Power of the Purse in Minnesota

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I. Introduction

The purpose of this paper is to trace the development of the Minnesota Legislature's power of the purse, from the earliest common law to the present day. It will explain the Legislature's role in setting the budget, and how the power of the Legislature to control the expenditure of public money relates to that of the executive and judicial branches.

II. The Power of the Purse is Reserved for the Legislature

A. The Common Law Gave the Power of the Purse to the Legislature

Modeled on the U.S. Constitution, article I, § 9, cl. 7,[1] the Minnesota Constitution, article XI, § 1, provides: "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law."[2] Both provisions codify the common law maxim that the legislature holds the power of the purse. Every other state, except Mississippi, Rhode Island, and Utah, has a similar provision.[3] The supreme courts of Mississippi and Rhode Island have found it implied in their constitutions as a gift of the English common law:

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[1] "No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time."

[2] Before the Constitution was restructured in 1974, article IV, § 12, included a sentence that said, "No money shall be appropriated except by bill." The ballot question presented this deletion to the people as having no legal consequence. *See* Act of Apr. 10, 1974, ch. 409, § 3, 1974 Minn. Laws 787, 819. It is clear that "an appropriation by law" means a law enacted by the Legislature passing a bill.

[3] Ala. Const. 1901, art. IV, § 72; Alaska Const. art. IX, § 13; Ariz. Const. art 9, § 5; Ark. Const. 1874, art. 5, § 29; Cal. Const. art. XVI, § 7; Colo. Const. art. V, § 33; Conn. Const. art. IV, § 22; Del. Const. art. VIII, § 6(a); Fla. Const. art. VII, § 1(c); Ga. Const. art. III, § IX(I); Haw. Const. art. VII, § 5; Idaho Const. art. VII, § 13; Ind. Const. art. X, § 3; Ia. Const. art. III, § 24; Kan. Const. art II, § 24; Ky. Const. § 230; La. Const. art. III, § 16(A); Me. Const. art. V, pt. third, § 4; Md. Const. art. III, § 32; Mich. Const. 1963, art. IX, § 17; Mo. Const. art. IV, § 28; Mont. Const. art. VIII, § 14; N.C. Const. art. V, § 7(1); N.D. Const. art. X, §12; Neb. Const. art. III, § 25; Nev. Const. art. 4, § 19; N.J. Const. art. VIII, § II (2); N.M Const. art. IV, § 30; N.Y. Const. art. VII, § 7; Ohio Const. art. 2, § 22; Okla. Const. art. V, § 55; Ore. Const. art. IX, § 4; Pa. Const. art. 3, § 24; S.C. Const. art. X, § 8; S.D. Const. art. XII, § 1; Tenn. Const. art. II, § 24; Tex. Const. art. 8, § 6; Vt. Const. ch. II, § 27; Va. Const. art. X, § 7; Wash. Const. art. VIII, § 4; Wis. Const. art. VIII, § 2; W. Va. Const. art. X, § 3; Wyo. Const. art. 3, § 35. *Compare* Ill. Const. art. VIII, § 2(b); Mass. Const. pt. 2, ch. II, § I, art. XI; N.H. Const. art. 56.

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature . . . . [U]ltimately the absolute control of Parliament over the public treasure was forever vindicated as a fundamental principle of the British Constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their Legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power.

Colbert v. State, 39 So. 65, 66 (Miss. 1905). *See also In re Incurring of State Debts*, 37 A. 14 (R.I. 1896).

One of the first statements of the maxim can be found in clauses 12[4] and 14[5] of the *Magna Carta* that the barons forced King John to sign in 1215. Those clauses required the king to convene a representative assembly of nobles and clergy and obtain their consent before levying certain taxes.

Edward III needed the consent of the House of Commons to finance the Hundred Years War with France, which he began in 1337. When Richard II ascended the throne in 1378, the House of Commons asserted its right to direct how levies were spent on the war and to examine the public accounts to verify they were spent for the purpose directed. Thomas Pitt Taswell-Langmead, ENGLISH CONSTITUTIONAL HISTORY 188-90 (10th ed., Plucknett, 1946). By 1380, "the right of the commons to investigate the accounts and appropriate the supplies was clearly established." *Id.* at 190. In 1406, Henry IV attempted to silence the demand of the commons for an audit of accounts, asserting that "kings do not render accounts," but he had to give way. *Id.* at 190 n.(h). The right having been established, it "fell into disuse" under the York and Tudor monarchs. *Id.* It was briefly revived in 1624 when the House of Commons, at the suggestion of James I, directed that money for the army expedition to relieve Protestants in the Palatinate from Catholic rule be paid to commissioners named by the commons. *See* Henry Hallam, II CONSTITUTIONAL HISTORY OF ENGLAND 324-25 (Everyman ed. 1930). In 1641, Charles I followed a similar procedure for other expenses. *Id.* During the Civil War and the Commonwealth, the commons exercised complete control over all receipts and expenditures from the national treasury. Taswell-Langmead, *supra*, at 479.

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[4] "No [taxes] may be levied in our kingdom without its general consent . . . ." *Magna Carta*, as numbered and translated from the Latin by the British Library (visited July 4, 2006) <http://www.fordham.edu/halsall/source/magnacarta.html>.

[5] "To obtain the general consent of the realm for the assessment of [a tax] . . . we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day . . . and at a fixed place. In all letters of summons, the cause of the summons will be stated. . . ." *Id.*

In 1665, Charles II was under financial pressure due to the costs of the war with Holland. The commons inserted in an act raising money for the war a proviso that no money should be issued out of the treasury except by order or warrant mentioning that it was payable for the expenses of the war. Taswell-Langmead, *supra*, at 478-79. The war did not go well, and in 1666 the commons became suspicious that not all the money was being spent for the purpose intended; in particular, that it "had been diverted to supply his wasteful and debauched course of pleasures." Hallam, *supra*, at 326. The commons drafted a bill to create a commission to examine the accounts. The king prorogued Parliament (sent the members home for a time). While they were gone the Dutch fleet sailed up the Thames and destroyed a large part of the English fleet unprepared at their moorings, though there had been ample warning from the extensive English spy network. It was the worst naval defeat in English history. Taswell-Langmead, *supra*, at 479-80; WIKIPEDIA *Raid on the Medway* (visited July16, 2007) <http://en.wikipedia.org/wiki/Raid_on_the_Medway>. When Parliament returned in 1667, the king opposed the bill and summoned his supporters in Parliament from "the play-houses and brothels" to vote against it, but it carried. Taswell-Langmead, *supra*, at 480; Hallam, *supra*, at 326-28 (quoting Pepys *Diary*).

> That supplies, granted by parliament, are only to be expended for particular objects specified by itself, became, from this time, an undisputed principle, recognized by frequent and at length constant practice. It drew with it the necessity of estimates regularly laid before the House of Commons; and, by exposing the management of the public revenues, has given to parliament, not only a real and effective control over an essential branch of the executive administration, but, in some measure, rendered them partakers in it.

Hallam, *supra*, at 325.

After more than four centuries of struggle with the Crown, Parliament invited William and Mary to the throne after the Glorious Revolution of 1688. As part of the invitation, to which the new monarchs assented, Parliament included the clause: "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." *The English Bill of Rights*, Feb. 13, 1689 (visited July 5, 2006) <http://www.yale.edu/lawweb/avalon/england.htm>.

The Supreme Court of Nebraska has summarized the conflict that gave rise to the clause:

> Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees, the power of the crown to levy taxes was restrained and abolished, but it was found that so long as the crown might, at its own discretion, disburse the revenue, the reservation to the people, through parliament, of the power to raise revenues, was not a complete safeguard. Efforts to control the crown in disbursement, as well as in the collection, of revenues, culminated with the revolution in 1688; and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. Three evils were at that time felt: In the

> first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and, thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives, by dispensing for long periods with sessions of parliament. By requiring appropriations for limited periods, it was sought to remedy all three evils,– the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary.

State ex rel. Norfolk Beet-Sugar Co. v. Moore, 69 N.W. 373, 375 (Neb. 1896). *See also, Edwards v. Childers*, 229 P. 472, 474, 1924 OK 652, ¶¶ 10-11; *State ex rel. Birdzell v. Jorgenson*, 142 N.W. 450, 457 (N.D. 1913); *Humbert v. Dunn*, 24 P. 111 (Cal. 1890); *Journal Pub. Co. v. Kenney*, 24 P.96, 97 (Mont. 1890).

In articulating the theory of separation of powers, based in part on his observations of the English Parliament, Montesquieu described appropriations by the legislature as essential to preserve liberty: "If the legislative power [were] to settle the subsidies, not from year to year, but forever, it would run the risk of losing its liberty, because the executive power would be no longer dependent . . . .." Charles de Montesquieu, *The Sprit of the Laws*, bk. 11, ch. 6 (2nd ed. 1752, Thomas Nugent trans., revised by J.V. Prichard, London, G. Bell & Sons 1914, *reprinted in* Const. Soc. online) <http://www.constitution.org/cm/sol_11.htm#006>.

At the Federal Convention of 1787, the maxim that the legislature held the power of the purse was discussed on June 13 in connection with a proposal by Elbridge Gerry of Massachusetts that "money bills" must originate in the house. JOURNAL OF THE FEDERAL CONVENTION (Boston, 1819) 121; 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 233 (M. Farrand ed. 1911) <http://memory.loc.gov/ammem/amlaw/lwfr.html>. As James Madison recorded him saying, "it was a maxim that the people ought to hold the purse strings" and the house was closer to the people. 1 Farrand RECORDS 233. On July 6, the "grand committee" agreed to include in its report to the Convention "[t]hat all bills for raising or appropriating money . . . shall originate in the first branch of the legislature of the United States, and shall not be altered, or amended, by the second branch; and that no money shall be drawn from the publick treasury, but in pursuance of appropriations to be originated by the first branch." JOURNAL 161; 1 Ferrand RECORDS 538-39. The committee's report on that subject was adopted by the Convention on July 16. JOURNAL 180; 2 Ferrand RECORDS 14-16.

The language agreed to on July 16 was coded by the Committee of Detail as article IV, § 5, in their first draft of the complete document on August 6, substituting "house of representatives" for "first branch" and "senate" for "second branch."[6] JOURNAL at 217; 2 Ferrand RECORDS at 178.

[6] "All bills for raising or appropriating money . . . shall originate in the house of representatives, and shall not be altered or amended by the senate. No money shall be drawn from the publick treasury, but in pursuance of appropriations that shall originate in the house of representatives."

Article IV, § 5, was deleted by motion on August 8 because preventing the Senate from originating money bills lessened its power and thus lessened the power of the smaller states. 2 Ferrand RECORDS at 214, 223-25.

The deleted article was reconsidered on August 13 in a debate that focused on the proper role of the Senate in originating and amending money bills. 2 Ferrand RECORDS at 273-80. George Mason contended that "the purse strings should be in the hands of the Representatives of the people." 2 Ferrand RECORDS at 274. James Wilson observed that "the purse was to have two strings, one of which was in the hands of the H. of Reps. the other in those of the Senate. Both houses must concur in untying, and of what importance could it be which untied first, which last." 2 Ferrand RECORDS at 275. Elbridge Gerry argued that "[t]axation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses." 2 Ferrand RECORDS at 275. Motions to reinstate the section as amended to compromise these differences all failed. 2 Ferrand RECORDS at 280.

The third Committee of Eleven, in their report of September 5, redrafted the section to permit the Senate to originate appropriation bills and amend revenue bills and moved it to article VI, § 12, replacing the language, "Each house shall possess the right of originating bills, except in the cases before mentioned," JOURNAL at 219; 2 Ferrand RECORDS at 181, with the language,"All bills for raising revenue shall originate in the house of representatives, and shall be subject to alterations and amendments by the senate. No money shall be drawn from the treasury but in consequence of appropriations made by law." JOURNAL at 328; 2 Ferrand RECORDS at 505. Consideration of this part of the report was postponed, JOURNAL at 328-29; 2 Ferrand RECORDS at 505-06. It was adopted, as amended to use the language of the Massachusetts Constitution regarding amendments by the Senate, on September 8. JOURNAL at 345;[7] 2 Ferrand RECORDS at 545, 552.

The Committee of Style, in its report of September 12, recodified the adopted articles and sections into essentially the arrangement we see today. The section relating to the power of the purse was divided and its two sentences allocated to two different sections: the sentence requiring revenue bills to originate in the house was codified as art. I, § 7, ¶ (a), JOURNAL at 355, 2 Ferrand RECORDS at 593; the sentence prohibiting payment of money out of the treasury without an appropriation was codified as art. I, § 9, ¶ (e), JOURNAL at 358, 2 Ferrand RECORDS at 596. The language requiring an accounting of the public money was added by amendment without discussion on September 14.[8] The finished document was signed on September 17, 1787. JOURNAL at 389-90; 2 Ferrand RECORDS at 648-49.

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[7] "All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills. No money shall be drawn from the treasury but in consequence of appropriations made by law."

[8] "and a regular statement and account of the receipts and expenditures of all publick money shall be published from time to time." JOURNAL at 378; Ferrand RECORDS at 610.

As Justice Story said in his 1833 Commentaries on the Constitution:

> [I]t is highly proper, that congress should possess the power to decide, how and when any money should be applied for [government] purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources to his pleasure. . . . It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. Congress is made the guardian of this treasure . . . .

III J. Story, Commentaries on the Constitution of the United States, § 1342 (1833 ed., *reprinted in* Const. Soc. online ed. 1997) <http://www.constitution.org/js/js_332.htm>.

For 600 years after the *Magna Carta*, the legislative branch had fought to wrest control of the public purse from the executive. With enactment of the English Bill of Rights and ratification of the U.S. Constitution, the public purse strings were securely in the hands of the legislature on both sides of the Atlantic. As the U.S. Supreme Court said:

> No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. . . . It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, 9 (1 Stat. at Large, 15).
>
> 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 sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

Reeside v. Walker, 52 U.S. 272, 291 (1850). *Accord, Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937).

When federal agencies shut down during a budget impasse, the Attorney General looks to the law as enacted by Congress to determine what functions to continue. 43 U.S. Op. Atty. Gen. 293, 5 U.S. Op. Off. Legal Counsel 1 (1981). No money is paid out of the treasury of the United States without an appropriation by law.

B. Federal Law Does Not Require a State Legislature to Surrender the Power of the Purse

In the 2005 case of *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota,* No. C9-05-5928 (2nd Dist. Ramsey County 2005), Chief Judge Johnson adopted the memorandum of law submitted by the Attorney General arguing that federal law

required the State to continue to make payments under various human service programs notwithstanding the absence of appropriations for them. Order of June 23, 2005, ¶ 8, slip op. at 10. The Memorandum cited four cases[9] to that effect. Each of those courts examined the federal laws requiring prompt payment to recipients of Aid to Families with Dependent Children ("AFDC") and concluded that the Supremacy Clause of the U.S. Constitution, article VI, cl. 2, mandated that state constitutional requirements yield to the federal aid program.

None of those courts considered whether that was what Congress intended. When the issue is not a denial of eligibility or a refusal to pay, but rather only a temporary delay in payments occasioned by a political duel between the chief executive and the Legislature over the biennial budget, it is unlikely that Congress, itself a guardian of the public purse having some experience with government shutdowns, would side with the chief executive. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." (Frankfurter, J.) (regarding whether Congress had intended to abolish legislative immunity for state legislators when it enacted the Civil Rights Act of 1871)). Each of the AFDC cases was litigated in haste, and was over in a matter of days or weeks, so there was never time to reflect on what Congress may have intended. Now, away from the heat of the moment, it is possible to see that those cases were wrongly decided.

Where the Ninth Circuit did a more careful review of federal law governing a program other than AFDC, it found that medical assistance need not be paid during a budget stalemate that lasted less than a month: "Delayed payment is an inherent feature of the Medicaid statutory and regulatory framework." *Dowling v. Davis*, 19 F.3d 445, 447 (9th Cir. 1994).

C. The Legislative Power of the Purse is Preserved in the Minnesota Constitution

The legislative power of the purse was preserved in the Minnesota Constitution of 1857 as article IX, § 9, (renumbered as article XI, § 1, in the restructured Constitution of 1974).

Seven hundred years after the *Magna Carta*, the Minnesota Supreme Court had no doubt that the legislative branch controlled the public purse: "The purpose of the Constitution in prohibiting the payment of money from the state treasury, except upon an appropriation made by law, was intended to prevent the expenditure of the people's money without their consent first had and given." *State ex rel. Nelson v. Iverson*, 125 Minn. 67, 71, 145 N.W. 607, 608 (1914).

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[9] *Pratt v. Wilson*, 770 F. Supp. 539, 543-44 (E.D. Cal 1991); *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 841 (1st Cir. 1981); *Knoll v. White*, 595 A.2d 665 (Pa. Cmwlth. Ct. 1991); *Coalition for Economic Survival v. Deukmejian*, 171 Cal. App.3d 954, 957 (Cal. App. 2 Dist. 1985).

D. A State Obligation May Not Be Liquidated Without an Appropriation

In the years when the taxes at issue in *Nelson v. Iverson* were distributed, the State of Minnesota maintained many departments using open and standing appropriations of department fees and receipts. *See State ex rel. Bradley v. Iverson*, 126 Minn. 110, 147 N.W. 946 (1914). As part of a progressive reform of state government budgeting practices, Laws 1913, chapter 140, abolished all open and standing appropriations, with certain exceptions, and began the biennial budget system used today.

The budgetary reform of 1913 caused the Minnesota Supreme Court to look more closely at the distinction between the legal obligation to pay money and the authority to liquidate the obligation by making the payment. In 1920, the Court held that a statute directing the State Auditor to reimburse counties for one-third the amount paid to dependent mothers under the law did not authorize the State Auditor to issue warrants when the Legislature had not appropriated money for that purpose. As the Court said:

> The mere creation of the liability on the part of the state, or promise of the state to pay, if the statute may thus be construed, is of no force in the absence of an appropriation of funds from which the liability may be discharged.

State ex rel. Chase v. Preus, 147 Minn. 125, 127; 179 N.W. 725, 726 (1920). *Accord*, *Beltrami County v. Marshall*, 271 Minn. 115, 135 N.W.2d 749 (1965); *State ex rel. Spannaus v. Schneider*, 297 Minn. 520, 211 N.W.2d 516 (1973); *Morris v. Perpich*, 421 N.W.2d 333, 339-40 (Minn. App. 1988).

The Court in *Preus* noted that Minnesota's system of biennial budgeting, in which direct appropriations are made by the Legislature every two years in specific amounts and for limited times, was different from the budgetary system of open and standing appropriations that had been in effect before 1913. Statutory language that imposed an obligation would no longer be considered an implied appropriation to carry it out. "Decisions of other states operating under different and perhaps more liberal systems are not helpful and cannot be followed." 147 Minn. at 127, 179 N.W. 725 at 726. As the Court said more recently in summarizing the meaning of those earlier decisions, "A statute creating a liability on the part of the state is not an 'appropriation by law' within the meaning of this constitutional provision." *Butler v. Hatfield*, 277 Minn. 314, 323, 152 N.W.2d 484, 493 (1967).

The rule summarized in *Butler v. Hatfield* has been followed by the Minnesota appellate courts in subsequent cases. When the Minnesota Zoological Board constructed its monorail "Zoo Ride" in 1977, pursuant to statutory language that made Zoo Board operations subject to biennial appropriations, the Legislature limited its appropriations for the Zoo Ride to the receipts generated by the ride. When those receipts were insufficient to make debt service payments as they came due, the Minnesota Supreme Court held that "the state cannot be required to pay money from the general

fund for the Zoo Ride unless and until the legislature appropriates funds for that purpose." *U.S. Fire Ins. Co. v. Zoological Board*, 307 N.W.2d 490, 496 (Minn. 1981).

In the 1980s, the State University Board constructed wood-fired boiler heating plants at its Bemidji and St. Cloud campuses under a statutory authorization to pay for them with the energy savings they generated. When there were no savings, and the Legislature first limited and then eliminated appropriations to pay for the boilers, the Court of Appeals ruled that "the state's obligation [to pay for the boilers] ended when the appropriation was not made." *First Trust Co. v. State*, 449 N.W.2d 491, 496 (Minn. App. 1990).

Without an appropriation by the Legislature of money to liquidate an obligation, the obligation must remain outstanding until the Legislature sees fit, by making an appropriation, to liquidate it.

E. Minnesota Statutes Impose Additional Restrictions on Expenditures from the State Treasury

Eliminating most open and standing appropriations to run state departments was not the only way the Minnesota Legislature in the Twentieth Century sought to plug holes in the public purse. It enacted several other laws restricting the payment of money out of the state treasury without or in excess of an appropriation.

Laws 1907, ch. 272, § 2 (codified as amended at Minn. Stat. § 16A.138 (2006)), makes it a misdemeanor and cause for removal from office for a state official to incur indebtedness on behalf of the state without an appropriation by the Legislature to pay it. Laws 1937, ch. 457, § 36 (codified as amended at Minn. Stat. § 16A.139 (2006)) makes it illegal and cause for removal from office for a state official or employee to spend money for any purpose other than the purpose for which the money was appropriated.

Governor Harold Stassen's reform act of 1939 (Laws 1939, ch. 431) imposed a number of new restrictions designed to ensure that state money was spent only as directed by the Legislature. Article 3, § 3 (codified as amended at Minn. Stat. § 16A.57 (2006)) prohibits a state official from spending state money without an appropriation. Article 2, § 16(c) (codified as amended at Minn. Stat. § 16A.14, subd. 3 (2006)) prohibits a state agency from spending an appropriation until a spending plan for that appropriation has been approved by the Commissioner of Finance. Article 2, § 16(d) (codified as amended at Minn. Stat. § 16A.14, subd. 4 (2006)) requires an agency's spending plan to be within the amount and purpose of the appropriation on which it is based. Article 2, § 16(h), (codified as amended at Minn. Stat. § 16A.15, subd. 3(a) (2006)) makes a state employee who pays money out of the state treasury without or in excess of an appropriation subject to removal from office and personally liable for the amount paid out.

The Minnesota Supreme Court has applied these statutes to affirm the actions of the state Department of Public Welfare to reduce its expenditures for medical assistance as necessary to live

within the amount appropriated by the Legislature. *See LaCrescent Constant Care Ctr. v. State*, 301 Minn. 229, 222 N.W.2d 87 (1974).

The law in Minnesota requiring an appropriation before money is paid out of the state treasury is clear.

F. Session Laws May Also Restrict the Expenditure of State Money

The Legislature has plenary power to create and abolish state officers and agencies, except as limited by the Constitution. This is most often done by laws that are coded in Minnesota Statutes, but it may also be done in appropriation acts that are not coded. *See*, e.g., Act of Apr. 24, 1953, ch. 741, § 38(F)(1)(a), 1955 Minn. Laws 981, 1013 (discussed in *Starkweather v. Blair*, *infra*); Act of June 27, 1985, 1st Sp. Sess. ch. 13, § 13, 1985 Minn. Laws 2072, 2082 (discussed in *State ex rel. Mattson v. Kiedrowski*, *infra*).

The Legislature may, by language attached as a rider to an appropriation, limit the use of the appropriation to pay the salary of a given position, *Bedford v. People ex rel. Tiemann*, 105 Colo. 312, 98 P.2d 474 (1939), or may prohibit that use, thereby abolishing the position at least temporarily. *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955).

On the other hand, in some states a legislative body may not limit the number of positions that may be supported by an appropriation, since that would intrude on the executive power and violate the separation of powers. *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978); *accord*, *Colo. Gen. Assembly v. Lamm*, 136 P.3d 262 (Colo. 2006). Requiring the approval of a legislative committee before certain money is spent also intrudes on the executive power in violation of the separation of powers. *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978); *accord, In re Opinion of the Justices to the Governor*, 341 N.E.2d 254 (Mass. 1976).

The Legislature may not transfer the core functions of a constitutional officer, such as the State Treasurer, to another officer in such a way as to "gut" the office. *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (1986). In *Kiedrowski*, the Court ordered that responsibilities, positions, and funding transferred from the State Treasurer to the Commissioner of Finance be returned to the State Treasurer, 391 N.W.2d at 783, but it did not order that the 7.5 positions abolished by the Legislature, 391 N.W.2d at 779 n.3, be reinstated or that any money be spent that had not been appropriated by the Legislature.

G. Some Ongoing Obligations of State Government are Provided for by Statutory Appropriations

While most of the biennial budget consists of direct appropriations of specific amounts for only two fiscal years, some ongoing obligations of state government are provided for by statutory appropriations that need not be re-enacted every two years. The largest single appropriation in the

budget, $10 billion for general education aid to school districts, is covered by a statutory appropriation, Minn. Stat. § 126C.20 (2006),[10] as are other significant expenses for which previous legislatures have found open and standing appropriations to be advisable. *E.g.*, Minn. Stat. § 16A.641, subd. 10 (2006) (debt service on general obligation bonds); § 167.50, subd. 1 (2006) (debt service on trunk highway bonds); § 273.1384, subd. 5 (2005) (market value homestead credit); and § 477A.03, subd. 2 (2005) (local government aid). A statutory appropriation for construction and maintenance of trunk highways has been used to pay attorneys' fees in litigation relating to the construction of trunk highways. *See Regan v. Babcock*, 196 Minn. 243, 264 N.W. 803 (1936).

III. The Judicial Branch is not Authorized to Exercise this Legislative Power

A. The Constitution Prohibits the Judiciary from Exercising this Legislative Power

In addition to reserving the power of the purse for the Legislature, the Minnesota Constitution prohibits the other branches from exercising legislative powers "except in the instances expressly provided in this constitution." Minn. Const. 1974, art. III. As the Minnesota Supreme Court said early in its history:

> By the constitution, the power of the state government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for. Const., art. 3, § 1. This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction; and 'it is the duty of each to abstain from and to oppose encroachments on either.' Any departure from these important principles must be attended with evil.

In re Application of the Senate, 10 Minn. 78, 10 Gil. 56, 1865 WL 939 (1865).

The Governor is expressly given a role in the appropriation process: the Governor may sign or veto a bill containing an appropriation, or sign the bill and veto an item of appropriation. Minn. Const. 1974, art. IV, § 23. But nowhere in the Constitution is it "expressly provided" that the judicial branch may authorize the executive branch to pay money out of the treasury when the Legislature has not appropriated it.

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[10] As for other education appropriations, not even George Wallace could fund education by executive order when the Alabama Legislature adjourned its regular session without enacting appropriations for education. *Wallace v. Baker*, 336 So.2d 156 (Ala. 1976).

The Minnesota Supreme Court has claimed that the separation of powers gives it "inherent judicial power" to preserve its existence, dignity, and function of deciding cases, *see In re Clerk of Court's Compensation for Lyon County*, 308 Minn. 172, 241 N.W.2d 781 (1976). That power might include the power to order the expenditure of money to support operation of the courts. *Id.*

The Court has also held that it has the inherent judicial authority to regulate the practice of law, to assess lawyers for the cost of that regulation, and to prevent the Legislature from transferring those assessments to the State's general fund. *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973). It has not yet claimed the power to order that tax receipts be paid out of the state treasury in the absence of an appropriation.

B. What Constitutes a "Core Function" is a Nonjusticiable Political Question

Even if the common law, the Minnesota Constitution, Minnesota Statutes, and the decisions of the Minnesota appellate courts did not prohibit the payment of money out of the state treasury without an appropriation, the spending questions that must be addressed by a court when deciding whether to authorize payment of money out of the state treasury without an appropriation because of a budget deadlock would be outside its jurisdiction because they are nonjusticiable political questions. Among the factors that make a question nonjusticiable are "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . . " *Baker v. Carr*, 369 U.S. 186, 217 (1962). "What constitutes an essential service [or "core function"] depends largely on political, social and economic considerations, not legal ones." *Fletcher v. Commonwealth*, No. 2005-SC-000046-TG, slip op. at 11, 163 S.W.3d 852, 860 (Ky. 2005). The courts simply are not equipped to decide these political questions.

IV. Nevertheless, Minnesota Courts have Ordered Payment of Money Out of the State Treasury in the Event of a Budget Deadlock

A. It is Not Unusual for the Legislature to Fail to Enact Necessary Appropriations During the Regular Legislative Session

It is not unusual for the Legislature to fail to enact necessary appropriations during the regular legislative session. Of the 19 biennial regular sessions since 1971, nine failed to enact all the appropriations necessary to start the new fiscal biennium. *See*, *Special Sessions of the Minnesota State Legislature and the Minnesota Territorial Legislature*, Minn. Leg. Ref. Lib. (last modified May 26, 2006) <http://www.leg.state.mn.us/lrl/histleg/spsess.asp>.

In the last four decades, when the House of Representatives, the Senate, and the governorship have not all been controlled by the same political party, failure to enact all the necessary appropriations during the regular session has been the norm. When the House and Senate were

controlled by Republicans and the Governor was a Democrat, Wendell Anderson called a special session to enact necessary appropriations in 1971. When the House was equally divided, the Senate was controlled by Democrats, and the Governor was a Republican, Al Quie called a special session to enact necessary appropriations in 1979. When the House was controlled by Republicans, the Senate by Democrats, and the Governor was a Democrat, Rudy Perpich called a special session to enact necessary appropriations in 1985. When Democrats controlled both the House and Senate and the Governor was a Republican, Arne Carlson called special sessions to enact necessary appropriations in 1993, 1995, and 1997. With a Republican House, a Democratic Senate, and a Reform (Independence) Party Governor, Jesse Ventura called a special session to enact necessary appropriations in 2001. With a Republican House, a Democratic Senate, and a Republican Governor, Tim Pawlenty called special sessions to enact necessary appropriations for his biennial budgets in 2003 and 2005.

B. It is not Unusual for Budget Agreements to be Reached at the Last Minute

As even the most casual observer of the legislative process knows, agreement on the appropriations to support the biennial budget is seldom reached before the closing hours of a regular session. When the three sides don't come together quite as quickly as they may have anticipated, a brief special session to wrap things up may be necessary, as happened in 1979, 1993, 1995, and 2003. *Id*.

When the political differences are more profound, even the special session may extend until almost the start of the new biennium on July 1 of each odd-numbered year, passing the last bills on June 21, 1985, June 26, 1997, and June 29, 2001. *Id.*

C. In 2005, a District Court Ordered Payment of Money Out of the State Treasury Without an Appropriation, Pending Enactment of a Budget

Enactment of the final appropriations bills in 2001 had come one day after the Ramsey County District Court issued an order directing the Commissioner of Finance to pay out of the state treasury money needed to sustain the State's "core functions" pending enactment of the necessary appropriations. *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, No. C9-01-5725 (2nd Dist. Ramsey Cty. June 29, 2001) (Cohen, C.J.). The order was moot the day it was issued. It was not appealed.

In 2005, the State's record of successful budget negotiations came to an end. Even though the Governor, the House, and the Senate had routinely pushed the constitutional deadline to adjourn the regular session, and had even pushed the deadline for the start of the new biennium, they had never failed to reach an agreement before the start of the new biennium. But on June 23, 2005, the

Ramsey County District Court issued an order directing the Commissioner of Finance to pay out of the state treasury money needed to sustain the State's "core functions" pending enactment of the necessary appropriations. *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, No. C9-05-5928 (2nd Dist. Ramsey Cty. June 23, 2005) (Johnson, C.J.). The timing of the order meant that the Governor and legislators had a week to assess the impact the order would have on the operations of state government if they failed to reach an agreement. The appropriations for higher education,[11] public safety,[12] and state government,[13] had been enacted during the regular session, and the bill to fund state parks[14] was ready to be enacted in the special session before the start of the new biennium. With the court's order to fund "core functions" in place, the Governor and legislative leaders knew that the adverse consequences of failing to reach an agreement would be limited. They could afford to hold out a while longer, and they did. The court authorized disbursements of over $569 million, *In re Temporary Funding,* Minnesota Department of Finance Accounting of Court-Ordered Appropriations for Fiscal Year 2006, pt. 1 at 4 (Sep. 27, 2005), of which only one payment, totaling less than $1 million, *id.* pt. 2 at 3-4, was actually made before a temporary appropriation[15] was enacted on July 9, 2005. The remaining three (out of seven) appropriation acts were enacted by July 14, 2005.[16] The appropriations were made effective retroactively from July 1, 2005, and were said to "supersede and replace funding authorized by order of the Ramsey County District Court in Case No. 9-05-5928,"[17] or to "supersede any amounts . . . authorized by order of the Ramsey County District Court in Case No. C9-05-5928."[18]

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[11] Act of May 26, 2005, ch. 107, 2005 Minn. Laws 619.

[12] Act of June 2, 2005, ch. 136, 2005 Minn. Laws 901.

[13] Act of June 3, 2005, ch. 156, 2005 Minn. Laws 1628.

[14] Act of June 30, 2005, First Spec. Sess. ch. 1, 2005 Minn. Laws 1983.

[15] Act of July 9, 2005, First Spec. Sess. ch. 2, 2005 Minn. Laws 2273.

[16] *See* Act of July 14, 2005, First Spec. Sess. ch. 4, 2005 Minn. Laws 2454 (health and human services); Act of July 14, 2005, First Spec. Sess. ch. 5, 2005 Minn. Laws 2790 (education); Act of July 14, 2005, First Spec. Sess. ch. 6, 2005 Minn. Laws 2941 (transportation).

[17] Ch. 4, art. 9, § 16, 2005 Minn. Laws 2790; ch. 6, art. 4, § 1, 2005 Minn. Laws 3058.

[18] Ch. 5, art. 1, § 54, subd. 1, 2005 Minn. Laws 2822; art. 2, § 84, subd. 1, 2005 Minn. Laws 2877; art. 3, § 18, subd. 1, 2005 Minn. Laws 2893; art. 4, § 25, subd. 1, 2005 Minn. Laws 2908; art. 5, § 17, subd. 1, 2005 Minn. Laws 2916; art. 6, § 1, subd. 1, 2005 Minn. Laws 2916; art 7, § 20, subd. 1, 2005 Minn. Laws 2926; art. 8, § 8, subd. 1, 2005 Minn. Laws 2931; art. 9, § 4, subd. 1, 2005 Minn. Laws 2934; art. 10, § 5, subd. 1, § 6, 2005 Minn. Laws 2937; § 7, 2005 Minn. Laws 2938.

On July 26, 2005, the district court issued an order providing that the temporary-funding order expired by its own terms as of July 14.

D. Two Separate Suits Challenging the Action of the District Court Were Dismissed

No member of the Legislature had sought to intervene in the 2005 case in district court, and no appeal was taken from its orders, but two separate actions were filed to stop the Commissioner of Finance from paying money out of the state treasury without an appropriation by law. Both were dismissed.

1. Writ of Quo Warranto in Supreme Court

On August 31, 2005, 13 Republican members of the House of Representatives filed a petition for a writ of quo warranto in the Minnesota Supreme Court against Peggy Ingison in her official capacity as Commissioner of Finance, seeking an order requiring the commissioner to cease disbursing state money without an appropriation by law. *State ex rel. Sviggum v. Ingison*, No. A05-1742 (Minn. 2005). The Supreme Court dismissed the petition without prejudice, allowing the legislators to file it in district court. *Id.* (Sep. 9, 2005).

2. Writ of Quo Warranto in District Court

In the amended petition filed in district court, the 13 Representatives were joined by 15 members of the Senate, eight Republicans and seven Democratic-Farmer-Labor Party members. *State ex rel. Sviggum v. Ingison*, No. C9-05-9413 (2nd Dist. Ramsey Cty. Dec. 2, 2005). On March 3, 2006:

> The district court denied the petition for a writ of quo warranto, holding that although the legislators had taxpayer standing to restrain the unlawful use of public money, quo warranto was not the appropriate action to challenge past official conduct. The court noted that quo warranto was instead intended to remedy "a continuing course of unauthorized usurpation of authority." The court also held that the case was moot because it did not present a live case or controversy for which judicial relief was available, and it was not capable of repetition yet likely to evade review. Further, the court held that the legislators' petition was barred by laches because they failed to intervene in the temporary-funding proceedings and instead waited until it was too late for the court to grant relief. Finally, the court concluded that the constitution did not bar judicial action to preserve core government functions pending the necessary appropriations by the Legislature.

State ex rel. Sviggum v. Hanson, 732 N.W.2d 312, 317, No. A06-840, slip op. at 4-5 (Minn. App. May 22, 2007).

The legislators appealed. The Minnesota Court of Appeals reversed the district court's conclusion that the legislators were guilty of laches, finding that "[t]hey may have reasonably decided not to become individually or collectively enmeshed in a judicial proceeding while they were trying to pass a budget. Furthermore, the commissioner has not established that she was prejudiced by the delay." 732 N.W.2d 312, 318, No. A06-840, slip op. at 6. The court affirmed the remainder of the district court's decision, concluding that "quo warranto cannot be used to challenge the constitutionality of completed disbursements of public funds," 732 N.W.2d at 320, slip op. at 10, and that the action was made nonjusticiable by the Legislature's having enacted appropriations that expressly superseded the action of the district court, 732 N.W.2d at 323, slip op. at 14. As the court said:

> [W]e cannot exercise powers that belong to the legislative branch. The Minnesota Constitution provides the legislature with the power to make appropriations. . . .
>
> The legislature has exercised its fundamental constitutional power to appropriate the public funds and to provide that the appropriations are retroactive to the beginning of the biennium and supersede the court-approved disbursement by the commissioner. . . . Not only is the question nonjusticiable from the courts' standpoint, but, because of the structure and function of legislative power, it is the legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses. The legislature could prevent another judicially mandated disbursement of public funds without an authorized appropriation by, for example, creating an emergency fund to keep the government functioning during a budgetary impasse or enacting a statute setting forth the procedures to be followed during a budgetary impasse. . . .
>
> We recognize the legislators' compelling argument that the commissioner's court-approved disbursements interfered with their appropriations power and improperly affected the dynamics of the legislative process during the special session. . . . If the events of 2005 repeat themselves, the legislators can raise a timely challenge to seek a judicial remedy for their asserted injury.

732 N.W.2d at 322-23, slip op. at 14-15 (citations omitted).

V. Conclusion

Although the Minnesota Constitution gives the power of the purse to the Legislature, and denies it to the judiciary, Minnesota district courts have now twice ordered the payment of money out of the state treasury without an appropriation, when the Legislature and the Governor deadlocked on enactment of the state budget. While the Minnesota Court of Appeals has recognized the Legislature's "fundamental power to appropriate the public funds," 732 N.W.2d at 323, slip op. at 14, the court has served notice that, should a similar circumstance arise in the future, the Legislature had best be prepared to appear in court to defend that fundamental power.