

Unallotment Conflict in Minnesota

2009-2010

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Introduction

This paper summarizes the conflict that has played out over the last year between the Minnesota Legislature and the Governor concerning the power of the Governor to reduce spending to prevent a deficit without the approval of the Legislature. It discusses the statute that gives the Governor, acting through the Commissioner of Management and Budget, the authority to reduce spending allotments in order to prevent a deficit; the Governor's actions at the close of the legislative session in May 2009; the allotment reductions of July 2009; one of the lawsuits that challenged two of those reductions; the Supreme Court decision of May 2010; and the impact of that decision on the close of the 2010 legislative session.

I. The Statute - Minn. Stat. § 16A.152, subd. 4

What is now coded as Minnesota Statutes, [§ 16A.152, subdivision 4](#), was enacted in 1939 at the request of Governor Harold Stassen in order to avoid the recurring deficits the State had experienced during the Great Depression.¹ It mandates that, if the Commissioner of Management and Budget “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, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission,” reduce allotments to prevent a deficit. (An allotment is a limit on how much of an appropriation may be spent within a certain time, such as a fiscal year or a fiscal quarter.)

As enacted, the statute had not included a limit on the amount or percentage of allotments that might be reduced, nor did it prohibit eliminating an appropriation or a program entirely. As time went by, the statute was amended to give the commissioner more authority, rather than less. For example, in 1987 it was amended to clarify that, in reducing allotments, the commissioner was authorized “to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.”² So, even when a statute said a recipient was entitled to receive a certain payment, the payment could be reduced when the allotment was reduced.

Before Governor Pawlenty, the authority to reduce allotments to prevent a deficit had been used only three times:

Governor Al Quie

- \$195 million in August 1980
- Local government aid payments were unallotted in November and December 1981

¹ See *Budget Message of Governor Harold E. Stassen Delivered to a Joint Session of the Senate and House of Representatives at 12:00 O’Clock Noon on February 1st, 1939* at 3, 6.

² Act of May 28, 1987, [ch. 268](#), art. 18, subd. 1(b), 1987 Minn. Laws 1039, 1404.

Governor Perpich

- \$109 million in April 1986

Governor Pawlenty used the authority twice before 2009

- \$278 million in February 2003
- \$269 million in December 2008

In each of these five cases, the authority was used to avoid a deficit that arose when revenues declined six months or more after the Legislature had enacted a balanced budget.³

II. Governor's Actions of May 2009

The budget forecast of February 2009 showed a deficit for the biennium beginning July 1, 2009, of about \$4.6 billion.⁴ During the 2009 session, the Legislature enacted a series of appropriation acts that reduced the predicted deficit to about \$2.7 billion. On May 14, 2009, as he considered the last of the appropriation bills, one that funded programs for health and human services, the Governor announced that he would sign it, but that he intended to veto the revenue bill the Legislature was about to pass that would close the budget gap with a \$1.8 billion delay in payments to school districts and almost \$1 billion in increased taxes. He said he would balance the budget on his own by reducing allotments under the authority granted to him by Minnesota Statutes, section 16A.152, subdivision 4. There would be no need for a special session of the Legislature to balance the budget.⁵

III. Allotment Reductions of July 2009

The allotment reduction statute depended on the Commissioner of Management and Budget finding that “probable receipts for the general fund will be less than anticipated,” but it did not say anticipated by whom or when. On June 4, 2009, the commissioner wrote to the Governor that receipts for the current fiscal year were down \$70.3 million compared to the February forecast. He then proposed to the Governor, on June 16, 2009, a combination of \$2.5 billion in allotment

³ See Peter S. Wattson, *Legislative History of Unallotment Power* 4-5, 9, 11 (June 29, 2009).

⁴ See Department of Management and Budget, *General Fund Balance Analysis, February 2009 Forecast* at 1 (Mar. 3, 2009).

⁵ See *Pawlenty Issues Ultimatum*, Mark Brunswick and Mike Kaszuba, STARTRIBUNE (May 15, 2009) <<http://www.startribune.com/politics/state/45042272.html?elr=KArksUUUoDEy3LGDiO7aiU>>.

reductions and \$210 million in other executive actions that would eliminate the deficit for the next two fiscal years, the biennium beginning July 1, 2009.⁶

In accordance with the statute, the commissioner convened a meeting of the Legislative Advisory Commission (LAC) on June 30, 2009. The LAC recommended against the commissioner's proposal.⁷ The Governor approved the commissioner's proposal on July 1, and the commissioner implemented it in a series of orders dated [July 1](#), [July 28](#), and [August 14, 2009](#), and [February 1, 2010](#).

IV. The Complaint - *Brayton v. Pawlenty*, November 3, 2009

Some of the allotment reductions were effective July 1, 2009, others the next year, and still others at varying times throughout the biennium.

One reduction affected a program of the Department of Human Services called the Special Diet Program. It was not a separate item in the appropriation act, but represented \$5.3 million of the \$69 million line item for Minnesota Supplemental Aid. The allotment reduction eliminated the Special Diet Program, which provided monthly cash payments to participants in the federal Supplemental Security Income program whose physicians prescribed for them a special diet based on U.S. Department of Agriculture standards.⁸ The reduction was effective November 1, 2009.

On November 3, 2009, participants in the Special Diet Program whose benefits had been terminated filed a [complaint](#) in Ramsey County District Court and moved for a temporary restraining order requiring Governor Pawlenty, the Commissioner of Management and Budget, and the Commissioner of Human Services to reinstate the program while the suit was pending.

On December 30, 2009, Chief Judge Kathleen Gearin enjoined defendants from reducing the allotment to the Special Diet Program, retroactive to November 1, 2009, until further order of the court.⁹

The parties stipulated to an expedited appeal of the district court's decision and, on January 19, 2010, the Minnesota Supreme Court set oral argument for March 15.¹⁰

⁶ *Proposed Unallotments & Administrative Actions*, Dept. of Management & Budget (June 16, 2009).

⁷ See Resolution, [LAC0001](#) (June 30, 2009).

⁸ See *Approved Unallotments & Administrative Actions* at 4, Dept. of Management & Budget (July 1, 2009).

⁹ *Brayton v. Pawlenty*, [Order](#), No. 62-CV-09-11693 (2nd Dist. Ramsey County, Dec. 30, 2009).

¹⁰ *Brayton v. Pawlenty*, [Order](#), No. A10-64 (Minn. Jan. 19, 2010).

On March 11, 2010, just four days before the oral argument, Supreme Court Chief Justice Eric Magnuson, who had been appointed by Governor Pawlenty in 2008, [announced](#) his intention to retire on June 30, 2010.

V. The Decision - *Brayton v. Pawlenty*, May 5, 2010

On May 5, 2010, the Minnesota Supreme Court ruled that Governor Pawlenty's allotment reductions since July 2009 were not authorized by the unallotment statute, Minn. Stat. [§ 16A.152, subd. 4](#), because they were taken before the legislative and executive branches had enacted a balanced budget.¹¹

In an opinion written by Chief Justice Magnuson, joined by Justices Page, Meyer, and Paul Anderson, the Court observed that the Constitution gives to the Legislature the responsibility to make the laws and to the executive the responsibility to carry them out. [Slip op.](#) at 14. With regard to the budget, the Court said:

The Legislature has the primary responsibility to establish the spending priorities for the state through the enactment of appropriation laws. Minn. Const. art. IV, § 22; *id.* art. XI, § 1. The executive branch has a limited, defined role in the budget process. The Governor may propose legislation, including a budget that includes appropriation amounts, which proposals the Legislature is free to accept or reject. But the only formal budgetary authority granted the Governor by the constitution is to approve or veto bills passed by the Legislature. *See* Minn. Const. art. IV, § 23. With respect to appropriation bills, the constitution grants the Governor the more specific line-item veto authority, through which an item of appropriation can be vetoed without striking the entire bill. *Id.* . . .

Once a bill has been passed by the Legislature and approved by the Governor (or a veto is overridden), the bill becomes law, and the constitutional responsibility of the Governor is to "take care that the laws be faithfully executed." Minn. Const. art. V, §3.

[Slip op.](#) at 15.

Given their respective roles in the budget process, the Court concluded that the Legislature had not intended "to authorize the executive branch to use the unallotment process to balance the budget for an entire biennium when balanced spending and revenue legislation has not been initially agreed upon by the Legislature and the Governor." [Slip op.](#) at 18.

Instead, we conclude that the Legislature intended the unallotment authority to serve the more narrow purpose of providing a mechanism by which the executive branch

¹¹ *Brayton v. Pawlenty*, [No. A10-64](#), slip op. at 18-21 (Minn. May 5, 2010).

could address unanticipated deficits that occur after a balanced budget has previously been enacted.

...

Reading the statute to require enactment of a balanced budget as a predicate to the exercise of unallotment authority provides a definite and logical reference point for measuring whether current revenues are “less than anticipated.” The anticipated revenues are measured as of the date the balanced budget is enacted.

...

... The unallotment statute provides the executive branch with authority to address an unanticipated deficit that arises after the legislative and executive branches have enacted a balanced budget. The 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.

Because the legislative and executive branches never enacted a balanced budget for the 2010-2011 biennium, use of the unallotment power to address the unresolved deficit exceeded the authority granted to the executive branch by the statute.

[Slip op.](#) at 18-21.

The decision affirmed the judgment of the district court regarding the Special Needs Diet Program, but its rationale would have invalidated all allotment reductions taken since July 2009, since a balanced budget had not yet been enacted by the legislative and executive branches.

Because the majority ruled that the statute had not been complied with, they did not address whether the statute itself was unconstitutional. Justice Page wrote separately to highlight his concern that:

[T]he unallotment statute confers on the executive branch such broad and uncircumscribed authority to rewrite legislative spending decisions that it may constitute an unlawful delegation of legislative authority in violation of the separation of powers principle in our constitution.

[Slip op.](#) at C-1.

Justice Paul Anderson joined Justice Page’s concurrence.

Justice Lorie Skjerven Gildea filed a dissenting opinion, in which Justices Dietzen and G. Barry Anderson joined. All three dissenters had been appointed by Governor Pawlenty; other than the Chief Justice, the majority had not.

Justice Gildea would have held the Governor's actions to be authorized by the plain language of the statute and the statute sufficiently limited to survive constitutional scrutiny. She said that a finding that revenue for fiscal year 2009 was \$70.3 million less than the February forecast was sufficient to justify allotment reductions of more than \$2.5 billion for fiscal years 2010 and 2011. [No. A10-64](#), slip op. at D-8.

Eight days after the decision in *Brayton v. Pawlenty*, on May 13, 2010, Governor Pawlenty [appointed](#) Justice Gildea to succeed Eric Magnuson as Chief Justice of the Minnesota Supreme Court. To fill the vacancy created by the elevation of Justice Gildea, the Governor appointed David Stras, a law professor who had filed an *amicus* brief in support of the Governor.

VI. Close of the 2010 Legislative Session

The Court's decision, coming just 11 days before the constitutional deadline for the Legislature to pass bills in regular session, removed the threat of unilateral unallotments from the Governor's weapons in the budget battle.

On May 10, the Legislature presented to the Governor a bill to balance the budget with a combination of \$2.4 billion in appropriation reductions and transfers from other funds and a \$434 million increase in taxes on couples with taxable income over \$200,000.¹² The Governor vetoed the bill the next day.

At 6:20 a.m. on Sunday, May 16, 2010, the last day for passing bills in the 2010 regular session, the Legislature passed [H.F. No. 3834](#), which omitted the tax increase but included a plan to allow the poorest Minnesotans to enroll early in the federal Medical Assistance program. The Governor promptly announced he would veto the bill because of the early enrollment option.

Negotiations with the Governor continued throughout the day and, shortly before midnight, the Governor and legislative leaders announced they had reached an agreement to include the early enrollment option, but to provide that it would not become effective unless the Governor issued an executive order to the Commissioner of Human Services to implement it. If Governor Pawlenty did not issue the executive order, the next Governor would be authorized to implement the early enrollment option, but only by an executive order issued no later than January 15, 2011.¹³ Thus, the question of whether to participate in the early enrollment option was set to be a major issue in the 2010 election campaign.

Legislative leaders had planned to present the Governor with [H.F. No. 3834](#), as already passed, and to address the Governor's objections with a second bill, a conference committee report on [S.F. No. 2702](#). But the Governor wanted one bill that contained the entire agreement. There were too few minutes remaining to incorporate the entire agreement into the conference committee report.

¹² See 2010 [H.F. No. 2037](#).

¹³ See 2010 First Spec. Sess. [H.F. No. 1](#), First Engrossment, page 111, art. 16, § 48.

So, legislative leaders agreed to adjourn the regular session and the Governor agreed to call a special session for 12:01 a.m. to enact the agreement in the form of a new bill.

Both houses adjourned their regular sessions around midnight and reconvened in special session immediately thereafter. The new bill, [H.F. No. 1](#), was posted on the Web about 8 a.m. and completed passage by the House and Senate about 10:40 a.m. The special session adjourned on Monday, May 17, 2010, the expected date for adjournment of the regular session.

VII. Impact of *Brayton v. Pawlenty* on the Legislative Process

Notwithstanding those who said the Court's decision in *Brayton v. Pawlenty* would render the government unworkable because no one would have authority to stop spending in excess of revenue,¹⁴ the decision seemed to have the effect the Court desired—forcing the executive and legislative branches to work together to solve their common budget problem.

¹⁴ See *Brayton v. Pawlenty*, No. A10-64, [Appellants' Brief, Addendum and Appendix](#), at 18-20 (Minn. Feb. 9, 2010); [Appellants' Reply Brief](#) at 7-9 (Minn. Mar. 2, 2010).