged in a way which defeats the clear policy choice made by the legislature in the first instance. **See State ex rel. Segó v. Kirkpatrick**, 86 N.M. at 364-66, 524 P.2d at 980-82. An interpretation of § 3(J) which would have it apply to revive 1984 appropriations in lieu of 1985 items of appropriation which have been subjected to item veto would allow the governor, in exercising his item veto power, to pick and choose between two particular items of appropriation--the items before him in the current Appropriation Act, and the comparable items in the prior Act. Such discretion, with respect to particular line items, might well involve him in legislative judgments prohibited by the separation of powers doctrine.⁶ **See State ex rel. Segó v. Kirkpatrick, supra; Dickson v. Saiz, supra.** The construction of § 3(J) which is favored here--applying the continuing resolution provision of that section only in the absence of a general appropriations act - avoids that difficult constitutional question.⁷

For the foregoing reasons, it is the opinion of this office that the Governor's valid veto of the repeal of the 1984 appropriations does not operate in conjunction with the continuing resolution language contained in § 3(J) of the 1984 Act to revive 1984 line items of appropriations with respect to the similar line items vetoed in the 1985 Act. The continuing resolution language of § 3(J) would only have operated if there had been no General Appropriations Act enacted in 1985.

Question 3:

As a matter of statutory construction, what is the effect of the line-item veto of the appropriation to the Legislative Council Service for interim activities contained in the 1985 General Appropriations Act?

Answer:

The result is a zero appropriation for the functions covered by that line-item.

Discussion:

See discussion of answer to Question 2, *supra*.

Question 4:

Is the answer to the foregoing question any different given the provisions of the constitution and statutes which seem to refer specifically to some of these interim functions (Art. III, Sec. 1, Art. IV, §§ 9, 10 and 30, Sections 2-3-1 **et seq.**; 2-5-1 **et seq.**; 2-10-1 **et seq.** NMSA 1978), and the previous vetoes of funding for legislative activities contained in H.B. 1, H.B. 150, S.B. 499, and S.B. 222?

Answer:

While the statutes and constitutional provisions listed above might be construed to constitute continuing appropriations, the better view is that they are not specific enough to act as authorization for the drawing of a warrant against the state treasury for interim activities.

Discussion:

When the legislative session began on January 15, 1985, one of the first items of business was the adoption of the so-called "feed bill", denominated H.B. 1. As has been the custom for a number of years, this bill contained funding for the Legislative Finance Committee, the Legislative Council, and the Legislative Education Study Committee. Because of a legislative dispute concerning the LESC, the legislature was unable to pass the feed bill with a 2/3 vote necessary to enact it as an emergency measure which would take effect immediately upon signing by the Governor. **See** N.M. Const. Art. IV § 23. Subsequently, the legislature passed H.B. 150 which mirrored the appropriations contained in H.B. 1 and added minimal appropriations to the judiciary and executive. H.B. 150 was then sent to the governor.

On February 15, 1985, the governor vetoed the line items of appropriation for the interim committees contained in H.B. 150, leaving intact all funding for the legislators and staff during the session. The legislature attempted to revive funding for the interim committees in S.B. 499 and H.B. 1. but the governor vetoed those bills on February 25th and 26th respectively.⁸

The question raised above, then, refers to the validity of the governor's vetoes of H.B. 1, H.B. 150, S.B. 222 and S.B. 499, in conjunction with the veto of the line item for interim legislative committees contained in the 1985 General Appropriation Act. The legal problem arises, not because of the Governor's lack of authority to veto any one of the

above-mentioned bills, but rather because the collective vetoes leave no appropriations for interim legislative activities. Our discussion will consider first the arguments against giving effect to the vetoes and then the arguments in favor of giving effect to the vetoes.

First, there may be constitutional and statutory provisions which mandate the funding of the legislative functions. In particular, N.M. Const. Art. IV, Sec. 9 provides:

The legislature shall select its own officers and employees and fix their compensation. Each house shall have one chaplain, one chief clerk and one sergeant at arms; and there shall be one assistant chief clerk and one assistant sergeant at arms for each house; and each house may employ such enrolling clerks, reading clerks, stenographers, janitors and such subordinate employees in addition to those enumerated, as they may reasonably require and their compensation shall be fixed by the said legislature at the beginning of each session.

In like fashion, Sections 2-3-11, 2-5-2, and 2-10-2 NMSA 1978 authorize the interim committees to set the salaries of the executive directors of the committees. The question to be resolved is whether these types of constitutional and statutory provisions constitute "continuing appropriations" sufficient to justify the drawing of a warrant against the state treasury in a manner allowed by N.M. Const. Art. IV, Sec. 30.

The theory for statutorily created "continuing appropriations" was recognized in **State ex rel. Fornoff v. Sargent**, 18 N.M. 272, 13 P. 602 (1913) where the court held that a statute fixing the amount of salary of a public officer and prescribing its payment at particular periods was a continuing appropriation and no further legislative appropriation was necessary. Similarly, cases in other jurisdictions have held that constitutional provisions setting salaries as described above are continuing appropriations authorizing payment from the state treasury without further appropriation. **See, e.g., State ex rel. Nunez v. Baynard**, 15 So.2d 649 (Ct.App. La. 1943).

Indeed, in **People ex rel. Fulton v. O'Ryan**, 204 P.86 (Colo. 1922), a statute that simply stated that the salary of the secretary of the board of charities "shall be set by the board" was held to be an appropriation.

This line of cases supports the argument that Art. IV Sec. 9 and the statutes enumerated above are continuing appropriations. If the Court were persuaded by these cases, then the Governor's vetoes would not totally eliminate funding for the interim activities. Essentially, the salaries set pursuant to those statutes and constitutional provisions currently in effect, would continue in effect despite the Governor's vetoes. Therefore, on July 1, 1985, warrants could be drawn on the treasury to pay legislative salaries set pursuant to those statutes and constitutional provisions.

There are, however, several arguments that these statutory and constitutional provisions do not create continuing appropriations. As noted above, **Fornoff** required that in order for a statute to constitute a continuing appropriation, it must set a salary

and the interval at which it must be paid. The constitutional and statutory provisions cited above do not contain a salary amount.

In fact, in **California State Employees Association v. State**, 32 Cal.App.3d 106, 108 (1973), the court held that even if legislation gives salary-setting authority to an agency, the Legislature retains power to appropriate or not to appropriate and the governor retains his veto power. Such an approach undermines the notion that the provisions in question ought to be given effect as continuing appropriations.

Furthermore, N.M. Const. Art. IV, Sec. 9 may not apply to staffs for interim activities. This section seems to control only the employment of staff necessary for the work of the legislative session. The governor did not veto the parts of H.B. 150 which provided money for the expenses of the session itself and, arguably as a matter of statutory construction, Art. IV, § 9 may require nothing more than the continued funding of staff for a legislative session.

Another statutory construction problem is found in Section 2-3-12 NMSA 1978. While Section 2-3-11 provides simply that the director's salary shall be fixed by the Legislative Council, section 2-3-12 is more specific about the salary of the staff. It states that the council "shall fix the compensation of each employee **within the appropriations made by the legislature for the use of the legislative council.**" (Emphasis added). This language seems to require a more specific appropriation to pay for staff, and, therefore, Section 2-3-12 could not constitute a continuing appropriation for staff of the council, other than the Director.

In contrast with the foregoing, Art. IV. Sec. 10, and Sections 2-1-8 and 2-1-9 NMSA 1978 (Supp. 1984) set specific mileage and per diem rates for members of the legislature both during the session and while on interim committee business thereby creating a very specific continuing appropriation. **See State ex rel. Fornott v. Sargent.** We are, therefore, unable to conclude with any degree of certainty that the previously cited provisions of law are sufficient without further appropriations to authorize payment of public funds to pay for staff and other necessary support for interim activities of the legislature.

Question 5:

Do general separation of powers principles preclude giving effect to the Governor's veto of the line item for interim legislative activities, continued in the General Appropriations Act, especially in light of his vetoes of other earlier attempts by the legislature to fund interim activities?

Answer:

To answer this question calls for a Hobson's choice between two equally important and fundamental constitutional principles. It is therefore impossible to say what the judicial outcome might be. Indeed, a decision either way might so threaten the fabric of

government, that the Court might find no alternative but to invoke the "political question doctrine" to avoid having to choose sides in this fundamental clash between the two political branches of government.

Discussion:

As indicated in the answer to the preceding question some cases suggest that vetoes which would in other circumstances cancel appropriations, may not be given that effect with respect to functions protected by substantive provisions of the constitution and statutes. For example, in **Thompson v. Legislative Audit Commission**, 79 N.M. 693, 448 P.2d 799 (1968), the court held that the legislature could not abolish the constitutionally established office of State Auditor, by taking away its fundamental functions or not properly funding the office. The New Mexico courts, though, have not had occasion to discuss the application of this principle in other contexts.⁹ Moreover, the contrasting lack of specificity in the constitution regarding interim activities of the legislature does not aid the argument in support of the application of **Thompson** to the vetoes here in question.

Furthermore, the fact that the Legislature may not abolish agencies by failing to provide for those agencies in the general appropriations act does not carry with it a correlative prohibition on the power of the Governor in exercising his item veto authority. That seemingly anomalous situation results from the fact that the constraint on legislative authority in this area derives from N.M. Const. Art. IV, § 16. That section of the constitution requires that the subjects of bills be expressed in their titles; that bills, other than general appropriations bills and codifications, may embrace only one subject, and that "general appropriation bills shall embrace nothing but appropriations . . ." The primary purpose of this section is to prevent fraud or surprise by concealed or hidden provisions in statutes. **E.g., City of Raton v. Sproule**, 78 N.M. 138, 429 P.2d 336 (1967).

The compulsions of that section apply to legislative attempts to repeal agencies by way of zero appropriation. "There can be no question that but for the restraining influence of Const. Art. 4, § 16 . . ., the appropriation on which administrative boards such as the Barbers' Board depend for existence and operation could be so reduced in a general appropriation bill as to put it out of business as effectively as if repealed." **State ex rel. Prater v. State Board of Finance**, 59 N.M. 121, 279 P.2d 1042 (1955). Article IV, § 16 places limits on the contents of bills which may be passed by the Legislature; it is not directed toward the Governor's power with respect to legislation.

Finally, the fundamental problem raised by the Governor's item veto of the appropriation for interim legislative activities, following his previous vetoes on the same subject, derives from the separation of powers doctrine expressly incorporated in Art. III, § 1 of our constitution. The veto power is "quasi-legislative" in nature--i.e., it is an express exception to the prohibition contained in Art. I, § 3 that no person . . . charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the other . . ." However, despite the fact that the

power is an exception to traditional separation of powers constraints, that power is not without limitation. **State ex rel. Sego v. Kirkpatrick**, 86 N.M. at 364, 524 P.2d at 980.

In addition to the **Sego** limitations, other courts have found in separation of powers principles a limitation which precludes one branch from exercising its power in a way that impedes the ability of another branch from carrying out its constitutional functions. **See State ex rel. Schneider v. Cunningham**, 39 Mont. 165, 101 P.962 (1909). As stated in **O'Coins Inc. v. Treasurer of County of Worcester**, 362 Mass. 507, 287 N.E.2d 608, 612 (Mass. 1972):

It is certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution.

On the other hand there is a line of cases which firmly upholds the exercise of gubernatorial veto in situations such as this. The Washington Supreme Court upheld its governor's veto of appropriations for the legislative council in unequivocal terms:

Since the people, in adopting their constitution, made no exception to laws which are subject to the Governor's veto, this court will not read an exception in Section 12 in view of the clear language used therein.

State ex rel. Greive v. Martin, 385 P.2d 846, 850 (Wash. 1963).

Furthermore, the legislature has ultimate authority to override a governor's veto (by a two-thirds vote of the body) as a constitutional check and counterbalance to the Governor's power to deny the legislative appropriations for interim committee. **See N.M. Const., Art. IV, § 22; People v. Russel**, 142 N.E. 537 (Ill. 1924); **Green v. Rawls**, 122 So.2d 10 (Fla. 1960).

There is present here, however, a dilemma which is real and insurmountable. If on the one hand the court were to rule that the effect of the Governor's otherwise valid veto is unconstitutional because it precludes the legislature from performing its "essential" constitutional duties,¹⁰ the Court would have declared the legislature immune from the constitutional check of gubernatorial veto, at least with respect to its own activities. In doing so the Court would be approving the very kind of one branch hegemony which the separation of powers doctrine was intended to prevent. **See Buckley v. Valeo**, 423 U.S. 1, 120-24 (1976).

On the other hand a ruling upholding the gubernatorial veto may well threaten the termination of substantial and important legislative activities and, thus, constitute an unlawful infringement on the separation of powers between the two branches. Putting aside the considerations of legislative override as a separate constitutional issue and considering the ultimate issue of separation of powers, such action could establish a dangerous precedent which, in certain circumstances, might require the legislature to bend to gubernatorial will on matters which fall uniquely within the legislative province.

And if those two choices are not difficult enough a third approach which tries to find some compromise in a middle ground position creates further separation of powers problems. If for example, the court were convinced that some of the legislative functions which are unappropriated, are protected by continuing resolution authority conferred by other sections of the Constitution, **see** Discussion to Question 4, **supra**, but others are not, then the Court would be placed in the unenviable position of seeking to determine which functions are constitutionally protected, and at what level of appropriation they must be so protected. Such an effort inevitably expands the separation of powers problem in dangerous ways, because then the third branch of government--the court--would find itself enmeshed in the political branch functions of determining levels of appropriations. **See California State Employees Association v. State**, 32 Cal.App.3d 103, 108 Cal.Rptr. 60, 64 (1973) ("courts have no authority to compel a separate and equal branch of state government to make an appropriation").

Finally, in many ways the current impasse involves an institutional struggle where there is "a textually demonstrable constitutional commitment of the issue" to the political branches of government. **Baker v. Carr**, 367 U.S. 186, 217 (1962). As a result, it may be one of those rare cases in which the court may be compelled to avoid its own entanglement and find the matter a nonjusticiable political question. See generally, **Powell v. McCormick**, 395 U.S. 486, 515-33 (1969).

Indeed, if viewed as an institutional struggle between the political branches, our constitutional system provides certain institutional remedies. First, as an institutional matter the legislature has the ultimate authority on this question by virtue of its power to override any gubernatorial veto. **See** N.M. Const. Art. IV, § 22. The fact that the legislature was forced to muster a two-thirds majority as opposed to a simple majority by virtue of the Governor's veto, is a political rather than a legal consideration.

In the final analysis, however, the ultimate check on the actions of the political branches lies with the informed electorate of this state, who have it within their power to provide resolution to the current stalemate. In any event, resolution by the courts is no certainty, and such a resolution if it were forced upon us, may cause as much, if not more, damage to the delicate balance of powers among the branches than we are currently experiencing.

Question 6:

Are the specific tuition schedules for institutions of higher education, contained in § 4(K)(19) of the General Appropriations Act, proper subjects of an appropriations act.

Answer:

Yes. Tuition schedules are non-substantive matters which relate and are germane to the setting of appropriations for higher education. As such, they are proper subjects for inclusion in the Appropriations Act.

Discussion:

Article IV, Section 16 of the New Mexico Constitution provides in part:

General appropriations bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills.

The New Mexico courts, in construing this section, have ruled that the details of expending appropriated money, which are necessarily connected with and related to the matter of providing the expenses of government, are so related, connected with, and incidental to the subject of appropriations that they do not violate this section of the Constitution if incorporated in a general appropriations bill. It is only such matters as are foreign, not related to, nor connected with such subject, that are forbidden. **State v. State Board of Finance**, 69 N.M. 430, 367 P.2d 925 (1961); **State ex rel. L. v. Marron**, 17 N.M. 304, 128 P. 485 (1912). The **Marron** case cites "provisions for the expenditure and accounting of the money, and the means and methods of raising it, whether it be by taxation, or by some other method", as an example of the type of detail germane and connected to an appropriation.

As a practical matter, tuition rates and the revenue thereby generated are an integral component of the budget projected for state educational institutions. Further, the amount of money appropriated to these institutions from general appropriations is directly related to the tuition rate to ensure that sufficient monies are appropriated to meet projected expenditures.

The procedure used by the Board of Educational Finance under Section 21-1-5 NMSA 1978 (Repl. 1982) further confirms that tuition schedules are details germane to general appropriations. That procedure requires that tuition schedules for state educational institutions listed in Article XII, Section 11 of the Constitution be reviewed by the Board of Educational Finance in connection with its review of legislative budget requests. The results of this review are reported to the legislature along with the Board of Educational Finance's appropriation recommendations.

We therefore conclude that tuition schedules are non-substantive matter germane to the appropriations to state educational institutions.

Question 7:

If the tuition schedules are proper subjects for inclusion in the General Appropriations Act, did the Governor have the constitutional authority to veto those schedules?

Answer:

Yes. Since the appropriations for higher education were only predicated, and not conditioned on the fee schedules, the Governor could exercise his item veto on those schedules.

Discussion:

Under the doctrine of **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974), the legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated. Furthermore, **Sego** holds that the Governor can not veto explicitly worded contingencies on the amount and disbursement of appropriations, while permitting the appropriations to stand. Otherwise, the Governor would distort, frustrate or defeat the legislative purpose of proper conditions, restrictions, limitations or contingencies placed upon the appropriation. **See** Discussion of Question 1, **supra**.

The tuition schedules contained in the 1985 General Appropriations Act cannot fairly be characterized as terms of restriction, limitation or condition with respect to the items of appropriation for higher education which follow those schedules. They are not written using traditional words of limitation or condition. **Compare State ex rel. Sego v. Kirkpatrick**, 86 N.M. at 367, 524 P.2d at 283 ("None of the above appropriation shall be spent for . . ." held conditional language which the Governor could not validly veto). As a result, the appropriation for higher education does not in any way depend for its effectiveness on the stated tuition schedules. With the failure of the schedules, the higher education appropriations can go into effect and give expression to the legislative intent to fund those institutions from the general fund at the amounts indicated. Since the tuition schedules could fail, and not distort the intention of the legislature with respect to the general appropriation for higher education, **see Sego**, 86 N.M. at 365, 524 P.2d at 281, they are proper subjects of the gubernatorial power of item veto.

Question 8:

If the Governor did have the authority to veto the tuition fee schedules, what is the effect of those vetoes? --i.e., do the vetoes have the effect of reviving the tuition schedules contained in the 1984 Appropriations Act.

Answer:

No. The vetoes do not revive the tuition schedules contained in the 1984 Act for two reasons. First, even without the tuition schedules, there are appropriations "otherwise provided by law," in the 1985 Act and second, the schedules are not items of appropriations.

Discussion:

In answer to Question 2, **supra** we indicated that line items vetoed by the Governor are not brought forward from the 1984 General Appropriations Act as a result of the

Governor's veto of the repeal of the continuing resolution contained in the 1985 General Appropriations Act. We have also concluded that tuition schedules are a detail germane to the general appropriation to state education institutions, rather than an item of an appropriation. The continuing resolution in the 1984 General Appropriations Act refers to the continuation of "appropriations", so it would not apply to tuition schedules, in any case. Finally, we have noted that the general appropriation to state educational institutions is effective, despite the veto of the tuition schedules. Since the legislature has appropriated money to state educational institutions in the 1985 General Appropriations Act, the continuing resolution language contained in the 1984 Appropriations Act does not apply.

We therefore conclude that the tuition schedules contained in the 1984 General Appropriations Act would not be revived by the line item veto of the tuition schedules contained in the 1985 General Appropriations Act.

Question 9:

If the Governor's veto of the tuition schedules is valid, but does not revive the 1984 schedules, is there other legal authority, outside the legislative appropriation process, by which tuition levels may be set for the 74th Fiscal Year.

Answer:

Yes. Absent a statute setting the tuition schedules, authority to set tuition schedules lies with the Boards of Regents of the respective institutions, or the Santa Fe Community College Board, so long as they act in accordance with the specific requirements of law on the subject.

Discussion:

Article XII, Section 13 of the New Mexico Constitution provides:

The legislature shall provide for the control and management of each of said institutions by a board of regents for each institution . . .

The institutions referred to are those State educational institutions listed in Article XII, Section 11 of the Constitution. Those institutions are: the University of New Mexico, New Mexico State University, New Mexico Highlands University, Western New Mexico University, Eastern New Mexico University, New Mexico Institute of Mining and Technology, New Mexico Military Institute, New Mexico School for the Visually Handicapped, New Mexico School for the Deaf and Northern New Mexico State School. The legislature has so provided, by enacting statutes conferring upon the Boards of Regents of each of the following institutions the power of management and control over the institution:

University of New Mexico Section 21-7-3, NMSA 1978 (1982 Repl.Pamp.) ("The management and control of said university (university) . . . shall be vested in a board of five regents").

New Mexico State University Section 21-8-3, NMSA 1978 (1982 Repl. Pamp.) ("Said regents and successors in office shall . . . (have) the right . . . of causing all things to be done necessary to carry out the provisions of the law.").

New Mexico Institute of Mining & Technology Section 21-11-4, NMSA 1978 (1982 Repl. Pamp.) ("The management and control of said school of mines (New Mexico institute of mining and technology) . . . shall be vested in a board of five regents.").

Eastern New Mexico Section 21-3-30, NMSA 1978 (1982 University Repl. Pamp.) ("Such board (of regents) shall have the general powers now conferred on boards of regents of the other normal schools of this state").

New Mexico Highlands University Section 21-3-7, NMSA 1978 (1982 Repl.Pamp.) ("Said boards of regents shall have full and complete power and control over their respective normal schools (universities).").

Western New Mexico University Section 21-3-7, NMSA 1978 (1982 Repl. Pamp.) ("Said boards of regents shall have full and complete power and control over their respective normal schools (universities)").)

New Mexico Military Institute Section 21-12-1, NMSA 1978 (1982 Repl.Pamp.) ("The New Mexico

military institute, at Roswell, shall be under the supervision and control of a board of five regents . . .").

Branch Community Colleges Section 21-14-2, NMSA 1978 (Supp. 1984 Cum.Supp.) ("If the proposal (for establishing a branch community college) is approved, the (branch community college) board and the board of regents of the parent institution shall enter into a written agreement which shall include provisions for: . . . (6) the detailed agreement of financing and financial control of the branch community college."

Northern New Mexico State School Section 21-4-1, NMSA 1978 (Repl. 1982) ("The management and control of the Spanish-American School (northern New Mexico state school) at El Rito . . . the . . . powers and duties of its regents, shall be the same as provided in Article XII, Section 13 of the constitution of New Mexico for the other state educational institutions mentioned in Article XII, Section 11 of the constitution of New Mexico").

Santa Fe Community College (21-13-10, NMSA 1978 (Repl. 1982) ("It shall be the duty of the community college board to determine financial and educational policies of the community college").

"Control" has previously been construed to mean control over curriculum, disciplinary control, financial control, administrative control and, in general, control over all affairs of the school. **Prince v. Bd. of Ed.**, 88 N.M. 548, 543 P.2d 1176 (1975).

In addition, the Boards of Regents of each of the institutions listed in Article XII, Section 11 of the Constitution are statutorily created public corporations, with the exception of the New Mexico Military Institution and the New Mexico School for the Deaf. (For a more detailed discussion on this point, see A.G. Opinion 64-54). The Boards of Regents

by statute have the power to do all things that, in the opinions of the respective Boards of Regents, will be in the best interest of the institutions in the accomplishment of their purposes or objects. Section 21-1-20, NMSA 1978 (Repl. 1982).

The legislature has expressly conferred upon the Boards of Regents of the State educational institutions listed in Article XII, Section 11 of the Constitution (with the exception of the New Mexico School for the Deaf and School for the Visually Handicapped) the power to set tuition rates. This power is set forth in Section 21-1-2, NMSA 1978 (Repl. 1982) and in the enabling acts for the following institutions: New Mexico Military Institute (Section 21-12-7, NMSA 1978 (Repl. 1982)), New Mexico State University (Section 21-8-5, NMSA 1978 (Repl. 1982)), New Mexico Highlands University (Section 21-3-7, NMSA 1978 (Repl. 1982)) and Western New Mexico University (Section 21-3-7, NMSA 1978 (Repl. 1982)).

By statute, the legislature has granted the Boards of Regents of the parent institutions of branch community colleges the power to set tuition for the branch community colleges. Section 21-14-5, NMSA 1978 (Repl. 1982) Santa Fe Community College, as an independent community college, is governed by Section 21-13-24.1, NMSA 1978 (Repl. 1982), which states that tuition rates shall be recommended by the Board of Educational Finance and shall be set by the legislature. Other community colleges are governed by Section 21-13-10, NMSA 1978 (Repl. 1982) (as amended by 1985 Laws Ch. 238), which vests the power to set tuition in the community college boards.

The statutory procedure to be followed by the Boards of Regents in the setting of tuition rates is set forth in Section 21-1-5 NMSA 1978 (Repl. 1982). As stated therein, the rates of required fees for State educational institutions confirmed in Article XII, Section 11 are reviewed by the Board of Educational Finance in connection with its review of legislative budget requests. Proposed increases of fees are subject to the approval of the Board of Educational Finance. No fee increase will be applicable within a fiscal year unless it was approved at a time when legislative budget requests for that fiscal year were under review by the Board of Educational Finance. The Board of Educational Finance reports the results of its review of required fees to the legislature along with its appropriation recommendations.

The Board of Educational Finance recommended an average increase in tuition rates of 9% for the four year and two year colleges listed in the 1985 General Appropriations Act for 1985-6, after consultation with the schools. The various recommended increases in tuition fees were then reported to the 1985 legislature with appropriation recommendations.

The legislature adopted a 16% increase in tuition rates across the board for four and two year colleges set forth in the 1985 Act for 1985-6. The Governor vetoed the tuition rates for the State educational institutions listed in the 1985 Act, but left the general appropriations intact.

A review of past legislation in this area indicates that as early as 1895, the general appropriations bill set forth minimum tuition rates to be set by the Boards of Regents of certain State educational institutions. General appropriations bills often contained this language, which was eventually codified in Section 70-30-2 NMSA (1953), the predecessor to Section 21-1-2, NMSA 1978 (Repl. 1982). Based upon this language and the absence of a statutorily set rate of tuition, the various Boards of Regents did set tuition rates.

Our research indicates that tuition rates were set by the legislature in a general appropriations act for the first time in 1965. The legislature has consistently set tuition rates in the general appropriations act since that date. The state educational institutions then charge the rates set by the legislature.

We also note that the statutes which grant the Boards of Regents and the community college boards the power to set tuition rates may be read to suggest that those independent bodies need not be bound by the tuition rates established by the legislature in computing the amounts of general fund appropriations are necessary to meet the needs of higher education. **See, e.g.,** § 21-3-7, NMSA 1978 (Repl. 1982) ("Said boards of regents **shall have full and complete power and control** over their respective . . . schools") (emphasis added). On the other hand, political realities command adherence to the legislative mandate in this area, and the above-mentioned statutory mechanisms for tuition setting at the Board of Regents level also help insure Board of Regents accountability when those mechanisms must be utilized.¹¹ Finally, the Board of Educational Finance mechanisms are established by statutes enacted by the legislature, thus insuring that such mechanisms are subject to ultimate legislative control. **See, e.g., Petty v. Utah State Bd. of Regents**, 595 P.2d 1299 (Utah, 1979) (board has authority to act inconsistent with legislative recommendations for tuition levels contained in appropriations act, although board is subject to general legislative control).

Thus, so long as the institutions of higher learning follow the legislatively mandated procedures, they are empowered to set tuition levels in the absence of validly established levels by the legislature.¹²

MISCELLANEOUS

Question 10:

Are there any legal impediments to the legislature's accepting staff support services for interim activities from a nonprofit corporation?

Answer:

There is no impediment as long as the nonprofit corporation does not attempt to contribute funds directly to the legislature and the provision of staff support services by contract is consistent with the requirements of the New Mexico Procurement Code. If

staff services were to be contributed in the form of a gift, however, the conflict of interest laws would have to be carefully scrutinized.

Discussion:

Such a proposal would be illegal if the interim committees were to receive monies directly from private sources. The case of **New Mexico Board of Public Accountancy v. Grant**, 61 N.M. 287, 299 P.2d 464 (1956), is of critical importance in this connection. In the **Grant** case the State Board of Public Accountancy received certain cash contributions from individual accountants to assist in the operation of the board for the current year. Those funds were deposited by the board into the State Treasury, presumably in compliance with the terms of Section 6-10-3 NMSA 1978. (Section 6-10-3 requires every state agency official, with the exception of the heads of educational, charitable, and penal institutions, to pay any monies received into the State Treasury.) The **Grant** court held that once deposited with the State Treasurer, the voluntary contributions could only be withdrawn through appropriations made by the legislature. This result was dictated by the provisions of Article IV, Section 30 of the New Mexico Constitution, which states that no money may be paid out of the treasury without the support of an appropriation by the legislature and a warrant drawn by the proper officer. We therefore conclude in the present case that, if the interim committees were to receive private monies directly, these monies would be, in effect, converted into public monies which could only be committed for expenditures through the normal appropriation process.

Another set of requirements comes into play if the interim committees intend to acquire staff support services by contracting with the nonprofit corporation. In such a case, the committees would have to comply with the applicable requirements of the New Mexico Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978. The Code applies to every expenditure by state agencies for the procurement of items of tangible personal property, services and construction. Section 13-1-30. Although excluded from the requirement of purchasing through the state purchasing agent of the General Services Department and from compliance with GSD Rule 84-611, procurement by the legislative branch of state government is expressly made subject to the Code. Section 13-1-99.¹³

If the instant proposal contemplates that the nonprofit corporation will provide a gift to the legislative committees in the form of services, we must note that we can find no authority which expressly sanctions such a practice. The court in the **Grant** case, **supra**, also observed that it could find no authority in the State Board of Public Accountancy to collect contributions, but assumed the propriety of doing so.

There are, however, certain statutes that explicitly authorize named agencies to receive gifts and donations for the purpose of carrying out their official duties. Some examples of these statutes may be found at Sections 28-4-3, 21-21A-19 and 28-3-3 NMSA 1978, which pertain to gifts to the Agency on Aging, state universities and colleges and the Commission on the Status of Women.

The conflict of interest laws must also be consulted in the context of a donation of services. Section 10-16-3 NMSA 1978 prohibits a legislator from requesting, receiving or accepting a gift for himself or another if it "tends to influence him in the discharge of his official acts." Article IV, Section 39 of the New Mexico Constitution also provides:

Any member of the legislature who shall vote or use his influence for or against any matter pending in either house in consideration of any money, thing of value or promise thereof, shall be deemed guilty of bribery; and any member of the legislature or other person who shall directly or indirectly offer, give or promise any money, thing of value, privilege or personal advantage, to any member of the legislature to influence him to vote or work for or against any matter pending in either house; or any member of the legislature who shall solicit from any person or corporation any money, thing of value or personal advantage for his vote or influence as such member shall be deemed guilty of solicitation of bribery.

Thus, the provision of staff services in the form of a gift would be subject to the limitations implicit in the conflict of interest laws.

Question 11:

Are there any legal impediments to the legislature's encumbering current year budget prior to the end of the fiscal year (July 1, 1985) in order to obtain items of tangible property and non-professional services to support interim legislative activities in the subsequent fiscal year?

Answer:

The current practice of the Department of Finance and Administration (DFA) provides some guidance in this area. There are no statutes or regulations which mandate that encumbrances of supplies be treated differently from the encubering of current year funds for professional services which are, in part, rendered in the subsequent fiscal year. There is a difference in treatment for rent, utility and similar services. The wholesale nature of year-end encumbrances may also be limited by current practices.

Discussion:

The General Appropriations Act of 1984 requires the remaining balances from F.Y. 73 appropriations to revert to the general fund at the end of the fiscal year (July 1, 1985) to the extent that they are "unencumbered balances." That Act contains no definition of encumbered or unencumbered funds. The only other use of the concept we could locate in statute or regulation is in Section 6-5-3 NMSA 1978, which reads as follows:

Before any vouchers or purchase orders are issued or contracts are entered into involving the expenditure of public funds by any state agency, the authority for such proposed expenditure shall be determined by the financial control division [of the department of finance and administration.] After the authority for such expenditure is

determined, the appropriate fund shall be shown by the division to be encumbered to the extent of such proposed expenditure.

Some guidance in the matter of permissible encumbrances may be gleaned from DFA practice. For example, funds may be encumbered before the end of the fiscal year for professional services that will be partially rendered in the next fiscal year, as long as the professional services contract under which the services are to be rendered is entered into before July 1. This ensures that the agencies' abilities to satisfy contracting needs are not disrupted and that the length of a contract is determined by programmatic requirements rather than by the artificial limits of the fiscal year. The DFA practice is the same with regard to supplies, as long as there is an order or requisition made under an existing contract before July 1. Encumbrances for rent, utilities and similar services, however, receive different treatment. As a general rule, funds cannot be encumbered in the current fiscal year for these purposes, if the actual expenditures for the items will not be made until next fiscal year. A notable exception is made by DFA for the estimated costs for the month of June, since the agencies will not be billed until July for the services rendered in June.

Although we have attempted to set forth the practice with regard to encumbrances, we caution that the formulation of general rules in the area is difficult and encumbrances must be examined on a case-by-case basis to determine their relationship to current year needs of the agency. We believe a further note of caution should be interjected in the current case. If wholesale encumbrances are intended to prevent reversion of all remaining balances, a serious question is raised as to whether the encumbrances are legitimately related to current year needs.

Question 12:

What are the necessary legal steps by which the legislature can challenge the item vetoes of the governor with respect to the 1985 Appropriations Act, who or what body would be the appropriate party, and what particular legal barriers might they have to overcome?

Answer:

The Attorney General respectfully declines to answer these questions because they do not appropriately relate to his opinion function. They touch upon matters of litigation tactics and strategy and are more appropriately addressed to prospective litigation counsel. This office would decline to represent either side in any potential litigation because this office represents both the executive and legislature on various matters. It is therefore particularly inappropriate for this office to give such advice to one of the prospective parties.

ATTORNEY GENERAL

Paul Bardacke, Attorney General

[n1](#) If the language of § 3(L) were conditional, then it would be necessary to explore the correlative inquiry required by **Sego** --whether the legislature improperly attempted to abridge the gubernatorial item veto power "by subtle drafting of conditions, limitations or restrictions upon appropriations, 86 N.M. at 364, 524 P.2d at 980. Since, however, it is our view that § 3(L) is neither a condition nor a restriction on the appropriations which follow it, that question need not be addressed.

[n2](#) It has been suggested that before answering this question it is necessary to decide whether the continuing appropriation language is an invalid attempt by one legislature to bind the hands of its successor. **See, e.g., Opinion of the Justices**, 308 Mass. 601, 32 N.E.2d 298, 306-07 (1941). However, three points are now well settled. First, in the absence of specific constitutional prohibitions, the legislature has plenary authority to make continuing appropriations, **see, e.g., Carr v. Frohmler**, 47 Ariz. 430, 56 P.2d 644 (1936); **State ex rel. Williams v. Musgrave**, 84 Idaho 77, 370 P.2d 778 (1962); **Carlton v. Mathews**, 103 Fla. 301, 137 So. 815 (1931). Secondly, a continuing resolution clause contained in a general appropriations act does not unlawfully bind the hands of a successor legislature, because such a law can always be repealed by the successor legislature. **See Opinion of the Justices**, 32 N.E.2d at 306-07. Thirdly, that the requirement that an appropriation must be made before public money can be expended has been determined to be satisfied by a continuing appropriation. **Unemployment Compensation Commission v. Renner** 59 Wyo. 437, 143 P.2d 181 (1943); **Gillum v. Johnson**, 7 C.2d 744, 62 P.2d 1037 (1936). Thus, it is the opinion of this office that the continuing resolution provision in a general appropriations act is legitimate.

[n3](#) Admittedly, the legislature could accomplish the same result by passing an independent law eliminating the function. With respect to such functions properly funded in a prior appropriations act, however, such substantive legislation ought not be required.

[n4](#) The same appropriations with the same exceptions and limitations as are made in Section 1 of this act, except those for the reimbursement of individuals for the payment of deficiencies, those which by their nature are for time past, and those which are for building purposes, are hereby declared to apply and be continued to and in any and every fiscal year, subsequent to the fifth fiscal year, unless any legislature subsequent to the one at which this act is passed shall provide otherwise. 1915 Laws, Ch. 86, § 6.

[n5](#) The 1915 General Appropriations Act only enacted appropriations for the fourth fiscal year. However, in addition to the continuing resolution clause, the 1915 Act also provided: "The same appropriations as herein-before made for the fourth fiscal year, or so much thereof as may be necessary, are hereby made for the fifth fiscal year with the same effect as though each thereof was in this section set out and repeated at large; except the appropriations for the preparation, translation and publication of the journals

and session laws . . . none of which appropriations shall extend to or be applicable in the fifth fiscal year." Ch. 86, 1915 Laws § 2.

[n6](#) Such an interpretation could create other problems if resort to the earlier year's appropriation, applied in the future, would amount to an appropriation in excess of anticipated revenues. That eventuality may run afoul of other constitutional prohibitions. **See** N.M. Const. Art. IX, §§ 7 and 8.

[n7](#) It should be noted again, however, that there is no continuing resolution language contained in the 1985 General Appropriations Act. As a result, if in 1986 no general appropriations act becomes law, that may well revive the 1984 levels of appropriation. **See Nance v. Daniel**, 183 Ga. 538, 189 S.E. 21 (1937). **But see, Thirteenth Guam Legislature v. Bordallo**, 430 F. Supp. 405, 411 (Guam, 1977), **aff'd in part**, 588 F.2d 265 (9th Cir. 1978) (continuing resolution clause operates only if legislature fails to pass bill, and not when such a bill falls to gubernatorial veto). We need not speculate about the resolution of that question, because it is not now presented. Suffice it to say that if that eventuality were to come to pass, it would raise grave questions of separation of powers in the worst context, because the very ability of the government to function would be at stake. **See Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[n8](#) The legislature also passed legislation to create a new public school reform committee to replace the LESC in S.B. 222. The governor had previously vetoed that bill on February 15, 1985.

[n9](#) In **State ex rel. Brotherton v. Blankenship**, 157 W.Va. 100, 207 S.E. 2d 421 (1973), the West Virginia court voided a veto of its governor which would have substantially reduced the funding of the school system. The Court found that the constitutional mandate that the state have a system of free public schools prohibited a valid exercise of the governor's veto power. See also **State ex rel. Nunez v. Baynard**, 15 So.2d 649 (La. Ct.App. 1943); **State ex rel. Greive v. Martin**, 63 Wash. 2d 126, 385 P.2d 846 (1963); **People v. Lindberg**, 60 Ill.2d 266, 326 N.E.2d 749 (1975).

[n10](#) It is arguable that the item veto at issue here does not strike at the core constitutional functions of the legislature since it only relates to interim functions, and arguably only to support capabilities for those interim activities. **See** Discussion to Question 4, **supra**. On the other hand, staff and other support are so essential to an effective use of interim legislative mechanisms, **compare Mowrer v. Rusk**, 95 N.M. 48, 618 P.2d 886 (1980) (violation of separation of powers for city executive to control court personnel), and interim activities are arguably essential to the effective conduct of legislative business during the next following session. Thus, resolution of this controversy is unlikely to hinge on some quantum measure of the extent to which the current impasse impairs essential legislative functions.

[n11](#) With respect to the Santa Fe Community College, its board could presumably follow a similar process so long as the tuition levels its sets are consistent with the

recommendations of the Board of Educational Finance. See § 21-13-24.1 NMSA 1978 (Repl. 1982).

[n12](#) Of course nothing precludes the legislature from establishing levels of tuition in a substantive law, or from otherwise altering the statutory authority of the respective Boards of Regents in this regard. **See Petty v. Utah State Bd. of Regents, supra.**

[n13](#) However, the procurement of "services of employees of a state agency" does not fall within the coverage of the Code. (A state agency includes, for this purpose, the committees of the legislative branch. See Sections 13-1-87, 13-1-90.)