

2019

The “Law of Ramsey County” – Reflections of a Trial Judge on State Government Gridlock

Kathleen Gearin

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Constitutional Law Commons](#), [Judges Commons](#), [Jurisdiction Commons](#), [Legal Remedies Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Gearin, Kathleen (2019) "The “Law of Ramsey County” – Reflections of a Trial Judge on State Government Gridlock," *Mitchell Hamline Law Review*: Vol. 45 : Iss. 2 , Article 5.
Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss2/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

THE “LAW OF RAMSEY COUNTY” – REFLECTIONS OF A TRIAL JUDGE ON STATE GOVERNMENT GRIDLOCK

Judge Kathleen Gearin[†]

“A statesman gains little by the arbitrary exercise of ironclad authority upon all occasions that offer[.] A little concession, now and then, where it can do no harm is the wiser policy.”¹

I.	INTRODUCTION.....	502
II.	STATE BUDGETING OVERVIEW	504
III.	THE RISE OF MINNESOTA STATE GOVERNMENT GRIDLOCK.....	506
	<i>A. Averted Partial Government Shutdown in 2001.....</i>	<i>507</i>
	<i>B. Partial Government Shutdown in 2005.....</i>	<i>509</i>
IV.	GRIDLOCK REACHES RAMSEY COUNTY COURT AGAIN	515
	<i>A. Brayton v. Pawlenty in 2010.....</i>	<i>515</i>
	<i>B. In re Temporary Funding Litigation in 2011.....</i>	<i>520</i>
V.	GROWING SKEPTICISM FOR JUDICIALLY-ORDERED FUNDING ..	528
VI.	ANALYSIS AND CONCLUSION.....	530

I. INTRODUCTION

Partisan gridlock at the Minnesota State Capitol inevitably heads south along a well-worn path from the Cass Gilbert-designed capitol building to the Ramsey County District Court’s classic art deco structure. During my tenure as Second Judicial District Chief Judge,² I presided over

[†] Judge Kathleen Gearin served as a Minnesota Second Judicial District Judge for twenty-six years, including four years as Chief Judge. She retired in 2013. The author expresses her appreciation to Mitchell Hamline School of Law students Lori Dockendorf-Nudd, Katherine McKim, and Heather O’Neill for their research and editorial assistance.

1. SAMUEL L. CLEMENS, A CONNECTICUT YANKEE IN KING ARTHUR’S COURT 141 (1917) (offering an account of Hank Morgan, a nineteenth-century New England resident, forced to navigate the medieval English legal system following a journey through time and space).

2. The Second Judicial District encompasses the City of St. Paul and its immediate suburbs. The district is most commonly referred to as Ramsey County District Court. All ten judicial districts in the state contain multiple counties except for the two with the largest populations: Ramsey County and Hennepin County, which includes the City of Minneapolis and its suburbs.

two of these gridlock cases: *Brayton v. Pawlenty* in 2010³ and *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota* in 2011.⁴ Despite the gravity of the constitutional issues at stake in these cases, only the first resulted in a substantive decision by the Minnesota Supreme Court.⁵ The procedural posture and actions of the coordinate branches that ultimately resolved the 2005 state government shutdown and the 2011 budget crisis resulted in supreme court rulings that left the ultimate constitutional issue of whether the judicial branch can order disbursements from the state treasury unresolved.

The lack of prior appellate level review in these cases was put on full display in the most recent government gridlock conflict, *Ninetieth Minnesota State Senate v. Dayton*.⁶ In that case, when then-Chief Judge John Guthmann noted that no appellate court had ever passed judgment on the legality of court ordered temporary funding, one party grasping for an argument said, “[w]ell, it’s the law of Ramsey County.”⁷ Though it is unlikely that Chief Judge Guthmann found the argument particularly persuasive, it underscores the lack of clarity in this area of Minnesota constitutional law. However, unlike these earlier cases, *Ninetieth Minnesota State Senate* did reach the Minnesota Supreme Court in 2017, and its decision finally gave some guidance on how district courts should respond to future government gridlock and what powers the Minnesota Constitution confers on each branch. The decision, however, rests on specific facts relating to the amount of operating funds available to the legislature prior to the start of the next regularly scheduled session and judicial restraint principles. That case will be discussed later in this article.

Part II of this article briefly describes the Minnesota state budgeting process.⁸ Part III provides an overview of earlier Minnesota state

3. *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010).

4. Findings of Fact, Conclusions of Law, and Order Granting Motion For Temporary Funding, *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota* (Ramsey Cty. Dist. Ct. June 29, 2011) (No. 62-CV-11-5203), https://www.leg.state.mn.us/docs/2011/other/110561/62CV115203_Executive_findings_of_fact.pdf [<https://perma.cc/3WUW-3YVM>].

5. *Brayton*, 781 N.W.2d at 357.

6. See *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609 (Minn. 2017).

7. Briana Bierschbach, *How One County Court Came to Play Such a Big Role In Minnesota Politics*, MINNPOST.COM (July 6, 2017), <https://www.minnpost.com/politics-policy/2017/07/how-one-county-court-came-play-such-big-role-minnesota-politics/> [<https://perma.cc/B63J-PZQZ>].

8. *Infra* Part II.

government shutdowns.⁹ Part IV summarizes the procedural history in the *Brayton* and *In re Temporary Funding*.¹⁰ Part V describes *Ninetieth Minnesota State Senate* and discusses the challenges of balancing public interests with the demands of the Minnesota Constitution.¹¹ Part VI concludes with a warning that the “law of Ramsey County” is evolving, and the Minnesota Supreme Court’s decision in *Ninetieth Minnesota State Senate* makes it less likely that future Ramsey County chief judges will authorize expenditures from the state treasury in the event of a shutdown. It also makes it likely that if funding is judicially ordered, it will be far narrower in scope.¹² Finally, this article also suggests that Minnesota would be better served by adopting a default budget statute, such as those used in Wisconsin and Rhode Island, rather than continuing with the threat of shutdowns.¹³

II. STATE BUDGETING OVERVIEW

The Minnesota Constitution requires that the legislature and governor adopt a balanced two-year budget (known as the biennial budget) for state government operations.¹⁴ While the state constitution does not expressly enumerate this balanced budget requirement—the issuance of debt is only allowed for express purposes;¹⁵ borrowing money to pay for a budget deficit is not one of those purposes.¹⁶

Minnesota law contemplates a collaborative budgeting process between the executive and legislative branches. In January of every odd-numbered year, the governor, with the assistance of the state budgeting agency, Minnesota Management and Budget, proposes a comprehensive and balanced two-year state budget to the legislature.¹⁷ This proposal is

9. *Infra* Part III.

10. *Infra* Part IV.

11. *See infra* Part V.

12. *See infra* Part VI.

13. *See infra* Part VI.

14. *See* MINN. CONST. art. XI, § 5 (1857); MINN. STAT. § 16A.04(1) (2017); MINN. STAT. § 16A.11(2) (2017). *See generally* MINN. ISSUES RESOURCE GUIDES: STATE BUDGET PROCESS, MINN. LEGIS. REFERENCE LIBRARY (2016), <https://www.leg.state.mn.us/lrl/guides/guides?issue=budget> [<https://perma.cc/Q3DP-3WWV>].

15. *See supra* note 14. *See also* LEGISLATIVE PARTY CONTROL: A CHART, 1901 TO THE PRESENT, MINN. LEGIS. REFERENCE LIBRARY (2018), https://www.leg.state.mn.us/lrl/history/caucus_table [<https://perma.cc/TQV3-9J2H>].

16. MINN. CONST. art. XI, § 5.

17. MINN. STAT. § 16A.11 (2017); MINN. STAT. § 16A.04 (2017). In addition to a detailed operating budget, Minnesota Statute section 16A.11 directs the governor to submit

further refined in late February or early March after new economic forecast data becomes available.¹⁸ The governor and the legislature must then reach an agreement on a balanced budget and enact the needed appropriation and revenue laws by the first Monday following the third Saturday in May—the date that the Minnesota Constitution requires the legislature to adjourn.¹⁹ When the executive and legislative branches do not reach an agreement, it creates a state government funding crisis, which then ends up in the courts all too often. Like almost all lawsuits, they are initiated at the district court level. In these cases, the venue is Ramsey County district court—located in Minnesota’s capital city, St. Paul.

These statutory and constitutional requirements give the executive and legislative branches about three and a half months to reach an agreement on a state budget for the next two fiscal years. If no agreement is reached by the May deadline, the governor may call a special legislative session, which recalls legislators to the state capitol.²⁰ Thus, the true deadline of consequence for the legislative and executive branches to reach a budget agreement is July 1 when the new fiscal year begins.²¹ If they fail to reach an agreement by that date, it is unclear what should happen. There are no statutes addressing what, if any, state treasury disbursements are allowed absent appropriations bills passed by the legislature and signed by the governor.

Minnesota is not the only state with a balanced budget requirement. Forty-nine states require balanced budgets, with Vermont as the sole exception.²² What constitutes a balanced budget, and what mechanisms must be used to keep it balanced in the event revenues or expenses outstrip expectations, varies from state to state. Despite the differences, the balanced budget requirement is an enduring fixture of the state legislative process (unlike at the federal level).

a “budget message” and a capital investment budget to the legislature. The capital investment budget (or “bonding bill”) is submitted in even-numbered years. *Id.* at subdv. 2, 4.

18. See MINN. STAT. § 16A.103 (2017). See also MINN. H.R., RESEARCH DEP’T, THE STATE BUDGET PROCESS (2016), https://www.house.leg.state.mn.us/hrd/issinfo/gvst_sbpx.aspx?src=14 [<https://perma.cc/WNR7-DYSW>].

19. See MINN. CONST. art. IV, § 12.

20. *Id.*

21. See MINN. ISSUES RESOURCE GUIDES: STATE BUDGET PROCESS, *supra* note 14.

22. NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS, NAT’L CONF. OF STATE LEGIS. 2 (2010), <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf> [<https://perma.cc/7RLB-4XPT>].

While the balanced budget requirement is long-standing, the frequency and severity of budgeting disputes between the legislative and executive branches have increased significantly. At least nineteen states have started new fiscal years without a final budget since 2002.²³ Five of these states—Michigan, Pennsylvania, New Jersey, Tennessee, and Minnesota—have experienced partial government shutdowns as a result.²⁴ The federal government, even without a balanced budget requirement, also has experienced nineteen funding gaps with varying degrees of severity since 1976.²⁵ While this article was being written, the federal government endured the nineteenth and longest partial shutdown, lasting thirty-four days, in United States history.²⁶

Though there has been an uptick in government gridlock litigation in recent years, it is not an all-together new phenomenon. There are at least two other instances of partial government shutdowns or related litigation in Minnesota history prior to the *Brayton* and *In re Temporary Funding* cases.

III. THE RISE OF MINNESOTA STATE GOVERNMENT GRIDLOCK

Differing opinions and divided government are hallmarks of democratic governance. Minnesota is no different. Since 1901, the state government in Minnesota has been divided for thirty-two out of the sixty-three biennial sessions.²⁷ In the past thirty years, divided government has become the norm.²⁸ Single party control in Minnesota has occurred only twice since 1990.²⁹

23. See MINN. ISSUES RESOURCE GUIDES: STATE BUDGET PROCESS, *supra* note 14.

24. LATE STATE BUDGETS, NAT'L CONF. OF STATE LEGIS. (Aug. 27, 2010), <http://www.ncsl.org/research/fiscal-policy/late-state-budgets.aspx> [<https://perma.cc/BBP6-WC39>].

25. See Ryan Struyk & Joyce Tseng, *The History of US Government Shutdowns in 1 Chart*, CABLE NEWS NETWORK (Jan. 3, 2018, 8:13 AM), <https://www.cnn.com/2018/01/13/politics/us-government-shutdowns-budget-chart/index.html> [<https://perma.cc/3DMW-D8FL>].

26. Mihir Zaveri, Guilbert Gates, & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/USF3-XMET>].

27. More than fifty percent of all Minnesota legislative sessions held since 1901 have been divided. See LEGISLATIVE PARTY CONTROL, *supra* note 15.

28. See *id.*

29. *Id.*

A. Averted Partial Government Shutdown in 2001

From the standpoint of political party affiliation, Minnesota’s 2001 Legislative Session was marked by a truly divided government. Republicans held a majority in the House of Representatives.³⁰ The Democratic-Farmer-Labor Party (DFL) controlled the State Senate.³¹ Jesse Ventura of the Independence Party occupied the Governor’s Office.³² Despite a state budget surplus, the legislature and governor struggled to reach an agreement on how to spend it.³³

When it became clear that a government shutdown might occur, Minnesota Attorney General Mike Hatch petitioned the Ramsey County District Court on June 20, 2001, asking that the core government functions receive funding and authority to operate if the legislature did not enact appropriations by the end of the 2001 fiscal year.³⁴ The petition acknowledged that article XI, section 1 of the Minnesota Constitution provides: “no money shall be paid out of the treasury of this State except in pursuance of an appropriation by law” and that article IV gives the Minnesota Legislature the power of appropriation.³⁵ However, the petition also asserted that state government is mandated by the Minnesota Constitution, the United States Constitution, and federal law pursuant to the Supremacy Clause³⁶ to perform “certain services which are ‘core or inherent’ functions [that] cannot be abridged by the legislative branch.”³⁷

30. *Id.*

31. *Id.*

32. *Id.* See also Laura McCallum, *Politics on a Three-Legged Stool*, MINN. PUB. RADIO (May 3, 2001), http://news.minnesota.publicradio.org/features/200105/03_mccallum_budget/ [https://perma.cc/JQJ2-KHCQ].

33. The State Senate wanted to use half of the anticipated budget surplus for transportation, health care and higher-education projects. Governor Ventura and the State House of Representatives wanted to use the entire surplus to issue rebates to the public. See McCallum, *supra* note 32.

34. See Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, *In re* Temporary Funding of Core Functions of the Exec. Branch (Ramsey Cty. Dist. Ct. June 29, 2001) (Cohen, C.J.) (No. C9-01-5725), <https://www.leg.state.mn.us/docs/2009/other/090583.pdf> [https://perma.cc/33X6-974N] [hereinafter “District Court Order (June 2001)”]; Michael Khoo, *With Shutdown Averted, Legislature Adjourns*, MINN. PUB. RADIO (June 30, 2001), http://news.minnesota.publicradio.org/features/200106/30_khoom_session/ [https://perma.cc/X28M-6L8E].

35. District Court Order (June 2001), *supra* note 34, at 6 (quoting MINN. CONST. art. XI, § 1).

36. *Id.*; U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and

The petition outlined broad definitions for the meaning of “core” or “essential” government services, relying on criteria previously articulated by the federal Office of Management and Budget and the United States Attorney General during a federal government shutdown.³⁸ Applying this criteria to Minnesota, Attorney General Hatch requested a declaration that (1) the executive branch must carry out core government functions as required by the Minnesota Constitution, United States Constitution, and federal law; (2) the state treasury shall issue checks and process funds necessary to pay for these obligations; and (3) that each government entity be allowed to determine its own core functions.³⁹ The petition also called for the appointment of a special master to resolve any issues relating to core function determinations and payment for these services.⁴⁰

The following day, June 21, Ramsey County Chief Judge Lawrence Cohen set a hearing for June 29, two days before the start of the next fiscal year.⁴¹ At that hearing, Judge Cohen issued the order granting the attorney general’s motion for temporary funding, with payments to be made from the state treasury for core functions from July 1, 2001, through July 23, 2001, until the legislature enacted the necessary appropriations bills or until another order from the court.⁴²

In response to concerns that a court order would upset the balance of power between the three branches, Attorney General Hatch noted that “there is a precedent for one branch of government [to] tread[] on the turf

the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

37. Petition of Attorney General Mike Hatch at 4, *In re* Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota (Ramsey Cty. Dist. Ct. June 29, 2001) (No. C9-01-5725), <https://www.leg.state.mn.us/docs/2009/other/090583.pdf> [<https://perma.cc/VDV9-5LUN>].

38. *Id.* at 5. The criteria for what portions of government should receive funding and the authority to operate was three-fold: (1) services necessary for national security; (2) services necessary to perform contract obligations; and (3) services necessary to protect life and property. *Id.*

39. District Court Order (June 2001), *supra* note 34, at 7.

40. *Id.*

41. See Peter S. Wattson, *Power of the Purse in Minnesota*, MINN. SENATE COUNSEL § IV at 13-14 (July 17, 2017), https://www.senate.mn/departments/scr/treatise/Power_of_the_Purse/Power_of_the_Purse.pdf [<https://perma.cc/TM5P-W3BT>] (citing *In re* Temporary Funding of Core Functions of the Exec. Branch (Ramsey Cty. Dist. Ct. June 29, 2001) (Cohen, C.J.) (No. C9-01-5725)).

42. District Court Order (June 2001), *supra* note 34, at 7.

of another.”⁴³ The attorney general reasoned, “[i]n the south with desegregation, there were many times when courts would have to order that school districts build schools so that kids could get educated. They weren’t financed or appropriated by the legislature, the executive branch wasn’t building them, the courts ordered that it be done[.]”⁴⁴

Ultimately, Chief Judge Cohen’s order was moot because the legislature and governor agreed on a budget deal the next day, averting the shutdown.⁴⁵ However, the impasse did create a template for future government gridlock: the legislature and governor unable to reach a compromise followed by intervention by the attorney general. It also may have communicated to the legislative and executive branches that judicial intervention would soften the consequences of future budgetary brinksmanship. Regardless of the implications of Judge Cohen’s order or the lessons learned by the other branches, the pattern repeated itself only a few years later.

B. Partial Government Shutdown in 2005

During the 2005 Legislative Session, Republican Governor Tim Pawlenty and the DFL-controlled legislature failed to timely enact legislation authorizing funding for the largest spending areas: health, human services, education, and transportation.⁴⁶ Between the May constitutional adjournment date and June 30, the legislature and governor were unable to reach a compromise agreement that would stop a partial government shutdown. The failure of the parties to reach an agreement by July 1 marked the first time in Minnesota history that the legislature failed to enact the necessary appropriation and revenue bills before the start of the new biennium.⁴⁷

In the months leading up to the partial government shutdown, it became evident that a compromise agreement was unlikely. Attorney General Hatch and Governor Pawlenty both filed petitions on June 15, 2005, requesting that the Ramsey County District Court authorize funding

43. Elizabeth Stawicki, *Judge Steps Onto Legislature’s Turf*, MINN. PUB. RADIO (June 29, 2001), http://news.minnesota.publicradio.org/features/200106/29_stawickie_judge/ [<https://perma.cc/R5RQ-QCCL>].

44. *Id.*

45. See Khoo, *supra* note 34.

46. See Wattson, *supra* note 41, at 13, 14; Tom Scheck, *Minnesota State Shutdown Ends with Early-Morning Deal*, MINN. PUB. RADIO (July 9, 2005), http://news.minnesota.publicradio.org/features/2005/07/09_scheckt_day9/ [<https://perma.cc/J3EX-PXLX>].

47. Wattson, *supra* note 41.

for certain core government functions in anticipation of a possible partial shutdown on July 1.⁴⁸ Attorney General Hatch again argued that the legislature had failed to fulfill its duty to provide appropriations, leaving executive branch officials, the agencies, and other government entities unable to carry out their mandates to provide required key functions and services for Minnesotans.⁴⁹ Thus, a judicial order was necessary to avert the looming emergency and ensure that critical services required by the Minnesota Constitution, the United States Constitution, federal statute or regulation would continue during a shutdown.⁵⁰ Governor Pawlenty’s petition relied in part on a principle announced in a 1976 Minnesota case that addressed the separation of powers, stating that when “‘established and reasonable procedures have failed’⁵¹ to result in sufficient appropriations for constitutionally-mandated functions, this Court . . . may provide relief to aggrieved officials.”⁵²

Through their petitions, both Governor Pawlenty and Attorney General Hatch further sought a declaration that the legislature’s failure to approve appropriations necessitated that the governor and executive branch officials have authorization to carry out “core functions” and “critical services,” and that the finance commissioner have authority to issue checks to ensure payment for these functions and services.⁵³ The attorney general also requested the appointment of a special master for the purpose of hearing disputes and providing recommendations to the court for any additional funding.⁵⁴

On June 23, Ramsey County Chief Judge Johnson ordered that the state continue funding programs and services as laid out in the “core and critical functions list,” noting that the court was not making any determination about the number of employees required to carry out those

48. Petition of Governor Tim Pawlenty at 3, *In re* Temporary Funding of Core Functions of the Exec. Branch (Ramsey Cty. Dist. Ct. June 15, 2005) (No. CO-05-5928), https://www.leg.state.mn.us/docs/2005/other/050414/Petitions_by_Tim_Pawlenty.pdf [<https://perma.cc/6NTG-YFQD>] [hereinafter “Pawlenty Petition”]; Petition of Attorney General Mike Hatch, at 6, *In re* Temporary Funding of Core Functions of the Exec. Branch (Ramsey Cty. Dist. Ct. June 15, 2005) (No. CO-05-5928), https://www.leg.state.mn.us/docs/2005/other/050414/Petitions_by_Mike_Hatch.pdf [<https://perma.cc/X9YB-SM38>] [hereinafter “Hatch Petition (June 2005)”].

49. Hatch Petition (June 2005), *supra* note 48, at 2.

50. Pawlenty Petition, *supra* note 48, at 3 (internal footnotes and citations omitted); Hatch Petition (June 2005), *supra* note 48, at 6.

51. Clerk of Courts Comp. for Lyon Cty. v. Lyon Cty. Comm’rs, 241 N.W.2d 781 (Minn. 1976).

52. Pawlenty Petition, *supra* note 48, at 2.

53. *Id.* at 7; Hatch Petition (June 2005), *supra* note 48, at 7.

54. Hatch Petition (June 2005), *supra* note 48, at 7-8.

functions.⁵⁵ Chief Judge Johnson’s order relied on the principle that each of the six executive branch constitutional officers specified in article X of the Minnesota Constitution are required to “perform certain core functions which are an inherent part of their Offices. Performance of these core functions may not be abridged.”⁵⁶ Moreover, the failure to fund these core services would nullify the offices in violation of the Minnesota Constitution.⁵⁷ Echoing Attorney General Hatch’s core function criteria from 2001, the district court concluded that a “critical service” was one necessary to “protect the lives, health and safety of those residing in Minnesota; or, safeguard public property against loss or casualty during any period in which government services may be interrupted.”⁵⁸

The order directed an appointed special master to determine whether particular government programs constituted “critical services.” Then, only after the special master’s approval, the finance commissioner would make payments from the state treasury for continued operations.⁵⁹ The order’s effect was immediate. Per its terms, the order would remain in effect until July 23, 2005, the enactment of a complete state budget, or further order of the court.⁶⁰ Notably, there were no appeals or challenges made to the order at that time.

The order remained in effect for nine days until the legislature and governor enacted a “lights on” temporary spending bill that allowed the non-funded agencies and programs to receive the same amounts they were allocated in the previous appropriation bills.⁶¹ The legislature and governor finally reached agreement on July 14. Attempting to blunt the constitutionally questionable nature of court-ordered treasury disbursements, or lessen the public criticisms of the shutdown, the legislature included language that made the two-year appropriations retroactive to July 1, 2005.⁶²

55. *In re* Temporary Funding of Core Functions of the Exec. Branch, Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, at Ex. B, (Ramsey Cty. Dist. Ct. June 23, 2005) (No. C9-05-5928), https://www.leg.state.mn.us/docs/2005/other/050414/Order_by_Judge_Gregg_Johnson.pdf [<https://perma.cc/ZW3J-773V>] [hereinafter “District Court Order (June 2005)”].

56. *Id.* at 7 (citing *State ex. rel. Mattson v. Kiedrowski*, 391 N.W. 2d 777 (Minn. 1986)).

57. District Court Order (June 2005), *supra* note 55, at 7.

58. Pawlenty Petition, *supra* note 48, at 3–4.

59. District Court Order (June 2005), *supra* note 55, at 8.

60. *Id.* at 9.

61. 2005 Minn. Laws 2273.

62. *State ex. rel. Sviggum v. Ingison* (Ramsey Cty. Dist. Ct. Mar. 3, 2006) (No. 62-C9-05-9413), https://www.leg.state.mn.us/docs/2005/other/050414/C9-05-9413_Order_and_Memorandum.pdf [<https://perma.cc/DX33-GZ95>]. Each of these bills

This language became important when legislators filed quo warranto⁶³ petitions to stop future state fund disbursements by the executive branch without an appropriation. The petitions were intended to spark appellate review of the underlying constitutional issues that surface when courts are asked to order appropriations as a perceived last resort.⁶⁴

On August 31, 2005, thirteen state legislators filed a petition for a writ of quo warranto in the Minnesota Supreme Court against Finance Commissioner Peggy Ingison, challenging the constitutionality of court ordered expenditures.⁶⁵ They sought an order “requiring [Commissioner Ingison] and her successors to cease and desist from any further disbursements of state funds at the end of the fiscal biennium without appropriation by law.”⁶⁶ The justices concluded that the reasons provided by petitioners for initiating their action in the Supreme Court were insufficient to overcome the requirement that quo warranto proceedings begin in district court. The petition was dismissed without prejudice on September 9, 2005.⁶⁷

On September 28, 2005, the legislators refiled their petition for a writ of quo warranto in Ramsey County District Court. Their petition asked the district court to issue a writ of quo warranto to Finance Commissioner Ingison requiring her to show by what constitutional authority she disbursed state funds at the end of a biennium without an appropriation by law; or in absence of such showing, to require her and her successor to

contained the following language with minor differences, but with the same effect: “Appropriations in this act are effective retroactively from July 1, 2005, and supersede and replace funding authorized by the Ramsey District Court . . . as well as by Laws 2005 1st Spec Session Chapter 2, which provided necessary funding through July 14, 2005[.]” See generally 2005 Minn. Laws 2454 (health and human services); 2005 Minn. Laws 2790 (education); 2005 Minn. Laws 2941 (transportation).

63. A writ of quo warranto is a proceeding that “inquire[s] [into] whether authority existed to justify or authorize certain acts of a public character or interest.” The Latin translation is roughly “by what authority” or “by what warrant?” *Quo Warranto*, Black’s Law Dictionary (10th ed. 2014) (quoting CHARLES HERMAN KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW 662 (2d ed. 1952)).

64. Wattson, *supra* note 41.

65. Sup. Ct. Or. Denying Pet. Quo Warranto, State *ex rel.* Sviggum v. Ingison (Minn. Sept. 9, 2005) (No. A05-1742) (“[Petitioners] seek an order requiring respondent and her successors to cease and desist from any further disbursements of state funds at the end of the fiscal biennium without an appropriation by law.”), https://www.leg.state.mn.us/docs/2005/other/050414/A05-1742_SupCt_Order.pdf [<https://perma.cc/T5VH-KW8T>].

66. Sup. Ct. Or. Denying Pet. Quo Warranto, *supra* note 65, at 1-2.

67. *Id.* at 5.

cease and desist from any further future state funding disbursements without an appropriation by law.⁶⁸

Chief Judge Johnson, who issued the prior order, denied this writ in its entirety, reasoning that the legislators were precluded from bringing their claim because “the writ by its very nature is not available to challenge past conduct. The writ is intended to apply to situations involving a continuing course of unauthorized usurpation of authority”⁶⁹ and here, there was no continuing, unauthorized usurpation.⁷⁰ The court also wrote that petitioners failed to meet the standard that the “challenged conduct is capable of repetition, yet likely to evade judicial review” established in *Elzle v. Commissioner of Public Safety*.⁷¹ In a nod to the issue’s moot nature, Chief Judge Johnson further explained that the legislature ultimately enacted language ratifying the funding ordered by the district court.⁷²

Chief Judge Johnson next defended the constitutionality of the original decision to provide funding for core government services. Chief Judge Johnson reasoned, “[t]he constitution of the state of Minnesota . . . is not a ‘suicide pact’ and must be interpreted to further its principle purpose of preserving the state.”⁷³ Chief Judge Johnson explained, “[t]he executive and judicial branches must retain the right and duty to respond to such emergencies as presented here by the inability of the legislative branch to fulfill its constitutional duty.”⁷⁴ He added judicial intervention in

68. Brief of Petitioners and Appendix Vol. 1 of 2 at 8–9, *State ex rel. Sviggum v. Ingison* (Dist. Ct. Ramsey Cty. 2005) (No. 62-C9-05-9413) (providing chronological history).

69. *State ex rel.*, 62-C9-05-9413 at 5. *See also* *State ex rel. Lommen v. Gravlin*, 295 N.W.2d 654 (Minn. 1941); *State ex rel. Groybach v. Common School District No. 65*, 54 N.W.2d 130 (Minn. 1952) (“[T]he writ of *quo warranto* is not allowable as preventive of, or remedy for, official misconduct and cannot be employed to test the legality of the official action of public or corporate officers.”).

70. *Id.* at 5.

71. *Id.* at 6 (citing *Elzle v. Commissioner of Public Safety*, 298 N.W.2d 29 (Minn. 1980); *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005)).

72. *Id.* at 3.

73. *State ex rel. Sviggum v. Ingison*, at 8 (Ramsey Cty. Dist. Ct. Mar. 3, 2006) (No. 62-C9-05-941) (citing *Fletcher v. Commonwealth*, 163 S.W. 3d 852, 873–77 (Ky. 2005) (holding that constitutional separation of powers provisions must be interpreted to further its purpose of supporting an enduring republic)), https://www.leg.state.mn.us/docs/2005/other/050414/C9-05-9413_Order_and_Memorandum.pdf [<https://perma.cc/DX33-GZ95>].

74. *Id.*

this case “was done with caution in order to ensure funding for core services of government related to life, health and safety.”⁷⁵

The legislators appealed Chief Judge Johnson’s dismissal to the Minnesota Court of Appeals.⁷⁶ The court of appeals largely affirmed the district court’s decision except for the conclusion that the action was barred by the doctrine of laches.⁷⁷ The court reasoned that even though the legislators may have foregone an opportunity to participate in the initial proceeding, it could not “conclude that they unreasonably delayed the assertion of their rights to question the constitutionality of the resulting decision.”⁷⁸

Acknowledging that the litigation’s purpose was to obtain appellate review of the Ramsey County District Court, which had been fruitless thus far, the court of appeals decision characterized the action as “seeking a declaration that the funds the commissioner disbursed under district court’s authorization and without legislative appropriation were unconstitutional and an order requiring the commissioner to cease disbursements.”⁷⁹ However, the court of appeals ultimately decided not to address these questions, citing the plain language of the legislature’s retroactive appropriations bills.⁸⁰ The court of appeals stated that, “[t]he judiciary does not have the constitutional power to ‘relegislate’ the effect of the legislature’s appropriations decisions.”⁸¹

Thus, the legislature successfully superseded the district court in authorizing the executive disbursements.⁸² In other words, it was as if Judge Johnson’s order never existed. The court then went on to urge the legislature to pass legislation that would address future budget impasses. The court explained, “it is the legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses.”⁸³

Judge Harriet Lansing, writing for the court, gently suggested two ways that the legislature could prevent another judicially-mandated

75. *Id.*

76. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 315–17 (Minn. Ct. App. 2007).

77. *Id.* at 324.

78. *Id.* at 318.

79. *Id.* at 316.

80. *Id.* at 323.

81. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007).

82. *See id.*

83. *Id.*

disbursement of public funds during a budgetary impasse.⁸⁴ First, the legislature could create an emergency fund to keep the government functioning.⁸⁵ Second, the legislature could enact “a statute setting forth the procedures to be followed during a budgetary impasse.”⁸⁶

However, between the issuance of this opinion and the next budget impasse in 2011, no legislation was enacted to replace the practice of the attorney general filing lawsuits in Ramsey County District Court asking for judicial involvement when the other branches were unwilling to settle budgetary differences. That legislative inaction left “the law of Ramsey County” intact and the constitutional arguments unresolved. While the court of appeals declined to rule on the constitutional issue, it acknowledged the issue’s importance in dicta: “[w]e 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.”⁸⁷ This statement likely was little consolation to the legislators who sought the review.

IV. GRIDLOCK REACHES RAMSEY COUNTY COURT AGAIN

A. *Brayton v. Pawlenty in 2010*

A few years later, I dealt with my first government gridlock case as Ramsey County Chief Judge. The facts differed somewhat from the 2001 and 2005 shutdown cases. Instead of the legislature and governor failing to agree on spending, they agreed to a state budget that was almost certain to exceed projected state revenues—which is exactly what happened.⁸⁸

As discussed above, Minnesota state government operates on a two-year budget cycle.⁸⁹ Each biennial budget is comprised of revenues and expenditures established in bills passed by the legislature and signed into law by the governor.⁹⁰ Minnesota Management and Budget is required to regularly prepare a series of anticipated revenue and expenditure

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 359–60 (Minn. 2010) (summarizing the history of the 2009 legislative session culminating in the failure of the legislature and governor to agree on a projected balanced budget).

89. *See generally supra* Part II.

90. *See generally supra* Part II.

forecasts.⁹¹ To develop each forecast, the department relies on reports from macroeconomic consultants, anticipated demographic changes, and additional analysis from the state economist.⁹²

The November 2008 forecast for the 2010–2011 biennium was bleak. Minnesota Management and Budget projected that the state government would have a \$4.847 billion budget deficit.⁹³ The department came to essentially the same conclusion in February 2009.⁹⁴ These budget forecasts made clear that expenditure cuts or revenue increases were necessary to balance the 2010–2011 budget as required by the Minnesota Constitution.⁹⁵

Considering this forecast, Governor Pawlenty’s proposed budget resolved the expected deficit through expenditure reductions.⁹⁶ During the legislative session, the legislature passed appropriations bills between May 4 and May 18 that reduced expenditures, but it was still not enough to overcome the forecasted deficit.⁹⁷ To resolve the balance, the legislature passed a revenue bill that would have solved the remaining shortfall by increasing taxes. The governor vetoed that bill on May 9, which the legislature failed to override.⁹⁸

On May 14, Governor Pawlenty announced at a controversial press conference that if a compromise budget deal was not reached, there would

91. *See generally supra* Part II. The Minnesota Department of Finance was merged with the Minnesota Department of Employee Relations to create Minnesota Management and Budget in 2008. The Finance Commissioner, who was a frequent party in these earlier gridlock cases, would be replaced by the Management and Budget Commissioner in the later proceedings. *See* Press Release, Office of the Governor, Tim Pawlenty, Governor Pawlenty Announces Merger of Employee Relations Department Completed on Schedule (May 30, 2008), <https://www.leg.state.mn.us/docs/2010/other/101582/www.governor.state.mn.us/mediacenter/pressreleases/2008/PROD008976.html> [<https://perma.cc/DEJ2-YKXJ>].

92. MINN. STAT. § 16A.103 (2017). *See also Forecast Overview*, MINNESOTA MANAGEMENT AND BUDGET, <https://mn.gov/nmb/forecast/overview/> [<https://perma.cc/LD74-2DC9>] (describing the state of Minnesota’s budget forecasting procedures).

93. MINN. MGMT. AND BUDGET, MINNESOTA FINANCIAL REPORT: NOVEMBER FORECAST (2008), https://mn.gov/nmb/assets/Budget-Economic-Forecast-Nov2008_tcm1059-228633.pdf [<https://perma.cc/B2R7-XLNF>].

94. *See* MINN. MGMT. AND BUDGET, MINNESOTA FINANCIAL REPORT: FEBRUARY FORECAST (2009), https://mn.gov/nmb/assets/Budget-Economic-Forecast-Feb2009_tcm1059-228598.pdf [<https://perma.cc/45QY-3HA8>].

95. *See id.*

96. *Brayton v. Pawlenty*, 781 N.W.2d 357, 359 (Minn. 2010).

97. *See id.*

98. *See id.* at 359–60.

be neither a special session nor a shutdown.⁹⁹ Instead, he would use the state’s unallotment statute to balance the budget.¹⁰⁰ The unallotment statute provides the executive branch authority to reduce unexpended allotments when the Minnesota Management and Budget Commissioner determines that “probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed.”¹⁰¹ The statute does not define or put timelines on the phrases “less than anticipated” or “less than needed.”¹⁰²

On the last day of the session, May 18, the legislature ignored the governor’s warning and passed another revenue bill to address the remaining \$2.7 billion projected deficit after the enactment of the appropriations bills.¹⁰³ The governor vetoed the bill.¹⁰⁴ As a result, a projected \$2.7 billion deficit remained unresolved by the legislature—setting the stage for the lawsuit that followed.¹⁰⁵

On November 3, 2009, Deanna Brayton filed suit in Ramsey County District Court against Governor Pawlenty, Minnesota Management and Budget, the Minnesota Department of Human Services, and the Minnesota Department of Revenue seeking a temporary injunction on behalf of low-income residents who received Minnesota Supplemental Special Diet Assistance.¹⁰⁶ State payments to the program had stopped two days earlier on November 1 because the governor’s unallotment plan significantly reduced the available appropriations for the Minnesota Department of Human Services from the levels enacted in May.¹⁰⁷ The

99. Mark Brunswick & Mike Kaszuba, *Pawlenty Issues Ultimatum on State Budget*, STAR TRIB. (May 15, 2009, 10:06 AM), <http://www.startribune.com/pawlenty-issues-ultimatum-on-state-budget/45042272/> [<https://perma.cc/R7QP-3DXG>].

100. *See id.*; MINN. STAT. § 16A.152(4) (2017).

101. MINN. STAT. § 16A.152(4) (2017).

102. *See* MINN. STAT. § 16A.011 (2017); MINN. STAT. § 16A.152 (2017).

103. *See* Brayton v. Pawlenty, 781 N.W.2d 357, 359 (Minn. 2010).

104. *Id.*

105. *See id.* at 359–60.

106. Class Action Complaint of Plaintiffs, Brayton v. Pawlenty (Ramsey Cty. Dist. Ct. Dec. 30, 2009) (No. 62-CV-09-1169), http://www.nmcourts.gov/Documents/2/Public/Civil/1%20Pawlenty%201139/Summons_and_Complaint_Nov_3_09.pdf [<https://perma.cc/AP6A-EXA4>] [hereinafter “Brayton Class Action Complaint”].

107. *See id.* Unallotment is a procedure by which previously appropriated funding is held back to ensure the state budget remains balanced between legislative sessions. *See id.* It has been used by at least three Minnesota governors since 1980. Governor Pawlenty’s 2009 unallotment plan would have restricted \$2.68 billion in previously approved state funding. *See generally* Colbey Sullivan and Elizabeth Klarqvist, *Unallotment: Executive*

complaint asked the district court to order the executive branch to reinstate funding for the Special Diet Plan Assistance program during the litigation.¹⁰⁸

On December 30, 2009, an order was filed enjoining the defendants from reducing the allotment to the program retroactive to November 1, 2009.¹⁰⁹ The order found that while the unallotment statute was constitutional, the governor had used his powers under this statute in an unconstitutional manner, given the unique facts of the case discussed above.¹¹⁰

The unallotment statute’s constitutionality previously had been addressed by the Minnesota Court of Appeals ruling in *Rukavina v. Pawlenty*, which held that the unallotment statute was constitutional.¹¹¹ Because of this controlling precedent, the decision not to rule the statute itself unconstitutional was an easy one. It was, as the court reasoned in their injunction order, “the specific manner in which the Governor exercised his unallotment authority that trod upon the constitutional power of the Legislature.”¹¹² Moreover, the “authority of the Governor to unallot [was] . . . intended to save the state in times of a previously unforeseen budget crisis.”¹¹³ It was “not meant to be used as a weapon by the executive branch to break” a budget impasse or “to rewrite the appropriations bill.”¹¹⁴ Because the projected budget shortfall “was neither unknown nor unanticipated when the appropriation bills became law,” the

Branch Power to Reduce Spending to Avoid a Deficit, MINN. H.R., RESEARCH DEP’T (2018), <https://www.house.leg.state.mn.us/hrd/pubs/unallot.pdf> [<https://perma.cc/33JT-Z6CU>]; MINN. ISSUES RES. GUIDES: UNALLOTMENT, MINN. LEGIS. REFERENCE LIBRARY (2018), <https://www.leg.state.mn.us/lrl/guides/guides?issue=unallotment> [<https://perma.cc/4LRB-EYD2>].

108. See Brayton Class Action Complaint, at 25.

109. See Order, *Brayton v. Pawlenty*, (Ramsey Cty. Dist. Ct. Dec. 30, 2009) (Gearin, C.J.) (62-CV-09-11693), <https://www.leg.state.mn.us/webcontent/lrl/guides/Unallotment/order2009.pdf> [<https://perma.cc/M3LQ-RAQQ>] [hereinafter “Brayton Order (December 2009)”].

110. See *id.*

111. See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 535 (Minn. Ct. App. 2004), *rev. denied* (Minn. Oct. 19, 2004) (“We conclude that Minn. Stat. § 16A.152, does not reflect an unconstitutional delegation of legislative power, but only enables the executive to protect the state from financial crisis in a manner designated by the legislature.”).

112. Brayton Order (December 2009), at 4.

113. *Id.* at 4.

114. *Id.*

executive branch’s use of the unallotment authority was invalid and violated separation of powers principles.¹¹⁵

The parties agreed that the defendants’ motion to dismiss the lawsuit should be denied and requested final judgment for the plaintiffs be entered instead of continuing the matter for further proceedings in the trial court. This paved the way for an expedited appeal to the Minnesota Supreme Court.¹¹⁶ The supreme court upheld the trial court ruling, in a four-to-three decision. The decision was upheld, not because it found that the governor’s actions were unconstitutional because they violated separation of powers principles, but because the governor’s actions exceeded the statutory authority granted to him by the legislature.¹¹⁷ The decision followed the established appellate court principle of avoiding a constitutional ruling when there is another basis on which the case can be decided.¹¹⁸

Appellants argued that the unallotment statute gives the executive branch authority to modify spending decisions regardless of whether the shortfall results from lower revenues than expected, veto of a revenue bill, or the governor’s decision not to sign adequate revenue legislation passed by both branches of the legislature.¹¹⁹ The court rejected that interpretation of the statute because it would give the executive branch too broad a role in the creation of biennial budgets.¹²⁰ The legislature and governor never reached an agreement on what amounts should be appropriated and if any revenues should be raised to achieve a balanced budget in 2009.¹²¹ Appropriations bills were passed and signed, but revenue bills were not—meaning that a balanced budget for the 2010-2011 biennium was never enacted.¹²² The court held that the statute only provides the executive branch authority to address an unanticipated budget deficit after the legislative and executive branches have enacted a balanced budget.¹²³ Applying this reasoning, the Special Diet Program unallotment was found to be unlawful and void because the 2009 budget-making process was never completed.¹²⁴

115. *Id.* at 6.

116. *See id.*

117. *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010).

118. *In re Sentry-Haugen*, 583 N.W. 2d 266, 269 n.3 (Minn. 1998).

119. *Brayton*, 781 N.W.2d at 367.

120. *See id.* at 368.

121. *See generally id.* at 359–62 (resolving the unallotment authority of the executive branch but never addressing the question of how to achieve a balanced budget in 2009).

122. *See id.*

123. *See id.* at 368.

124. *See id.*

The supreme court majority also noted how the governor’s actions represented a threat to separation of powers.¹²⁵ The court explained, “[t]he statute does not shift to the executive branch a broad budget-making authority allowing the executive branch to address a deficit that remains after a legislative session because the legislative and executive branches have not resolved their differences.”¹²⁶ *Brayton* was the Minnesota Supreme Court’s first substantive ruling after a decade of litigation on budget conflicts between the legislative and executive branches. It established a meaningful limitation on executive authority in the budget process—denying the governor the ability to use the unallotment statute to avoid a government shutdown during an impasse.

B. In re Temporary Funding Litigation in 2011

For most Minnesotans, the 2011 government shutdown began at midnight on July 1. For me, it started six months earlier, when *Politics in Minnesota* published its annual January legislative session preview. The cover article was entitled “The Decider” featuring my photo. It predicted if the legislative and executive branches failed to resolve the looming budget issues, the Ramsey County Chief Judge would preside over any government shutdown litigation.¹²⁷ As chief judge, I knew that the prediction was accurate. I did not relish the possibility. I already had handled the politically sensitive unallotment case, served on the canvassing board in the 2008 Franken-Coleman Senate election recount, and led the Ramsey County courts during the 2008 Republican National Convention, held in St. Paul, and its aftermath.¹²⁸

By mid-June 2011 it was evident that the discussions between DFL Governor Dayton and the Republican-controlled legislature were deadlocked. The governor stated that he would not call a special session of

125. *Id.*

126. *Id.* See also *id.* at 369 (Page J., concurring) (“Under our definition of pure legislative power, the sweeping discretion granted by section 16A.152, subdivision 4, to modify and negate legislative spending decisions raises serious separation of powers concerns.”).

127. Jake Grovum, *Gearin: ‘I’ve Had the Chief Judgeship From Hell’*, MINNESOTA LAWYER (July 22, 2011), <https://minnlawyer.com/2011/07/22/gearin-%E2%80%98i%E2%80%99ve-had-the-chief-judgeship-from-hell%E2%80%99/> [https://perma.cc/LKY4-N5HG].

128. *Id.* More than 800 people were arrested during the 2008 Republican National Convention in St. Paul, including 300 people on the first day of the event. Colin Moynihan, *For the Police and Protesters, a Quieter Convention*, N.Y. TIMES (Aug. 31, 2012), <https://www.nytimes.com/2012/09/01/us/politics/for-police-and-protesters-a-quieter-convention.html> [https://perma.cc/5BS4-V56P].

the legislature to pass appropriation bills in the absence of a compromise. Not unexpectedly, a “shutdown” funding lawsuit was filed in Ramsey County.¹²⁹

Like the prior lawsuits handled by Chief Judges Cohen and Johnson, the attorney general initiated it. After discussions between legislative leaders and the governor failed to produce any significant movement towards compromise, on June 13, Attorney General Lori Swanson filed a petition seeking an order directing state government to fund executive branch core functions.¹³⁰ It also asked the court to appoint a special master to resolve any issues concerning the order’s terms.¹³¹

An order to show cause was signed and a hearing was set for June 23.¹³² The order uncorked a deluge of phone calls and letters to my chambers urging me to order continued funding for specific government services and programs. The dispute placed me in the difficult position of applying the law to a political conflict with real and immediate consequences. The calls included dozens of pleas to ensure that the animals at the Oliver H. Kelly Farm, run by the Minnesota Historical Society, and the Minnesota Zoo received food and care. There were dozens of calls from businesses and individuals who were unable to renew the licenses they needed to make a living. Construction companies worried they would be unable to complete road projects before winter. Worried citizens called wondering if they would get state processed social service payments, if state parks would be open, or if their state jobs would be considered critical.

Governor Dayton filed his response to Attorney General Swanson on the same day as the order to show cause was issued.¹³³ Unlike Governor

129. Petition of Attorney General Lori Swanson, *In re* Temporary Funding of Core Functions of the Exec. Branch of the State of Minn. (Ramsey Cty. Dist. Ct. June 13, 2011) (No. 62-CV-11-5203), https://www.leg.state.mn.us/docs/2011/other/110561/62CV115203_Petition.pdf [<https://perma.cc/E4M9-KQRP>].

130. *Id.* at 7–8.

131. *Id.*

132. See Motion of the State of Minnesota to Consolidate at 3, *In re* Temporary Funding of Core Functions of the Exec. Branch of the State of Minn. (Ramsey Cty. Dist. Ct. June 30, 2011) (No. 62-CV-11-5203), https://www.leg.state.mn.us/docs/2011/other/110561/A11-1107_AGs_Motion_to_Consolidate.pdf [<https://perma.cc/3AXY-K82K>].

133. See Response of the Governor to the Petition of the Attorney General, *In re* Temporary Funding of Core Functions of the Exec. Branch (Ramsey Cty. Dist. Ct. June 15, 2011) (No. 62-CV-11-5203), https://www.leg.state.mn.us/docs/2011/other/110561/62CV115203_Response_Governor_Petition.pdf [<https://perma.cc/2668-35NM>].

Pawlenty in 2001 and 2005, Governor Dayton opposed the petition despite recognizing that “[a] government shutdown would threaten the lives and safety of the people of Minnesota.”¹³⁴ He urged the court to order the parties into mediation and forego issuing any other order for relief unless and until mediation failed.¹³⁵ He also argued that the office of the governor has a number of inherent and statutory powers and that if the legislature fails to pass appropriations bills that are either signed by the governor or have the support of a two-thirds majority in each house necessary to override a gubernatorial veto, he would use these executive powers to fund core government functions.¹³⁶

Following the initial hearing on Attorney General Swanson’s petition, an order was issued denying both the motion to order the parties into mediation and the motion to stay the proceedings.¹³⁷ The House of Representatives and the State Senate appeared through counsel at that hearing and opposed mandatory mediation.¹³⁸ The June 27 order denying the request that the courts direct the executive and legislative branches to engage in mediation cited article III of the Minnesota Constitution and *State ex. rel. Birkeland v. Christianson*.¹³⁹ In *Birkeland*, the Minnesota Supreme Court explained:

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.¹⁴⁰

The funding order was filed on June 29, which was the latest I believed I could delay in the hope that the other branches would resolve the issue.¹⁴¹ The order directed Minnesota Management and Budget to

134. *Id.* at 1.

135. *See id.*

136. *See id.* at 6–7.

137. Order Denying Mediation at 1, *In re* Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota (Ramsey Cty. Dist. Ct. June 27, 2011) (No. 62-CV-11-5203), http://www.mncourts.gov/Documents/2/Public/Civil/Order_Denying_Mediation.pdf [<https://perma.cc/9EQV-SFMU>].

138. *Id.*

139. *See id.* at 2 (citing *State ex. rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930)).

140. *State ex. rel. Birkeland*, 229 N.W. 313 at 314.

141. *See* Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, *In re* Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota (Ramsey Cty. Dist. Ct. June 29, 2011) (No. 62-CV-11-5203).

issue checks, process funds, and make payments necessary to carry out the performance of the critical functions of government identified in the order.¹⁴² It went into effect at midnight on June 30 and was scheduled to expire on July 31, or earlier if a budget was enacted before that date.¹⁴³

To justify the disbursements that had not been appropriated by the legislature, the order relied on the totality of the Minnesota Constitution and Minnesota cases addressing similar issues. The analysis centered on article I, section 1, which states that “[g]overnment is instituted for the security, benefit, and protection of the people in whom all political power is inherent” and the articles establishing three separate branches, to justify ordering un-appropriated disbursements.¹⁴⁴

The cases cited to provide support for the order were *State ex. rel. Mattson v. Kiedrowski*¹⁴⁵ and *Clerk of Court’s Compensation for Lyon County v. Lyon County Commissioners*.¹⁴⁶ In the first case, State Treasurer Robert Mattson sought a writ of quo warranto directing Finance Commissioner Jay Kiedrowski to refrain from executing the State Treasurer’s duties as required by a new statute that transferred some of the office’s responsibilities and employees to the Finance Department.¹⁴⁷ The supreme court granted the writ and declared the statute unconstitutional. The court reasoned that it had the authority to make the decision, in part, because “the Legislature should have known that it could not denude the office of its inherent powers and duties even though they had been prescribed by statute, and leave the office as an empty shell.”¹⁴⁸

The second case, *Lyon County*, considered whether the Fifth Judicial District could order the Lyon County Board of Commissioners to pay a specific salary for the clerk of court.¹⁴⁹ The supreme court reversed the district court’s order because available legislative-administrative procedures had not been exhausted before the order.¹⁵⁰ The court also acknowledged that the judicial branch has inherent power to keep another branch from effectively abolishing a different branch “through [the] exercise of financial and regulatory authority.”¹⁵¹ Both *Mattson* and *Lyon County* illustrate a

142. *See id.* at 16–18.

143. *See id.*

144. MINN. CONST. art. I, § 1.

145. 391 N.W.2d 777 (Minn. 1986).

146. 241 N.W.2d 781 (Minn. 1976).

147. *State ex. rel. Mattson v. Kiedrowski*, 391 N.W. 2d 777, 778 (Minn. 1986).

148. *Id.* at 780–81 (quoting *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953)).

149. *Clerk of Courts Comp. for Lyon Cty. v. Lyon Cty. Comm’rs*, 241 N.W.2d 781, 782 (Minn. 1976).

150. *Id.* at 787.

151. *Id.* at 784.

recognition by the supreme court that if the judicial branch lacked the power to stop “unreasonable and intrusive assertions of such authority,” it would make “separation of powers . . . a myth.”¹⁵²

Ultimately, last minute efforts to avert the 2011 government shutdown failed and the order went into effect at midnight on June 30. For the next twenty days, millions of dollars were disbursed from the state treasury, daily hearings were held before myself and Special Master Kathleen Blatz (a former Minnesota Supreme Court Chief Justice and former state legislator), approximately 19,000 state employees were laid off and began to receive unemployment compensation, state parks and highway rest stops were closed, construction projects stopped, and millions of citizens were without services they previously received.¹⁵³

Given that nearly none of the two-year budget bills had been enacted, there would be hundreds of requests from parties wanting to be included in the critical core function category. It was impossible to fully anticipate the breadth and complexity of the funding process. It soon became evident that the judicial branch lacked the “institutional competency” to comfortably unravel the different funding mechanisms contained in hundreds of funding statutes.¹⁵⁴

Judges are legal generalists. Yet, Special Master Blatz and I had to quickly try to make decisions regarding funding provisions, priorities, and mechanisms that had taken legislators, commissioners, and experienced staff members years to comprehend. This proved to be no easy task. For example, some state budget issues involve federal programs, and within this category are programs that appear to fall under the Supremacy Clause, programs where the state seems to act as a funding conduit, and programs that require matching funds from the state. Other programs are funded almost exclusively by the state, but with some federal funds. Some are federal grants administered by state employees who make the disbursement decisions and who also audit and manage the funds. Finally,

152. *Id.*

153. MINN. MGMT. AND BUDGET, STATE GOVERNMENT SHUTDOWN 2 (2011), https://mn.gov/mmb/assets/2011-shutdown-report-October-2011_tcm1059-125041.pdf [<https://perma.cc/GYX2-NW84>].

154. Unfortunately, this was not a new problem. Minnesota courts grappled with this same challenge of addressing the consequences of a shutdown in prior government gridlock cases. *See, e.g., State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007) (“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.”).

some state statutes fund programs continuously and do not require a new appropriation in the biennial budget.

As a result, some early decisions would change as the parties had a chance to fully argue the impacts of their requests and educate the court about the ways in which their client’s funding was not dependent upon biennial appropriations. For example, after a July 1 hearing, the Minnesota Zoological Society successfully argued that it operated under a statute that established a continuous standing appropriation. Therefore, the Minnesota Zoo could reopen.¹⁵⁵

As the budget standoff continued, the funding requests escalated to parties that needed state government permits and licenses. For example, loggers needed permits to take their harvested wood from the state forests to market. The lawyers representing them made it clear that for the people in Koochiching County on the Canadian border, the state lumber permitting agent’s function was more critical to them than police officers or firemen. The black and red flannel-shirted loggers who came to the hearing were clearly angry about the financial hardship caused by the shutdown and worried about how they would support their families. Despite their sincere concerns, the district court ruled that state law did not extend far enough for the court to justify granting their request.¹⁵⁶

In a similar instance, liquor retailers needed state permits called “buyers cards” in order to buy alcohol from wholesalers. A request to order the state to issue those permits also was denied.¹⁵⁷ The growing threat of Minnesota bars running out of beer during the heat of late-July may well have hastened the final resolution of the crisis.¹⁵⁸

Despite the significant constitutional questions raised by the judicially ordered disbursements that were made from July 1 until July 21, the Minnesota Supreme Court only addressed the 2011 shutdown through

155. See *Minnesota Zoo to Remain Open During State Government Shutdown*, ST. PAUL PIONEER PRESS (July 1, 2011, 11:01 PM), <https://www.twincities.com/2011/07/01/minnesota-zoo-to-remain-open-during-state-government-shutdown/> [https://perma.cc/Y5UK-2YUA].

156. See MINN. FOREST RES. COUNCIL, MINNESOTA FOREST RESOURCES COUNCIL 2011 REPORT TO THE GOVERNOR AND LEGISLATURE ON THE IMPLEMENTATION OF THE SUSTAINABLE FOREST RESOURCES ACT 10 (2011), https://mn.gov/frc/docs/MFRC_2011_Report.pdf [https://perma.cc/E26K-KZLJ].

157. See Eric Roper, *One by One, Bars Get Tapped Out*, STAR TRIB. (July 12, 2011, 10:58 PM), <http://www.startribune.com/one-by-one-bars-get-tapped-out/125459928/> [https://perma.cc/TVJ7-2TUG].

158. *Id.*

orders issued in response to two writs of quo warranto.¹⁵⁹ Like the 2005 writs, they were filed by state legislators.¹⁶⁰ The first writ was filed on June 20. It was opposed by the attorney general and the governor. The supreme court dismissed this petition without prejudice.¹⁶¹ In its order, the court concluded that the petition did not satisfy the established standards for the exercise of original jurisdiction for a writ of quo warranto.¹⁶² “While this court retains its original jurisdiction . . . we today signal our future intention to exercise that discretion in only the most exigent of circumstances.”¹⁶³

The legislators filed a second writ of quo warranto on July 8, 2011.¹⁶⁴ By this time, Minnesota Management and Budget was making disbursements pursuant to my original and follow-up orders. The petitioners argued that the circumstances were exigent because, in their view, the court and special master had “exceeded the jurisdictional boundaries of the separation of powers doctrine and have indulged in the constitutional powers reserved for the executive and legislative branches of government.”¹⁶⁵ Heeding the lesson of *Swiggum*, the petitioners wisely filed before the budget issues were resolved and while the court ordered disbursements were still being made.

On July 11, the supreme court agreed to hear the case and arguments were scheduled on July 22.¹⁶⁶ Escaping review once again, the executive and legislative branches finally reached a compromise budget agreement the day before the hearing. The supreme court issued its order dismissing the second petition on November 30, 2011.¹⁶⁷ By then, the governor and

159. See Order to Dismiss, *Limmer v. Swanson* (Minn. June 22, 2011) (No. A11-1107), https://www.leg.state.mn.us/docs/2011/other/110561/A11-1107_Order_Dismiss.pdf [<https://perma.cc/BR69-XWJK>] [hereinafter “Order to Dismiss”]; *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) (noting that because the constitutional questions had become moot by the time of the order, the court may and did decline to address the constitutional questions).

160. Petition for Writ of Quo Warranto, *Limmer v. Swanson* (Minn. June 20, 2011) (No. A11-1107), https://www.leg.state.mn.us/docs/2011/other/110561/A11-1107_Petition_for_Writ_of_Quo_Warrento.pdf [<https://perma.cc/T2HV-DZKD>].

161. Order to Dismiss, *supra* note 159, at 2.

162. *Id.*

163. *Id.*

164. Petition for Writ of Quo Warranto, *Limmer v. Swanson*, 806 N.W.2d 838 (Minn. July 8, 2011) (No. A11-1222), <https://www.leg.state.mn.us/docs/2011/other/110561/PetitionforWritofQuoWarrantoA111222RamseyCountyCourt.pdf> [<https://perma.cc/K9GZ-4XX7>].

165. *Id.* at 3.

166. See *Limmer v. Swanson*, 806 N.W.2d 838, 838–39 (Minn. 2011).

167. *Id.* at 839–40.

the legislature had agreed upon the disputed budget bills and enacted compromise appropriations laws that were made retroactive to July 1, 2011. As was done in the aftermath of the 2005 shutdown, the legislation expressly “supersede[d] and replace[d] funding authorized by” the Ramsey County District Court.¹⁶⁸ Again, as in 2005, the court ruled the issues were moot because of this language.¹⁶⁹

The court acknowledged that it occasionally decides moot cases that were “functionally justiciable” when they involved questions that have statewide significance to Minnesotans.¹⁷⁰ It also agreed with the petitioners that the case was “functionally justiciable.” The majority, nevertheless, concluded that they “should not exercise [their] discretion to make an exception to the mootness doctrine in this case.”¹⁷¹ In coming to this conclusion, the court expressed reluctance to rule on important constitutional questions unless it was absolutely necessary.¹⁷²

However, like the *Svigium* court, the supreme court also urged the legislature to act to prevent a future budget crisis.¹⁷³ Unfortunately, this advice, which should be viewed as a respectful way of saying “please stop involving the courts in areas that are constitutionally your duty” has proven fruitless. Since the 2005 shutdown, there have been multiple legislative proposals to enact continuing appropriation mechanisms that would basically keep existing funding levels in effect into the next biennium, with some specific exceptions, in the event the legislature failed to enact a new state budget. Despite the obvious need, none of these bills have been successfully enacted into law.¹⁷⁴

For the third time in a decade, the 2011 dismissal meant Minnesota appellate courts had once again failed to address the substantive questions underlying these government gridlock cases. The Minnesota Supreme Court still has not fully answered whether judicially ordered funding is

168. *Id.* at 839.

169. *Id.* at 839-40.

170. Petition for Writ of Quo Warranto, *supra* note 164, at 34 (quoting *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn. 2000)).

171. *Limmer*, 806 N.W.2d at 839.

172. *Id.* (citing *State v. N. Research Dev. Inst.*, 294 Minn. 56, 80, 200 N.W.2d 410, 425 (1972)).

173. *Id.* (explaining that the “legislative and executive branches have the ability to put mechanisms in place that would ensure that the district court is not again called upon to authorize expenditures by executive branch agencies in the absence of legislative appropriations, even if a budget impasse were to occur.”).

174. Colbey Sullivan, *Automatic Continuing Appropriations and Government Shutdowns*, App. A, MINN. HOUSE OF REPRESENTATIVES RES. DEP’T (2011), <https://www.house.leg.state.mn.us/hrd/pubs/contappr.pdf> [<https://perma.cc/KW8V-HKPX>].

permitted by the Minnesota Constitution, whether the failure to fund certain governmental functions contravenes the Minnesota Constitution, and whether the United States Constitution and federal law authorize state treasury expenditures in the absence of a legislative appropriation. The court’s approach clearly has prioritized judicial restraint principles and respect for the other branches of government in these cases. Though the lack of clarity is frustrating, judicial comity is especially important when the cases involve separation of powers and other constitutional questions.

Notwithstanding this prior pattern, the court came much closer to clarifying constitutional funding issues in the most recent case of *Ninetyeth Minnesota State Senate v. Dayton*.¹⁷⁵ Indeed, the court’s ruling in *Ninetyeth Minnesota State Senate* should deter future legislatures and governors from relying upon the Ramsey County District Court to buffer Minnesotans from state budget impasse consequences.

V. GROWING SKEPTICISM FOR JUDICIALLY-ORDERED FUNDING

On May 30, 2017, Governor Dayton exercised his line-item veto power to excise funding for the legislature from an appropriations bill. In making the decision, the governor cited the inclusion of “what he called a ‘poison pill’ provision to a bill that would have eliminated all Minnesota Department of Revenue funding if [a separate tax cut bill was vetoed].”¹⁷⁶ In response, the House of Representatives and State Senate filed a lawsuit against the governor.¹⁷⁷

As result, a Ramsey County District Court judge was once again presented with a case seeking judicial ordered funding for a governmental entity. In this case, Ramsey County Chief Judge John H. Guthmann was asked to consider whether article XI, section 1 of the Minnesota Constitution prohibits the judiciary from authorizing funding for the legislature in the absence of an appropriation. The legislature argued that the governor’s line-item veto power could not be used over the appropriation without violating the separation-of-powers clause in the Minnesota Constitution.¹⁷⁸

Based on the parties’ stipulation, the lower court found that this issue was ripe, that the legislature had standing, and that the court could

175. *Ninetyeth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 612 (Minn. 2017).

176. Brian Bakst, *Dayton Ok's Minn. Agency Spending but Slashes Money to Run Legislature*, MINN. PUB. RADIO (May 30, 2017), <https://www.mprnews.org/story/2017/05/30/dayton-ok-complete-minnesota-budget-no-vetoes> [https://perma.cc/DSM7-EQRX].

177. *See Ninetyeth Minn. State Senate*, 903 N.W.2d. at 612.

178. *Id.*; *see also* MINN. CONST. art. III.

authorize temporary funding for both legislative bodies during the pendency of the lawsuit.¹⁷⁹ In a July 19 order, the district court granted the legislature’s request to declare the governor’s line-item vetoes null and void because it impermissibly prevented the legislature from exercising its constitutional powers and duties.¹⁸⁰

On September 8, the Minnesota Supreme Court issued an order that reluctantly allowed the lower court temporary funding stipulation decision to remain in effect.¹⁸¹ This order also required the parties to file informal memoranda addressing the constitutionality of the judicially ordered funding for the legislature, file a joint statement regarding the amount of carryover funds available to each legislative body, disclose the date by which carryover funds will be exhausted, and address the anticipated expenses of the House of Representatives and the State Senate.¹⁸²

Moreover, unlike the 2011 trial court decision in *In re Temporary Funding*—where a request to order mediation was refused—the Minnesota Supreme Court also ordered the governor and legislature “to participate in good-faith efforts to resolve this dispute through mediation.”¹⁸³ The court reasoned, “the other Branches should have the opportunity to resolve this dispute.”¹⁸⁴ Notably, Justice Lillehaug—a member of the 2017 Minnesota Supreme Court that ordered the mediation—was the attorney who represented the governor in his 2011 request for mediation. Ultimately, in 2017, the mediation was unsuccessful in breaking the stalemate and the court had to hear arguments, read briefs, and issue an opinion on the issue of whether the governor constitutionally exercised his line-item veto authority.

While the court allowed the temporary court-ordered funding to continue, it expressed concern regarding the lower court order. It agreed that it is the people of Minnesota whose rights are at stake, but the court did “not see in the language of Article XI authority for a judicial funding remedy simply because those interests are at risk.”¹⁸⁵ The court cautioned that “[w]e are unaware of any authority that allows the Judicial Branch to authorize spending simply because parties ask a court to do so.”¹⁸⁶

179. *Ninetyeth Minn. State Senate*, 903 N.W.2d. at 615.

180. *Id.*

181. *Ninetyeth Minn. State Senate v. Dayton*, 901 N.W.2d 415, 417 (Minn. 2017).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 416.

186. *Id.*

On November 16, the Minnesota Supreme Court issued its final decision.¹⁸⁷ This order concluded that the governor’s exercise of his line-item veto power in these circumstances did not violate article III of the Minnesota Constitution. The ruling overturned the lower court’s conclusion that the vetoes “‘effectively abolished’ and ‘nullified’” the legislature by depriving it of the funding needed to perform its core functions.¹⁸⁸ The majority, however, refrained from deciding the issue of whether the governor’s exercise of the line-item veto violated article I by unconstitutionally coercing the legislature. Its decision was based on principles of judicial restraint and respect for the other branches of government. The supreme court’s conclusion that the legislature had sufficient carry-over funding to continue its usual functions until it reconvened in February 2018 was critical to the court’s decision. As a result of these carryover funds, the court reasoned, that the veto did not have the effect of abolishing the legislature:

[T]he Legislature has sufficient funding to continue to perform its functions independently until it reconvenes. Once it reconvenes, the Legislature can pass additional appropriations for itself without adhering to the conditions the Governor set in his veto message, and the respective powers available to the branches under Article IV can be exercised.¹⁸⁹

Despite *Ninetieth Minnesota State Senate’s* seemingly inconclusive outcome, the Supreme Court’s overall opinion suggests that future Ramsey County district courts should exercise greater caution before ordering treasury disbursements. Part VI discusses this issue in greater detail immediately below.

VI. ANALYSIS AND CONCLUSION

By virtue of containing the state capitol, district court judges in Ramsey County regularly address complex separation of powers cases. Both *Brayton* and *In re Temporary Funding* were covered extensively in the state and national media and resulted in the parties who disagreed with the decisions referring to me as an “activist judge.”¹⁹⁰ Both cases were filed

187. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609 (Minn. 2017).

188. *Id.* at 619.

189. *Id.* at 624.

190. See, e.g., Don Davis, *Minnesota Politics: Pawlenty Fights Judicial Legislating*, GRAND FORKS HERALD (Dec. 31, 2009), <https://www.grandforksherald.com/news/government-and-politics/2116445-minnesota-politics-pawlenty-fights-judicial-legislating> [<https://perma.cc/JUV7-SH9S>] (“It is a conservative candidate’s dream: the chance to accuse a judge of taking over powers that should be left to legislators and governors.

at a time when the executive and legislative branches were controlled by opposing parties and involved a failure of those branches to reach a compromise that would resolve the remaining appropriation and revenue raising issues and enact a balanced budget as required by the state constitution.

In the prior state government shutdown cases handled by Chief Judge Lawrence Cohen in 2001, and Chief Judge Gregg Johnson in 2005, and myself in 2011, we issued orders providing funding for core state government functions. Indeed, these orders were issued despite the clear command of the Article III, section 1:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.¹⁹¹

There are no express provisions in the original Minnesota Constitution or its amendments that empower the judicial branch to authorize funding when the other two departments fail to reach a compromise regarding the biennial state budget so that appropriation bills passed by the legislature can become law. Additionally, there is no constitutional or statutory guidance that addresses how to pay for even the most basic government functions during a budget impasse.

However, even as early as the *Sviggum* decision, Minnesota courts recognized the significant separation of powers issues arising from court-ordered state treasury disbursements and how they improperly affect budget negotiation dynamics.¹⁹² While not reaching the merits in that case, the court of appeals cautioned, “[i]f the events of 2005 repeat themselves, the legislators can raise a timely challenge to seek a judicial remedy for their asserted injury.”¹⁹³

This sentiment is echoed in the Minnesota Supreme Court’s 2011 decision. In a footnote, the majority rejected the suggestion in Justice Page’s dissent that “by maintaining our traditional institutional reticence on issues of constitutional magnitude, particularly those that are moot, we either create the perception of or condone violation of constitutional

Minnesota Gov. Tim Pawlenty, a probable 2012 Republican presidential candidate, enjoyed that opportunity when Judge Kathleen Gearin ruled that he violated the state constitution last summer in making budget cuts.”)

191. MINN. CONST. art. III, § 1.

192. State *ex rel.* *Sviggum v. Hanson*, 732 N.W.2d 312 (Minn. Ct. App. 2007).

193. *Id.* at 323.

provisions.”¹⁹⁴ In his dissent, urging the court to rule on the petition despite its mootness, Justice Page noted that “for the third time in a decade it fell to a single district court judge in Ramsey County to decide which agencies—if any—would continue to operate and, by extension, which functions—if any—the state government would continue to perform.”¹⁹⁵ Justice Page suggested that by involving the judicial branch “to decide the very issues on which [they] are at an impasse, [they] make the judicial branch part of that process. . . . [A]t some level, it seems that each of the two political branches, along with their surrogates, [are] using the judicial branch as a tool to reach their respective political ends.”¹⁹⁶

In 2017, the Minnesota Supreme Court likewise never reached the ultimate question of whether the judicial branch can order disbursements from the state treasury without an appropriation under any circumstances. However, the court included language that should cause district court judges to hesitate when asked to order temporary funding:

The only conclusion we can draw from the plain language of the constitution and these decisions is that Article XI, Section 1 of the Minnesota Constitution does not permit judicially ordered funding for the Legislative Branch in the absence of an appropriation.¹⁹⁷

In drawing this conclusion, the supreme court relied on its decision in *State v. Dahlgren*.¹⁹⁸ In that case, the court refused to order funding to pay for counsel for indigent criminal defendants even though it agreed that the defendants have a constitutional right to counsel.¹⁹⁹

The Minnesota Supreme Court’s strong unambiguous language in *Ninetieth Minn. State Senate* hopefully will cause both the executive and legislative branches of government to avoid the heated conflicts that have twice pushed them over the shutdown cliff. If they do not, they risk the possibility that future Ramsey County District Court judges will refuse to bail them out from their failure to reach some type of budget compromise.

There are other remedies that should be explored by both the legislative and executive branches. As the *Sviggum* court explained, “[t]he 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

194. *Limmer v. Swanson*, 806 N.W.2d 838, 839–40 n.1 (Minn. 2011).

195. *Id.* at 841.

196. *Id.* at 843.

197. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d at 620.

198. 107 N.W.2d 299 (Minn. 1961).

199. *Id.*

budgetary impasse or enacting a statute setting forth the procedures to be followed during a budgetary impasse.”²⁰⁰

Some states, chief among them Wisconsin and Rhode Island, have enacted default budget statutes.²⁰¹ These statutes have not significantly hindered the enactment of timely budgets in these states. In a 2015 law review article analyzing the long-term effects of government shutdowns on public trust, David Louk and David Gamage suggest that urging legislators to rely on their better angels is unlikely to be successful.²⁰² “Rather than attempting the Sisyphean task of exhorting Democrats and Republicans to work together on bipartisan budget compromises, we advocate for implementation of default budget policies that would automatically trigger when negotiation failure occurs.”²⁰³ In their view, which Minnesota’s repeated shutdown experience bears out, “[i]f we are correct in predicting that the risk of negotiation failure is here to stay, then reforms should aim at reducing the harmful consequences of such failure.”²⁰⁴

The supreme court’s decision in *Ninetieth Minnesota State Senate* suggests that the Minnesota Legislature would be well-served by adopting the types of mechanisms discussed by Louk and Gamage.²⁰⁵ Moreover, the court’s decision to expressly preserve the possibility of judicially ordered funding as part of its opinion nonetheless indicates that the overall effect of *Ninetieth Minnesota State Senate* is to constrain the expansive funding orders previously authorized by Ramsey County District Courts:

Our decision today should not be read to foreclose the possibility of a judicial remedy in a different situation. . . . Minnesotans have a constitutional right to three independent branches of government, each functioning at a level sufficient to allow the exercise of the constitutional powers committed to each branch for the “security, benefit, and protection of the people, in whom all political power is inherent.”²⁰⁶

This passage suggests that the courts may have a funding role if the legislature does not have reserve funds or newly appropriated money to

200. *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007).

201. WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2019 Act 5); 35 R.I. GEN. LAWS ANN. § 35-3-19 (West 2019, Westlaw through Ch. 20 of the 2019 Reg. Sess.). These statutes are discussed in Sullivan, *supra* note 174.

202. David Scott Louk & David Gamage, *Preventing Government Shutdowns; Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 236–37 (2015).

203. *Id.* at 237.

204. *Id.*

205. *See Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 625 (Minn. 2017).

206. *Id.* (quoting MINN. CONST. art. I, § 1).

legislatively function. It also is a reminder that all three co-equal branches must have funding to exercise their constitutional powers.

At a minimum, given *Ninetieth Minnesota State Senate*'s totality, future Ramsey County District Court judges will be more hesitant to order Minnesota Management and Budget to disburse public funds without appropriations and more likely to limit any expenditures that are ordered. The consequences of this shift would be widespread for Minnesotans. More facilities would be closed, more state employees would be laid off, more agencies would cease operations, more private businesses would suffer, and the people of Minnesota would be more adversely impacted.

Even before *Ninetieth Minnesota State Senate*, I questioned whether I had ordered expenditures for too many government functions considering the constitutional issues raised in the quo warranto petitions. I wondered what I would do if a balanced budget was not enacted before my order expired on July 31, 2011. I became increasingly concerned that my order was too broad. In an interview given two days after the shutdown ended, I explained that I thought judicial involvement in budgeting was a negative consequence of our political system becoming more divisive. As a result, some elected officials have lost sight of the effect that zero-sum politicking has on citizens who may not pay significant attention to government.²⁰⁷

Ninetieth Minnesota State Senate should serve as a valuable guide for future district court judges put in the difficult position of sorting out government gridlock. For legislators and governors, it should serve as a warning that the consequences of future impasses, in the absence of a default budgeting law, will be more pronounced, create greater hardship for Minnesotans, and increase the public's frustration with government institutions. It should inspire serious research, thoughtful debate, and the careful enactment of laws that prevent judicially ordered funding divorced from the legislature's public policy setting prerogative. Ultimately, our system of elected government demands that the selection of policies and balancing of stakeholder interests belong with those who write the laws, rather than those who apply it.

207. See Grovum, *supra* note 127 (“It’s easy to say people are becoming less willing to compromise. Compromise doesn’t mean you give up your principles. Compromise to me means you realistically look at your position, one, see how realistic it is that it can succeed at this time. You don’t give up your position. And then you look at, all right . . . how much is it going to hurt the state if I just stick with my position? How much should I basically reach some common agreement that isn’t exactly what I wanted, what either side wanted?”).

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu