Law Day:
Separation of Powers

Matt Gehring and Ben Weeks
Research Department
Minnesota House of Representatives
May 1, 2018
Separation of Powers: What is it?

“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.”

• James Madison, Federalist 51 (1788)
Separation of Powers: But what is it, really?

TO: All Members and Staff
FROM: Kelly Knight
DATE: January 19, 2017
RE: Weather Delays or Cancellations

This is to remind you that the House, Senate and Joint Legislative offices are separate from the Executive Branch regarding any weather related closing of state agencies and offices. The Governor is the decision maker for the Executive Branch to close offices due to weather.

Any decisions to delay or close the House of Representatives will be made by the Speaker of the House. The Senate Majority Leader will make the decision for Senate Offices. Before heading out in bad weather, House staff may want to check their House voicemail or email for details regarding a delayed start time or for the closure of House offices. Notices about weather delays and/or cancellations will also be posted by House Public Information Services on Twitter and Facebook.

Time off granted by the Speaker due to a delay or closure should be recorded under "Holiday". Time worked during these holiday hours will be treated in the same manner as work on any other holiday.

If you have any additional questions, please contact Human Resources.

Thank you.
Separation of Powers: But what is it, really?

Minnesota Supreme Court, 1930:
“The three departments of state government, the legislative, executive and judicial, are independent of each other. Neither department can control, coerce or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the constitution, or by valid law, involving the exercise of discretion.”

- State Ex Rel. Birkeland v. Christianson, 229 N.W. 313 (Minn. 1930)
Minnesota Constitution, Article III

Section 1. **Division of powers.** 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.
Who should decide the size of the legislature?

In a 1971, a Federal court ordered a smaller Minnesota legislature:
- Senate reduced from 67 members to 33
- House reduced from 135 members to 105

The U.S. Supreme Court reversed:
“...the action ... is not required by the federal constitution and is not justified as an exercise of federal judicial power.”

Who can occupy this State Capitol hallway?
Who can occupy this State Capitol hallway?

In 1994, the right to occupy the Capitol offices pictured here was disputed by the Governor (Carlson), the House, and the Senate.

A TRO, supported in part by separation of powers principles, prevented the House from being evicted from the space by the Governor.

The dispute was eventually settled by political agreement, rather than further litigation.
What does a constitutional amendment look like?

CONSTITUTIONAL AMENDMENTS

To vote for a proposed constitutional amendment, fill in the oval next to the word “YES” on that question. To vote against a proposed constitutional amendment, fill in the oval next to the word “NO” on that question.

AMENDMENT 1
RECOGNITION OF MARRIAGE SOLELY BETWEEN ONE MAN AND ONE WOMAN
Shall the Minnesota Constitution be amended to provide that only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota?

☐ YES
☐ NO

AMENDMENT 2
PHOTO IDENTIFICATION REQUIRED FOR VOTING
Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?

☐ YES
☐ NO
### What does a constitutional amendment look like?

<table>
<thead>
<tr>
<th>Titles Proposed by Legislature, under Minn. Const. Art. IX</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Recognition of Marriage Solely Between One Man and One Woman”</td>
</tr>
<tr>
<td>“Photo Identification Required for Voting”</td>
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</tbody>
</table>

<table>
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<tr>
<th>Titles Proposed by Secretary of State, under Minn. Stat. § 204D.15</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Limiting the Status of Marriage to Opposite Sex Couples”</td>
</tr>
<tr>
<td>“Changes to In-Person &amp; Absentee Voting &amp; Voter Registration; Provisional Ballots”</td>
</tr>
</tbody>
</table>
What does a constitutional amendment look like?

The Minnesota Supreme Court recognized the separation of powers challenge, and turned to the principle of avoidance:

“even if the construction that avoids a constitutional confrontation is the ‘less natural’ construction...”

• Limmer v. Ritchie, 819 N.W.2d 622, 629 (Minn. 2012), citing State v. Gaiovnik, 794 N.W.2d 643, 648 (Minn. 1980).

A parallel case upheld the legislature’s chosen wording for its ballot question related to elections.

• League of Women Voters Minnesota v. Ritchie, 819 N.W.2d 636 (2012)
Separation of Powers Issues in Funding State Government
Budget Process

• Every two years, Minnesota lawmakers pass a new state budget through a series of budget laws
• The budget establishes the size and scope of state government for the next two years and authorizes the legislature, courts, state agencies, and constitutional officers to access money in the state treasury
• Although some programs are funded by ongoing statutory appropriations, most entities receive operating money through direct appropriations enacted every two years
• Budget bills are passed in the odd year and are effective for two fiscal years beginning on July 1 of an odd numbered year and running through June 30 of the following odd numbered year
Power of the Purse

• “...no money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”

-MN Const. Art. XI, Sec. 1
2011 State Shutdown

From findings of fact in Chief Judge Gearin’s 6/29/2011 order:

1) “Basic custodial care for residents of state correctional facilities, regional treatment centers, nursing homes, veterans homes, and residential academies and other similar state-operated services.

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

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

4) Preservation of the essential elements of the finance system of the government.

5) Necessary administration and supportive services, including [but] not limited to computer system maintenance, internet security, issuance of payments.”
2011 State Shutdown

From conclusions of law in Chief Judge Gearin’s 6/29/2011 order:

• “Core functions include matters relating to the life, health and safety of Minnesota citizens, the protection of rights of citizens under the Minnesota and United States Constitutions, and the maintenance and preservation of public property.”

• MN has entered into agreements to participate in federal programs, including Food Stamps, TANF, and Medicaid. The Supremacy Clause of the U.S. Constitution “mandates
2011 State Shutdown

Examples of programs/entities that received funding:
• prisons, state funded nursing homes, veterans’ homes, etc.
• federal/state programs involving agreements between MN and U.S. (e.g., TANF, Medicaid, SNAP)
• the legislature and courts
• law enforcement
• school payments
• state aid to cities
• benefit payments and medical services to individuals
2011 State Shutdown

Examples of programs/entities that did not receive funding:

• non-emergency road and bridge projects
• state parks
• state licensing entities
• various state agencies, e.g. Finance, Racing Commission, Workers’ Compensation Court of Campaign Appeals
Arbitrary Results: Horses
2017 Veto of Legislative Funding
ARTICLE 1
STATE GOVERNMENT APPROPRIATIONS

Section 1. APPROPRIATIONS.
The sums shown in the columns marked “Appropriations” are appropriated to the agencies and for the purposes specified in this article. The appropriations are from the general fund, or another named fund, and are available for the fiscal years indicated for each purpose.
The figures “2018” and “2019” used in this article mean that the appropriations listed under them are available for the fiscal year ending June 30, 2018, or June 30, 2019, respectively.

<table>
<thead>
<tr>
<th>Appropriations Available for the Year Ending June 30</th>
<th>2018</th>
<th>2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subdiv. 1. Total Appropriation</td>
<td>82,193,000</td>
<td>82,169,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Appropriations by Fund</th>
<th></th>
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<tbody>
<tr>
<td>General</td>
<td>82,005,000</td>
<td>82,041,000</td>
</tr>
<tr>
<td>Health Care Access</td>
<td>128,000</td>
<td>128,000</td>
</tr>
</tbody>
</table>

The amounts that may be spent for each purpose are specified in the following subdivisions:

<table>
<thead>
<tr>
<th>Appropriations by Fund</th>
<th>Subdiv. 2. Senate</th>
<th>Subdiv. 3. House of Representatives</th>
<th>Subdiv. 4. Legislative Coordinating Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>32,299,000</td>
<td>32,383,000</td>
<td>17,511,000</td>
</tr>
<tr>
<td>Health Care Access</td>
<td>17,533,000</td>
<td>17,553,000</td>
<td>17,681,000</td>
</tr>
</tbody>
</table>

Appropriations provided by this subdivision may be used for designated stuff to support the following offices and commissions: Office of the Legislative Auditor, Office of the
2017 Veto of Legislative Funding

STATE OF MINNESOTA
Office of Governor Mark Dayton
130 State Capitol • 75 Rev. Dr. Martin Luther King Jr. Boulevard • Saint Paul, MN 55155

May 30, 2017

The Honorable Michelle L. Fischbach
President of the Senate
Room 2115, Minnesota Senate Building
St. Paul, Minnesota 55155

Dear Madam President:

Please be advised that I have received, approved, signed, and deposited in the Office of the Secretary of State, Chapter 4, Senate File 1, with the exception of the line-item vetoes listed below:

- Page 2, Line 24: "Subd. 2 Senate 32,999,000 32,105,000"
- Page 2, Line 25: "Subd. 3 House of Representatives 32,481,000 32,480,000"

At the last minute, the Legislature stuck language into the State Government Bill that would hold hostage the Department of Revenue appropriations in this bill to my signature on the Taxes bill. I am unwilling to put the jobs of 1,300 Department of Revenue employees at risk. As a result of this action, I am line-item vetting the appropriations for the Senate and House of Representatives to bring the Leaders back to the table to negotiate provisions in the Tax, Education and Public Safety bills that I cannot accept. Attached is my letter to Speaker Dettmer and Majority Leader Gunther explaining my reasoning for line-item vetting the Senate and House of Representatives’ appropriations.

Minnesota expects state government to provide high-quality services. SF 1 provides the needed operating adjustments for state agencies and constitutional offices to maintain these services. Providing the adjustments will help to ensure that our state can address the challenges presented with rising costs over the next biennium as well as population growth and increased demand for services.

There are other investments in this bill that will also benefit Minnesotans, such as:

- Funding to ensure every Minnesota child is counted in the 2020 census; moving the state historic preservation office to the Department of Administration to benefit businesses, and additional funding for tuition incentives that the men and women who join our national guard can take advantage of.

However, there are provisions in this bill that cause concern. The bill intrudes upon my authority to manage the executive branch of state government. It places excessive reporting requirements on state agencies and limits the flexibility of commissioners to manage their agencies.

2.15 Sec. 2. LEGISLATURE
2.16 Subdivision 1. Total Appropriation $ 82,193,000 $ 82,169,000
2.17 Appropriations by Fund
2.18 2018 2019
2.19 General 82,065,000 82,041,000
2.20 Health Care Access 128,000 128,000

2.21 The amounts that may be spent for each purpose are specified in the following subdivisions.

2.22

2.23 Subd. 2. Senate 32,999,000 32,105,000
2.24 Subd. 3. House of Representatives 32,481,000 32,480,000

2.25 Subd. 4. Legislative Coordinating Commission 17,511,000 17,681,000

2.26 Appropriations by Fund
2.27 General 17,383,000 17,553,000
2.28 Health Care Access 128,000 128,000

2.29 Appropriations provided by this subdivision may be used for designated staff to support
2.30 the following offices and commissions: Office
Litigation
Implications for Future Budget Impasses

9/8/2017 Order

• Plain language, textual analysis
• Cites Art. XI, Sec. 1 of MN Constitution
• “We are unaware of any authority that allows the Judicial Branch to authorize spending simply because parties ask a court to do so. . . . In fact, our cases suggest that the Judicial Branch does not have the inherent power to appropriate money.”
• Deference to political branches/judicial restraint
Implications for Future Budget Impasses

“The language of Article XI, Section 1 of the Minnesota Constitution is unambiguous: ‘No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.’ The purpose of this provision in Article XI is ‘to prevent the expenditure of the people’s money without their consent first had and given.’ State ex rel. Nelson v. Iverson, 145 N.W. 607, 608 (Minn. 1914).

In the face of this unambiguous language, we have declined to order funding even in circumstances where constitutional rights were at stake. [citations omitted].
Implications for Future Budget Impasses

• Six justices of the current court signed on to this opinion (Justice Stras did not participate)
• Puts future judicially ordered “core” funding in doubt
• Absent a change in law, this would fall to a single Ramsey County District Court judge to determine
  • tough spot
Policy choices:
How can funding issues be addressed?
How can funding issues be addressed?

“...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.”

• State ex rel Sviggum v. Hanson, 732 N.W. 2d 312, 323 (Minn. Ct. App. 2007).
HF 3360 (Rep. Jessup)

• **Scope**: Operating money for the judiciary, constitutional offices, executive agencies, and legislature; all funds; all direct appropriations reauthorized unless onetime in nature

• **Amount**: 90% of prior level for direct appropriations; 100% of forecast for forecasted programs; no effect on existing statutory appropriations

• **Duration**: Appropriations valid only for the first fiscal year of the new budget biennium

• **Variations**: Adjustments to the percentage (100%, 95%, or variable amount based on the projected deficit or surplus)
HF 3891 (Rep. Knoblach)

• **Scope:** Operating money for “critical functions” in the judiciary, constitutional offices, executive agencies, and legislature, as determined by the commissioner of management and budget

• **Amount:** Generally limited to 100% of prior levels, with some exceptions; statutory appropriations suspended

• **Duration:** Appropriations remain in effect until superseded by law

• **Variations:** Petition to Supreme Court to determine critical functions and associated funding amounts
Other Approaches: Wisconsin and Rhode Island

• **Scope**: Applies broadly to most/all appropriations
• **Amount**: Generally limited to prior year’s levels
• **Duration**: Appropriations remain in effect until superseded by law

• **Experience**: Wisconsin’s law has been triggered somewhat-regularly. Rhode Island’s law has rarely been used. Both states have avoided government shutdowns and complex litigation over funding issues.
  • Wis. Stat. § 20.002(1)
  • R.I. Gen. Laws § 35-3-19
Other Approaches: Federal Government

Sequestration, fiscal cliffs, and debt ceilings are all variations on a theme: they attempt to adjust the incentives of Congress and the President to avoid government shutdowns, while preserving traditional separation of powers principles in federal budgeting.

• These efforts have generally been unsuccessful in avoiding shutdowns. They have not been proposed in Minnesota (and in any case, the Minnesota budgeting process is different).
For more information:

“Automatic Continuing Appropriations and Government Shutdowns”
Colbey Sullivan, House Research Department (December 2011)
Available at: www.house.leg.state.mn.us/hrd/pubs/contappr.pdf

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