STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

In re Temporary Funding of Core Functions of the Executive Branch Of the State of Minnesota	Case Type: Civil Court File No. 62-cv-11-5203

RESPONSE OF THE GOVERNOR TO THE PETITION OF THE ATTORNEY GENERAL

INTRODUCTION

Governor Mark Dayton ("the Governor") submits this Response to the Petition of the Attorney General filed on June 13, 2011.

With only minor exceptions, the legislature has failed to pass appropriations bills that will be signed or that have the support of two-thirds of each house. The biennium ends on June 30, 2011. If no compromise is reached by then, the legislature's failure to appropriate will cause an unprecedented emergency.

The Governor believes, as the Minnesota Constitution declares, that Minnesota's government was "instituted for the security, benefit and protection of the people," Article I, § 1. A government shutdown would threaten the lives and safety of the people of Minnesota.

The Governor does not want a government shutdown. The Governor wants a balanced compromise. He still hopes that the legislative majority will voluntarily fulfill its constitutional duty to pass appropriations bills that will be signed or that have the support of two-thirds of each house.

I. THE COURT SHOULD APPOINT A MEDIATOR.

As discussed below, the Petition raises serious constitutional and statutory issues regarding the inherent powers of each of the three departments of state government. All three departments have strong reason to have the disagreement regarding appropriations resolved by compromise, thereby avoiding both constitutional issues and a government shutdown.

Accordingly, the Governor requests that the Court immediately appoint a mediator to oversee and facilitate negotiations between the legislative majority, on the one hand, and the legislative minority and the Governor, on the other. A mediator of great stature and unquestioned integrity is required. The Governor respectfully suggests that the Court consider appointing either of two former members of the Minnesota Supreme Court, neither appointed by a member of the Governor's political party: former Chief Justice Kathleen Blatz or former Justice James Gilbert.

Justice Gilbert has already been proposed by the Attorney General as a Special Master, and is willing to serve. So is Chief Justice Blatz.

The duties of a Special Master should include mediation. Indeed, in 2005, Chief Judge Gregg Johnson appointed former Justice Edward Stringer "as Special Master to *mediate* and, if necessary, hear and make recommendations to the Court . . . ." *See In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, Order ¶ 5 (Ramsey Cty. Dist. Ct., June 23, 2005) (emphasis added).

The Governor commits to be present at the mediation and to devote his full time and attention to reaching an agreement. The Governor wants a balanced compromise, not a government shutdown.

II. THE GOVERNOR'S AND THE COURT'S POWER TO SPEND MONEY NOT APPROPRIATED IS LIMITED BY THE MINNESOTA CONSTITUTION AND BY STATUTES.

In the event that mediation is not successful, the Court should proceed cautiously, to avoid infringing on the inherent powers of the legislature and the governor. The Court must honor the constitutional principle of separation of powers.

Pursuant to the Minnesota Constitution, Article III, § 1, the executive department may not exercise any of the powers properly belonging to either the legislative or the judicial departments, except as expressly provided in the Constitution. *See Bloom v. Am. Express Co.*, 23 N.W.2d 570, 575 (Minn. 1946) ("A constitutional grant of power to one of the three departments of government . . . is a denial to the others.") While "[it] is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), neither may the judicial department exercise any of the powers properly belonging to either the legislative or the executive departments. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322 (Minn. Ct. App. 2007) ("We start from the fundamental principle that we cannot exercise powers that belong to the legislative branch.") Separation of powers is premised on the belief that excessive power vested in one branch promotes "corruption and tyranny." *State v. Baxter*, 686 N.W.2d 846, 851 (Minn. Ct. App. 2004); *see also* The Federalist Nos. 47, 48, and 51 (Terence Ball ed., 2003).

The command in the second sentence of Article III, § 1, that no branch may exercise the powers of another, is not found in the United States Constitution. That command, found in many state constitutions, is an "'unusually forceful command' . . . [which] has no counterpart in the United States Constitution." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860-61 (Ky. 2005) (construing similar provision in Kentucky Constitution, "reputed to have been penned by Thomas Jefferson").

As the Minnesota Supreme Court summarized in *State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930):

> The three departments of state government, the legislative, executive, and judicial are independent of each other. Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion. The Legislature cannot change our constitutional form of government by enacting laws which would destroy the independence of either department or permit one of the departments to coerce or control another department in the exercise of its constitutional powers.

The "power of the purse" through the enactment of appropriation laws belongs primarily to the legislature. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 364-66 (Minn. 2010); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007) ("The legislature has exercised its fundamental constitutional power to appropriate the public funds . . .").

However, the governor shares the power of the purse by virtue of the governor's right to approve or veto a bill, including the right to veto one or more items of appropriation of money. *See* Minn. Const., Art. IV, § 23; *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993). The legislature has the power to override a veto by a two-thirds vote of each house. *Id.*

With the exception of the judicial department's inherent power to protect itself from unreasonable and intrusive assertions of authority by the other departments, *see In re Clerk of Lyon Cnty. Courts' Comp.,* 241 N.W.2d 781, 784-87 (Minn. 1976), the Minnesota Constitution does not grant to the courts the power of the purse.

All three departments are bound by Article XI, § 1 of the Minnesota Constitution, which states, unequivocally: "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." *See State ex rel. Nelson v. Iverson,* 145 N.W. 607, 608 (Minn. 1914) (purpose is "to prevent the expenditure of the people's money without their consent first had and given.")

Forty-seven other states have a similar provision.[1] Minnesota's provision contains no exception for the legislature's failure to pass appropriations bills that will be signed or that have the support of two-thirds of each house. *See Fletcher v. Commonwealth,* 163 S.W.3d 852, 868 (Ky. 2005) (similar provision in Kentucky Constitution, "absent a statutory, constitutional, or valid federal mandate . . . precludes the withdrawal of funds from the state treasury except pursuant to a specific appropriation by the General Assembly").

The clear command of Minnesota's Article XI is based on a similar provision in the United States Constitution, Article I, § 9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." *See Reeside v. Walker,* 52 U.S. 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously

[1] The list of states with constitutional citations may be found at: P. Wattson, *Power of the Purse in Minnesota* (July 17, 2007), available on the Minnesota Legislature's website.

sanctioned. Any other course would give to the fiscal officers a most dangerous discretion."); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990) (purpose of clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants.")

The federal Antideficiency Act, 31 U.S.C. § 1341 *et seq.*, expressly allows federal officials to spend in advance of appropriations in the event of "emergencies involving the safety of human life or the protection of property." *See* 31 U.S.C. § 1342. However, there is no similar provision in Minnesota law. To the contrary, Minnesota Statute § 16A.57 provides: "Unless otherwise expressly provided by law, state money may not be spent or applied without an appropriation . . . ." Minnesota Statute § 16A.138 prohibits all state boards and officials from incurring indebtedness before an appropriation, upon pain of criminal penalty. After the 2005 shutdown, the legislature did not accept the invitation of the Court of Appeals in *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007), to create an emergency fund or enact procedures to keep the government functioning during a budgetary impasse.

III. THE GOVERNOR HAS BOTH CONSTITUTIONAL AND STATUTORY POWERS THAT MAY BE INVOKED IN THE EVENT THAT THE LEGISLATURE FAILS TO APPROPRIATE.

Like the other two departments, under Article V, § 3, the governor has certain inherent powers. The Governor construes those powers through the lens of Article III, § 1, that the governor not exercise any of the powers properly belonging to either the legislative or the judicial departments. However, the legislature's failure to pass appropriations bills that will be signed or that have the support of at least two-thirds of

each house may create an emergency that requires the exercise of inherent executive power.

Under Article V, the governor has the power to execute the laws and suppress insurrection, and he has the obligation to take care that all of the laws -- not just the appropriations laws -- be faithfully executed. The Minnesota Constitution further imposes on the governor the obligation to observe and protect individual rights, such as preventing the infliction of "cruel or unusual punishment," Article I, § 5.

The Minnesota Constitution, and the Supremacy Clause of the United States Constitution, further impose on the governor the obligation to support the United States Constitution and the rights protected thereby. When the Governor took his oath of office, in accordance with the Minnesota Constitution, Article V, § 6, he swore "to support the constitution of the United States." This includes not depriving any person of "life, liberty, or property without due process of law," or denying any person "the equal protection of the laws." U.S. Const. amend. XIV.

The Governor plans to proceed carefully in invoking the inherent powers of his office. As a former United States Senator, he understands that the power to make laws is primarily the legislative department's "alone in both good and bad times," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). *See id.* at 650 (Jackson, J., concurring) (emergencies "afford a ready pretext for usurpation" and "tend to kindle emergencies"). But if he must take action to protect the lives and safety of the people of Minnesota, he will.

Minnesota statutes further assign the governor power not contingent on specific biennial appropriations. For example, the governor is designated the "custodian of all

property of the state not especially entrusted by law to other officers," Minn. Stat. § 4.01. The legislature has directed that the governor may "adopt such measures for its safekeeping as the governor deems proper."

Further, the governor has powers -- both constitutional and statutory -- regarding the expenditure of federal funds. The legislature has enacted a continuing appropriation, Minnesota Statute § 4.07, that authorizes the governor to spend federal funds received by the State. Subdivision 3 requires that the governor "shall comply with any and all requirements of federal law and any rules and regulations promulgated thereunder to enable the application for, the receipt of, and the acceptance of such federal funds." Such money received is "appropriated annually" in order for the designated agencies "to carry out the purposes for which the funds are received." Such funds must be "available for expenditure in accordance with the requirements of federal law." *See* Minn. Stat. § 4.07.

If federal law expressly commands ongoing state funding, the State may be required under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, to continue it. However, the federal government may not compel a state to enact or enforce a federal program. *See New York v. United States*, 505 U.S. 144, 188 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997). This necessarily requires a program-by-program and grant-by-grant review of the federal law governing each program or grant. *See, e.g., Dowling v. Davis*, 19 F.3d 445 (9th Cir. 1994) (holding California was entitled to delay Medicaid claims following legislature's failure to enact timely budget). It is the Governor's power to make those determinations in the first instance, and he expects to do so with input from the Attorney General. In all of his determinations, his primary objective will be to protect the life and safety of the people of Minnesota.

IV. FOR THE PRESENT, THE COURT SHOULD DEFER ANY OTHER ORDER TO ALLOW THE MEDIATION PROCESS TO SUCCEED.

The Governor understands and respects the Attorney General's commencement of a proceeding that could bring judicial clarity to a challenging and unprecedented situation. The Governor appreciates the Attorney General's desire, which he shares, to ameliorate the potentially harsh consequences of the legislative majority's failure to compromise. The life and safety of the people of Minnesota is paramount.

However, the scope of the relief proposed by the Attorney General goes beyond the relief ordered by the Chief Judge of this Court in 2005,[2] and exceeds what the Governor considers to be allowed by the Minnesota Constitution.

The Attorney General has requested that this Court order each "Government Entity" (defined in Paragraphs 2 through 9 of the Petition) to determine its own "core functions." "Government Entity" includes not only the constitutional officers, but county and municipal governments, school districts, "[n]umerous public officials" who head agencies, "a variety of boards, commissions and the like," and even the United States Attorney. After a Government Entity has determined its core functions, it shall "verify the performance of such core services" and then submit a bill to the Commissioner of the Department of Management and Budget, who "shall" pay the bill, apparently upon demand.

To support her request for such wide-ranging judicial relief, the Attorney General relies primarily on the case of *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777

---

[2] The relief granted in 2001 and 2005 was not in the context of a genuine adversary proceeding. The Court of Appeals declined to review the 2005 decision because the judicial relief granted was superseded by legislative action. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312 (Minn. Ct. App. 2007).

(Minn. 1986) ("*Mattson*"). The case arose out of the statutory transfer to a commissioner of the inherent responsibilities of the elected state treasurer, a constitutional officer. The statute transferred both functions and employee positions, and abolished employee positions that had been assigned to the treasurer's office. The Supreme Court determined that the transfer of functions and positions was unconstitutional as infringing on the inherent power of the treasurer as an official established by the Constitution. The Court ordered that functions and positions be restored and that the appropriated funds follow the positions back to the treasurer. However, the Court did not restore the positions abolished or order the legislature to appropriate new funds. Thus, *Mattson* is not authority for a court order to pay unappropriated funds from the state treasury, as the Attorney General seeks here.

As of the date of this Response, the Governor is not yet prepared to conclude that the legislative majority's use of the power of the purse -- by its failure to pass appropriations bills that will be signed or that have the support of two-thirds of each house -- has abridged inherent functions of the governor in a fashion akin to *Mattson*, much less requires the sweeping relief requested by the Attorney General. The Governor hopes and trusts that, before June 30, the legislative majority will recognize that the governor shares the power of the purse under Article IV, § 23, and proceed to a balanced compromise. The Governor has the right to call the legislature into special session, Article IV, § 12, and he intends to exercise that power if and when a balanced compromise is reached.

For the time being, the Court should forego any order that would hold or suggest that the members of a co-equal department of government have failed to discharge

faithfully their duties. Rather, the Court should order mediation and appoint a respected facilitator to help reach a balanced compromise.

Deferring the request for relief would allow the Court to avoid confronting the issue of whether the requested relief conflicts with provisions of the Minnesota Constitution and Minnesota Statutes. The Governor is concerned about a judicial remedy that would delegate the legislature's and the governor's shared power of the purse, through the Court, to every "Government Entity." The Governor is particularly concerned about a judicial remedy that would allow every such "Government Entity" to draw upon the state treasury, and require the Commissioner to pay, without constitutional and statutory checks and balances. Such relief could conflict with:

* Article III, § 1, which prevents the judicial department from exercising any of the powers belonging to the legislative and executive departments; in this case, the legislature's power to appropriate, and the governor's power to veto, pursuant to Article IV.

* Article V, which grants inherent power to the executive, including to manage the spending of state money. It is the right of the executive department, not each and every "Government Entity," to exercise that spending power. *See* Minn. Stat. § 16A.055, subd. 1(a) (Commissioner of Management & Budget must "safely keep" treasury money "until lawfully paid out" and "manage the state's financial affairs.")

* Article XI, § 1, which provides that "no money" shall be paid from the state treasury except by appropriation. Every "Government Entity" does not, and cannot, have the power to draw money from the state treasury on its own determination and demand.

VI. IF THE COURT ISSUES AN ORDER OTHER THAN TO MEDIATE, IT SHOULD BE BASED ON THE GOVERNOR'S DETERMINATION OF WHAT PRIORITY CRITICAL SERVICES MUST BE CONTINUED.

To prepare for a government shutdown, the Governor has created a Statewide Contingency Response Team ("SCRT"), chaired by the Commissioner of the Department of Management and Budget, to establish statewide objectives in the event of a shutdown. In order of priority, they are:

1. Provision of basic custodial care for residents of state correctional facilities, regional treatment centers, nursing homes, veterans' homes, and residential academies and other state operated services;

2. Maintenance of public safety and immediate public health concerns.

3. Provision of benefit payments and medical services to individuals.

4. Preservation of the essential elements of the financial system of the government.

5. Provision of necessary administrative and support services for Objectives 1, 2, 3, and 4.

In addition, using terms that are used in all types of state contingency and emergency planning, and in consultation with the state departments that respond to emergencies, including the Departments of Administration, Public Safety, and Corrections, the SCRT has established four Statewide Priority Service Levels, defined as follows:

* Priority 1 Critical Services: immediate threat to public health and/or safety.

* Priority 2 Critical Services: disorder or severe, statewide economic impact may develop if not delivered in a few days.

* Priority 3 Critical Services: services required by law or rule that can be suspended by law or rule during an emergency.

* Priority 4 Critical Services: services that can be suspended during an emergency and are not required by law.

The Governor also directed the SCRT to develop a list of categories within each of these four Statewide Priority Services Levels.

The Recommended Statewide Objectives developed by the SCRT, including the Priority Service Definitions and Categories, are attached hereto as Exhibit A.

The Governor, through the SCRT, has also directed that all agencies assign their services to the four Statewide Priority Services Levels. The SCRT has reviewed the agency submissions and has developed a list of Priority 1 and Priority 2 Critical Services that it recommends be continued in the event of a shutdown. That list is attached hereto as Exhibit B.

In the event that the Governor must invoke inherent and statutory powers, the Governor will direct that recommended Priority 1 and Priority 2 Critical Services be continued. In the event that the Court should decide to grant relief in the nature of an order continuing critical services, the Governor submits that the order should focus on those same Critical Services.

CONCLUSION

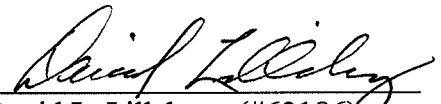
For all of these reasons, the Governor requests that the Court:

1. Order the parties to mediate; and

2. Avoid any infringement by the judicial department on the constitutional powers of the legislative and executive departments by foregoing any other order for relief unless and until mediation fails.

Dated: June 15, 2011

Respectfully submitted,



David L. Lillehaug (#63186)
Joseph J. Cassioppi (#0388238)
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402
Telephone 612-492-7000
Email dlillehaug@fredlaw.com

SPECIAL COUNSEL TO THE
OFFICE OF THE GOVERNOR[3]

[3] On June 10, 2011, the Governor retained Special Counsel solely on the matter of the potential government shutdown. Special Counsel represents only the Office of the Governor, and does not represent the State of Minnesota generally, the Attorney General, or the State's other constitutional officers, departments, entities, or subdivisions, whether executive, regulatory, legislative, or judicial.