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### Colorado General Assembly v. Lamm

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

FEB 27 1984

David W. Brezina

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 381

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APPELLANTS' REPLY BRIEF

Appeal from the District Court of the City and County of Denver  
Cases No. 81CV10058 and 82CV5005  
Honorable HAROLD D. REED, Judge

-----  
THE COLORADO GENERAL ASSEMBLY,

Plaintiff-Appellee,

v.

THE HONORABLE RICHARD D. LAMM, Governor of the State of  
Colorado,

Defendant-Appellant,

and

THE COLORADO GENERAL ASSEMBLY and the  
COLORADO GENERAL ASSEMBLY on behalf of THE PEOPLE OF THE  
STATE OF COLORADO,

Plaintiff-Appellee and Cross-Appellant,

v.

THE HONORABLE RICHARD D. LAMM, Governor of the State of  
Colorado,

ROY ROMER, Treasurer of the State of Colorado,

JAMES A. STROUP, Controller of the State of Colorado,

R. GARRETT MITCHELL, Executive Director of the Department  
of Administration of the State of Colorado, and

LUMBERMANS MUTUAL CASUALTY COMPANY,

Defendants-Appellants and Cross Appellees.  
-----

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Governor Richard D. Lamm and the other executive branch de-

fendants, by their attorney Duane Woodard, attorney general for the State of Colorado, submit the following as their reply brief. A separate answer brief, responding to the points raised by the general assembly on cross-appeal, is being filed simultaneously.

#### SUMMARY OF THE ARGUMENT

1. Both the general assembly and the district court erroneously assume that the authority to transfer between appropriations is identical to the power of appropriation.

2. Separation of powers issues should not be decided as abstract questions of law, without considering the factual record.

3. The transfer statutes confer authority to make the challenged transfers.

4. If the transfer statutes are unconstitutional the Governor's inherent constitutional power to administer the budget authorized the challenged transfers.

5. Evidence of arbitrary budget cuts in the governor's office resulting in insufficient funds to meet his payroll establishes a prima facie violation of the separation of powers.

## ARGUMENT

### I.

BOTH THE GENERAL ASSEMBLY AND THE DISTRICT COURT ERRONEOUSLY ASSUME THAT THE AUTHORITY TO TRANSFER BETWEEN APPROPRIATIONS IS IDENTICAL TO THE POWER OF APPROPRIATION.

A false premise underlies the answer brief and fatally flaws the logic of its arguments. That premise is that the authority to transfer between appropriations is identical to the power of original appropriation. Answer brief, p. 23. Having made this erroneous equation, the general assembly points to the constitutional provision concerning the appropriation power and sweepingly concludes that the Governor may not be delegated the power to transfer funds between appropriations. In ruling for plaintiffs, the district court adopted both this false premise and its illogical conclusion.

The plain fact is that a transfer is not an original appropriation. The Governor's power to make appropriations is not at issue; only his power to transfer is. Throughout this litigation defendants have pointed out that the challenged transfers involved nothing more than shifts of funds between appropriation items previously approved by the general assembly. None of the transferred funds was spent for a purpose for which there was no appropriation. A transfer between appropriations does have an impact upon appropriations, of course, because it authorizes ex-

penditures which differ in some respect from the original line item appropriations. The fact that both involve an authorization to spend does not mean, however, that the two are identical.1/

Art. V, sec. 33 of the Colorado Constitution expressly provides that state moneys shall be expended only upon appropriation or as "otherwise authorized by law...." This constitutional provision recognizes that an appropriation is not the only way to confer spending authority and refutes the general assembly's argument that an executive transfer is only a guise for a prohibited executive appropriation.

The general assembly's false premise necessarily leads it to make contradictory arguments. On the one hand, it argues, the authority to transfer is identical to the legislative power to appropriate and consequently cannot be delegated under any circumstances (answer brief, pp. 23-25). On the other hand, it also argues, not only may the legislature delegate transfer authority, it has done so in other statutes which it does not challenge in this lawsuit (answer brief, p. 26). Having raised these two arguments the general assembly ultimately concludes that the second argument is correct and thereby recognizes that the power to transfer may be delegated without infringing on the power of appropriation (answer brief, p. 12).

## II.

SEPARATION OF POWERS ISSUES SHOULD NOT BE  
DECIDED AS ABSTRACT QUESTIONS OF LAW, WITH-  
OUT CONSIDERING THE FACTUAL RECORD.

This court rarely decides issues on the basis of abstract principles of law.<sup>2/</sup> Where the constitutionality of a statute is at issue, this court has been particularly careful to review the statute under the circumstances in which it has been applied in a particular case. The court has declined to speculate about hypothetical abuses. It is an axiom of constitutional adjudication that a person to whom a statute may constitutionally be applied will not be permitted to challenge the statute on the ground that it may conceivably be applied unconstitutionally under circumstances not before the court. See e.g. Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978).

For the above reasons, this court should not repeat the error of the district court by ignoring most of the factual record concerning the circumstances of the challenged transfers. Particularly where the issues are those of separation of powers, it was error for the district court to consider them as abstract questions of black or white. See MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972).<sup>3/</sup>

Much of the general assembly's answer brief addresses not



the factual circumstances of the specified challenged transfers, but allegations of how the Governor might abuse the transfer authority in the future. The factual record was presented at trial not to excuse a violation of the law (another misrepresentation in the answer brief), but to demonstrate that the challenged transfers occurred under extraordinary circumstances in which the exercise of the transfer authority was essential to the Governor's ability to meet his responsibilities to manage the state budget within the constitutional prohibition against deficit spending.

The factual record demonstrates that the challenged transfers were made not as a matter of gubernatorial "whim," but as the only realistic solution to avert major crises caused by end of the fiscal year appropriation shortfalls. This factual record establishes that the general assembly's concerns about unrestrained executive intrusion upon the power of appropriation are not raised by this case.

### III.

#### THE TRANSFER STATUTES CONFER AUTHORITY TO MAKE THE CHALLENGED TRANSFERS.

A. Executive transfers are essential to management of the state budget.

The district court resolved the transfer issues by holding

unconstitutional C.R.S. 1973, 24-37-405(1)(k) and C.R.S. 1973, 24-30-201(1)(b) (the "transfer statutes") as invalid delegations of the legislative appropriation power. The answer brief attempts to support this conclusion by placing undue reliance upon cases in other jurisdictions which are not transfer cases at all, but deal with situations where the executive branch tried to expend moneys in the absence of any legislative appropriation for the purpose of the expenditure.<sup>4/</sup> As discussed above in argument II, the district court conclusion was based upon the false premise that the power to transfer is identical to the power of appropriation.

The general assembly obviously is uncomfortable with the position of the district court that authority to transfer between appropriations may not be delegated. The answer brief recognizes that executive transfer authority exists in other statutes and that transfers have been directed in appropriations bills. Executive transfers are critical to the day-to-day fiscal management of the state of Colorado and the general assembly recognizes that fact. The affidavit of state controller James Stroup, which is attached to appellants' motion for stay, illustrates the routine use of transfers of relatively small amounts of funds at the end of the fiscal year to fund overexpenditures in certain line items and permit payment of the state's obligations without incurring a deficit. As discussed in the opening brief, the staff director

of the legislative Joint Budget Committee testified at trial that some executive transfers are necessary to manage the state budget. Mr. Stroup's affidavit points out that as of July 14, 1983 the controller anticipated making about 138 transfers between appropriations of amounts totalling \$6,621,127, of which only \$459,736 were transfers between appropriations made to different departments. These facts rebut the argument that the Governor uses the transfer authority to circumvent legislative appropriations.

Governor Lamm testified at trial that in his opinion it would be almost impossible to run the state without the use of transfers between appropriations. The executive branch has systems in place, he explained, to keep agencies within their budgets. Unexpected contingencies arise by the end of the fiscal year each June which could not be anticipated in the budget finalized in February or March of the previous year. Lamm, R. 122-125.

Interagency transfers such as those challenged in this lawsuit are extraordinary, according to the Governor. Lamm, R. 124-125. The state controller substantiated this testimony at trial with his emphatic statement that transfers are used not to give an agency an "open checkbook," but to permit the agency to carry out its statutory function where there is a minimal shortfall in an appropriation based on an estimate made 18 months earlier.

Stroup, R. 486-487.

The fact is that executive transfers occur on a regular basis without legislative objection. Governor Lamm testified that prior Governors used executive transfers as well. Lamm, R. 126. The opening brief points to cases in other jurisdictions which have concluded that constitutional executive authority to manage the budget includes transfer power. Other states have enacted statutes to provide for executive transfers as a budget management tool.<sup>5</sup>/ A close reading of the answer brief reveals that even the general assembly recognizes that the district court decision invalidating the transfer statutes as an unconstitutional delegation of the appropriation power results in an unworkable scheme of government.

B. The transfer statutes are not unconstitutional as an overbroad delegation.

The general assembly therefore contends that while the legislature may delegate transfer authority to the executive, the delegation found in the challenged transfer statutes is unconstitutional because it is overbroad and lacking in standards. The contention that the legislature may not delegate without meaningful statutory standards has been recognized as an empty doctrine at the federal level and inquiry has shifted from statutory standards to administrative standards. K. Davis, Administrative Law

Treatise, section 2.00 (1970 Supp.).6/.

This argument assumes that the general assembly has standing to attack the constitutionality of its own statutes. This assumption is erroneous for the reasons stated in the opening brief. The arguments made there pertain to the overbreadth argument made in the answer brief as well as to the decision of the district court that transfer authority may not be delegated.

In recent decades this court has allowed the legislature considerable latitude to make broad grants of authority to the executive branch to carry out legislative enactments. As this court stated in Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965):

It is not necessary that the legislature supply a specific formula for the guidance of the administrative agency in a field where flexibility and adaptation of the legislative policy to infinitely variable conditions constitutes the essence of the program.

157 Colo. at 388. This court has found such broad statutory standards, as "reasonable" and "reasonably necessary" to be sufficient to validate legislative delegations to administrative agencies. Colorado Auto & Truck Wreckers Assoc. v. Dept. of Revenue, 618 P.2d 646, 651-652 (Colo. 1980). This court has deferred to legislative judgment so far as to infer standards from the statutory context of a particular delegation. See Colorado Auto & Truck Wreckers v. Department of Revenue, supra.

In the Colorado Auto & Truck Wreckers Assoc. case this court further recognized that a broad legislative delegation of authority will be upheld where an administrative agency has spelled out those situations included within the operative statutory language. 618 P.2d at 652. Evidence presented at trial in this case established that the executive branch has established written policies on transfers between appropriations to guide executive agencies and to prevent the excesses which concern plaintiff.

Defendants' exhibits 16, 17 and 18 are budget circular number 1, adopted on November 1, 1979, and subsequent revisions in the years 1981 and 1982 which set out these transfer policies under the direction of the controller. State Controller James Stroup testified at trial that proposals for transfers are typically initiated by an agency, then reviewed by his office and the office of state planning and budgeting. This review is made to determine magnitude and necessary documentation, availability of funds, whether a proposed transfer is prohibited by statute or fiscal rule, and whether the transfer would increase the overall level of appropriation to the executive branch or create new spending authority where there previously was none. Stroup, R. 482-483.

The transfer statutes expressly identify the Governor and the controller as the responsible officers charged with transfer

responsibility. Those statutes limit transfers to those between appropriations and must be interpreted within the context of constitutional law provisions relating to the appropriation power. The existence of written administrative guidelines further directs transfer policies.

Most importantly, the general assembly itself has the power to restrict its previously granted broad delegation through the legislative process if it so wishes. Under all these circumstances, it cannot be said that plaintiff has overcome the presumption of constitutionality which attaches to the transfer statutes.7/

C. The transfer statutes should not be construed to deny effect to the express language.

The express language of the transfer statutes and the statutory and constitutional context provide standards to guide executive discretion in making transfers between appropriations. The testimony at trial of the attorney general and the responsible executive officials established that the challenged transfers were made in a responsible fashion to carry out programs authorized by statutory and constitutional provisions.

Nevertheless, the general assembly argues that the transfer statutes must be construed so narrowly as to deprive them of any effect. At pages 32-34 of the answer brief it is contended that

the transfer statutes must be read to refer only to transfers which are separately authorized by a specific statute. Reference again must be made to the statutory language. C.R.S. 1973, 24-37-405(1)(k) provides that one duty of the office of state planning and budgeting is to:

Review for the governor all transfers between appropriations and all work programs recommended by the controller.

The powers and duties of the controller include C.R.S. 1973, 24-30-201(1)(b) which directs the controller:

To recommend transfers between appropriations under the provisions of law, to become effective upon approval by the governor.

Construction of a statute is ordinarily necessary only where a statute involves some ambiguity. C.R.S. 1973, 2-4-203. While the general assembly objects to the broad scope of the transfer statutes it does not raise any ambiguity aside from arguing that the phrase "under the provisions of law" in C.R.S. 1973, 24-30-201(1)(b) should be moved from modifying "appropriations" to modify "transfers." As well as requiring a reorganization of the plain language of the statute, this argument overlooks the fact that the phrase "under the provisions of law" does not appear in the other related transfer statute, C.R.S. 1973, 24-37-405(1)(k).

The most significant objection to the general assembly's



proposed construction is that it requires the court to conclude that the transfer statutes were enacted solely to refer to other statutory enactments to be enacted in the future. Such a result would be contrary to the rule that the courts are not to presume that the legislature used language in a statute idly and with no intent that it be given meaning. Blue River Defense Comm. v. Town of Silverthorne, 33 Colo. App. 10, 516 P.2d 452 (1973); C.R.S. 1973, 2-4-201(1)(b).

Finally, the general assembly's proposed construction is contradicted by its own actions in using an appropriations bill note to authorize executive branch transfers. See opening brief, pp. 33-34. The Colorado Constitution prohibits enactment of substantive legislation in an appropriation bill. See e.g. Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978). If it is now the position of the general assembly that specific statutory authority must exist to support transfers between appropriations, then the general assembly violated that principle by attempting to enact substantive transfer authority in an appropriations bill. The analysis which would give effect to this legislative appropriations bill note is to view the note as legislative acknowledgement that executive branch transfer authority is established by the transfer statutes and no additional legislation was necessary.

#### IV.

IF THE TRANSFER STATUTES ARE UNCONSTITUTIONAL THE GOVERNOR'S INHERENT CONSTITUTIONAL POWER TO ADMINISTER THE BUDGET AUTHORIZED THE CHALLENGED TRANSFERS.

This court need reach the issue of the Governor's constitutional power to make transfers between appropriations only in the event it concludes that the transfer statutes are unconstitutional or construes them as not authorizing the challenged transfers. If the court does reach this issue, then the pertinent inquiry is whether the Governor's presumptively valid exercise of his power to administer the budget amounted to a substantial interference with the legislative power of appropriation. See the opening brief, pp. 36-46.

Much of the general assembly's response to this position is premised on the mistaken assumption that a transfer is necessarily the same as an appropriation. As discussed above, this is a false premise. The circumstances of the challenged transfers demonstrate that each involved a transfer between existing appropriations previously approved by the general assembly in order to carry out a legislative or constitutional purpose for which the appropriation was originally made. In no instance were funds transferred and expended for a purpose for which no spending authority had ever been approved.8/

The Governor in his opening brief pointed to decisions in

other state jurisdictions which have recognized that the executive constitutional authority to administer the budget includes the power to transfer between appropriations. See opening brief, pp. 37-39. The general assembly's arguments that these cases are distinguishable from the instant circumstances are not persuasive.

The answer brief argues that the decision in Advisory Opinion In re Separation of Powers, 295 S.E.2d 589 (N.C. 1982) rests on a unique provision of the North Carolina Constitution. Review of that decision demonstrates that the court's reasoning was based upon the Governor's constitutional responsibility to administer the state budget, not upon any unique language in North Carolina's constitution. 295 S.E.2d at 593. This court recognized in Anderson v. Lamm, supra, that the Governor of Colorado likewise is given the constitutional responsibility to administer the budget. Moreover, the language from the North Carolina Constitution quoted on page 40 of the answer brief makes the Governor responsible for avoiding a deficit by requiring him not to spend unless revenues are sufficient. This court has recognized that art. X, sec. 16 of the Colorado Constitution places precisely the same responsibility on the Governor of Colorado to avoid a deficit, even to the extent of treating a legislative appropriation as void if revenues are insufficient. See e.g. In re Appropriations by the General Assembly, 13 Colo. 316, 22 P. 464

(1889); Parks v. Commissioners of Soldiers' & Sailors' Home, 22 Colo. 86, 43 P. 542 (1896); People ex rel. Colorado State Hospital v. Armstrong, 104 Colo. 238, 90 P.2d 522 (1939).

With respect to the Louisiana and Kansas cases cited on page 38 of the opening brief, the Governor does not contend that the circumstances of those cases are identical to the instant case. Nonetheless, those cases demonstrate judicial recognition of inherent executive authority to transfer between appropriations absent legislative approval and illustrate that executive transfers do not amount to a per se interference with the appropriation power.

V.

EVIDENCE OF ARBITRARY BUDGET CUTS IN THE GOVERNOR'S OFFICE RESULTING IN INSUFFICIENT FUNDS TO MEET HIS PAYROLL ESTABLISHES A PRIMA FACIE VIOLATION OF THE SEPARATION OF POWERS.

The Governor's second counterclaim alleges a violation of the separation of powers by the general assembly's actions in underfunding his personal staff beginning with the appropriation for fiscal year 1979-80 through the fiscal year 1981-82. The district court dismissed this counterclaim for failure to present a prima facie case. The general assembly now argues that this dismissal must be upheld because of the district court's conclu-

sion that the Governor deliberately overspent his original appropriation for fiscal year 1981-82.

The district court's conclusion misconstrued the legal theory of the Governor and overlooked the evidence in the record that the "knowing overspending" was necessitated by an arbitrary decision of the general assembly to reduce the personal staff of the Governor and thereby interfere with his executive function.

Governor Lamm testified at trial that the transfers to his office in 1982 were necessary to maintain his office at the staffing level inherited from his predecessor. Lamm, R. 142. State Controller James Stroup testified that without the transfer in 1982, the Governor would have been without sufficient funds to meet his payroll in April or May. Stroup, R. 584. The Governor's former chief of staff, John Lay, supplied more details on the history of the funding of the Governor's office, establishing that prior to the Governor's controversial veto in 1979 the general assembly had provided virtually the entire request made each year for the Governor's office. After the veto, the Governor's office budget request was slashed significantly below the prior year's appropriation. Lay, R. 558-575. See defendants' exhibit 20 (comparison of executive recommendation to appropriations). Although some funds were restored late in the fiscal year to the Governor's budget the result of the retaliatory budget cutting was to establish a lower base for future appropriation increases

through the 1981-82 fiscal year. See defendants' exhibit 20. Although the general assembly argues that the 1982 transfer to the Governor's office was made to circumvent legislative restraint, the evidence at trial established that the transfer was necessary to maintain the existing level of staffing from previous years.

The position of the general assembly in its answer brief is simply that the Governor must accept whatever level of funding the legislature chooses, regardless of its impact on the functions of the executive branch and regardless of the motives of the legislature. This contention represents a serious threat to the doctrine of separation of powers. The power of the purse strings does not permit the general assembly to require the chief executive to close his doors for the last two months of the fiscal year.

The general assembly's reliance on Beacom v. Board of County Commissioners, 657 P.2d 440 (Colo. 1983) is misplaced. Unlike the district attorney in that case, the Governor presented evidence that the function of his office was directly threatened with impairment by the underfunding. But for the exercise of his transfer authority, the Governor would have been unable to meet his payroll for the last two months of the fiscal year and faced possible layoffs of his staff. Moreover, the Governor presented evidence of a pattern of budget underfunding based upon arbitrary

political retaliation, circumstances absent from the Beacom case. Finally, the general assembly mistakenly equates the budget request of the Governor's personal office with that of any other executive agency. The threat which occurred in this case was curtailment of the basic functions of the staff of the chief executive. The evidence at trial demonstrated that this was not a routine examination of a budget request but a calculated attempt to undermine the effectiveness of the Governor. The proper analogy to this case is not the Beacom decision, but Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963) in which the function of the courts was threatened directly by a lack of funding. Under all these circumstances the court erred in dismissing this counterclaim for failure to establish a prima facie case.

#### CONCLUSION

Close examination of the answer brief reveals that the general assembly is as concerned as is the executive branch with the sweeping decision of the district court that it is an unconstitutional violation of the separation of powers for the executive branch to have authority to transfer between appropriations. Such a conclusion, founded upon an abstract and unrealistic view that the respective powers may never overlap, would cripple practical management of the state budget. That decision would pro-

hibit even those transfers which the general assembly views as administrative, in order to prevent abuses which have not been substantiated.

The solution proposed by the general assembly is for this court to engage in the process of construing the transfer statutes. This remedy is more properly the subject of the legislative process. It is respectfully submitted that for all the reasons stated above, and in the opening brief, this court should decline the invitation to step outside its normal judicial role. The court properly should conclude that the Governor lawfully made the challenged transfers and therefore reverse the district court as to that portion of its order.

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1/ The logic of the general assembly on this point is reminiscent of that encountered by Alice after she went through the looking-glass:

When I use a word, Humpty Dumpty said, in rather a scornful tone, it means just what I choose it to mean -- neither more nor less.

Lewis Carroll, Through the Looking-Glass and What Alice Found There, The Annotated Alice, 269 (Bramhall House 1960) (emphasis in original).

2/ One of the rare exceptions is the constitutional provision which permits the houses of the general assembly to submit interrogatories in special circumstances not applicable to this matter. Art. VI, sec. 3, Colorado Constitution. Another possible exception is provided by an original proceeding, an opportunity which has already been declined by this court in this lawsuit.

3/ The answer brief misrepresents the position of the district court by stating that the court rejected the Governor's version



of the facts. The express conclusion of the court was that as a matter of law it considered much of the factual record presented by defendants to be irrelevant to the court's decision on the real issues. As a consequence the findings of the district court ignored much of the factual record actually presented at trial and summarized in the opening brief. For example, the district court findings contained no mention of the testimony of William Becker, the only member of the general assembly to testify at trial. Mr. Becker was formerly chairman of the legislative committee created by statute to review the construction of prison facilities. His un rebutted testimony was that both he and his committee believed that the Governor properly made the corrections transfers. Becker, R. 163-186.

4/ One 1905 case is cited extensively in the answer brief, Colbert v. State, 86 Miss, 769, 39 So. 65 (1905). The issue in that case was whether the Governor could call state bonds for payment in the absence of a legislative appropriation for that purpose. In another case relied upon by the general assembly, Wallace v. Baker, 336 So. 3d 156 (Ala. 1976) the Governor expended funds for public education after the legislature failed to pass any appropriation measure. Again no transfer issue was presented.

5/ There has recently come to the attention of appellants, a report prepared in 1981 by the staff of the general assembly's legislative council which documents statutory authority for executive transfers in other states. That study reports that sixteen states authorize transfers between departments and 39 states authorize transfers between programs within departments. Several examples of transfer statutes are provided, including delegations of this authority to executive branch officers. A copy of the study is attached as exhibit A to this brief.

6/ Professor Davis states:

Not only is delegation without meaningful standards a necessity for today's governments at all levels but such delegation has been deemed a necessity from the time the United States was founded....

K. Davis, supra p. 46.

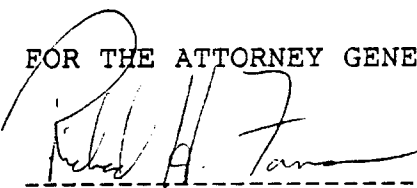
7/ At footnote 6 of the answer brief the general assembly asks this court to take judicial notice of certain executive branch documents relating to House bill 1320, passed during the 1983 session. This request is premature since the issue raised by the

footnote is likely to be the subject of yet another lawsuit by the general assembly against the executive branch, which may ultimately be reviewed by this court. House Joint Resolution No. 1033, passed during the 1983 session, directs the committee on legal services to retain counsel to bring a civil action to challenge the constitutionality of actions of the Governor and attorney general with regard to House bill No. 1320. 1983 Sess. Laws at 2119.

With respect to the question raised by footnote 6 in the answer brief, recent United States Supreme Court decisions are quite clear that there are some matters which the legislature properly may delegate to the executive branch but may not delegate to only one legislative house or to a legislative committee. INS v. Chadha, 103 S. Ct. 2764 (1983); Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir.), aff'd summ. 103 S. Ct. 3556 (1983). (One house legislative vetoes of federal agency actions held invalid.)

8/ At footnote 9 on p. 30 of the answer brief the general assembly concedes this point. Its brief adds a reference to testimony that such a transfer creating new spending authority may have taken place in a different context. This vague, undocumented testimony reference was unrelated to the challenged transfers and the district court made no finding on this testimony.

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13 12 13  
MEMORANDUM

February 3, 1981

TO: Members of the General Assembly  
FROM: Legislative Council Staff  
SUBJECT: Transfer of State Funds

The purpose of this memorandum is to provide information concerning the transfer of appropriated funds in other states. This analysis is based upon a 1977 report by the National Association of State Budget Officers /Budgetary Processes in the States (A Tabular Display)/ and a staff examination of thirty-eight state statutes.

Based on the above methods, the staff has found the following information:

- (1) Only sixteen states allow transfers between departments;
- (2) Thirty-nine states permit transfers between programs within a department;
- (3) Only two states do not allow transfers between classes within a particular program;
- (4) No states permit transfers from operating budgets to capital construction;
- (5) No states allow utilizing unspent funds from a prior year to be spent the succeeding year without specifically being appropriated; and
- (6) Almost all states have some type of emergency or contingency funds which are used in the following manner:
  - (a) Contingency funds. Twenty-three states allow contingency funds to be used for covering deficiencies; twenty-seven states allow contingency funds to be used for unexpected expenditures; and nine states allow contingency funds to be used for authorized programs.
  - (b) Emergency funds. Thirty-four states have emergency funds which are available for natural disasters or military/police purposes.

In order to provide specifics, the staff has selected what we consider to be good examples of the various types and methods of appropriation transfers.

EXHIBIT A

### Transfers Between Departments

Iowa. The State of Iowa allows the transfer of appropriations between departments under the following conditions:

...when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency.

Prior to any transfer of funds pursuant to this section, the state comptroller shall notify the chairpersons of the standing committees on budget of the senate and the house of representatives and the chairpersons of subcommittees of such committees of the proposed transfer. The notice from the state comptroller shall include information concerning the amount of the proposed transfer, the departments, institutions or agencies affected by the proposed transfer and the reasons for the proposed transfer. Chairpersons notified shall be given at least two weeks to review and comment on the proposed transfer before the transfer of funds is made. (Iowa Statutes, § 8.39)

### Transfers Between Programs and Categories within a Department

Florida. Transfers within departments are authorized, but are limited:

(1) Unless otherwise expressly provided by law, appropriations shall be expended only for the purpose for which appropriated, except that if deemed necessary said moneys may be transferred as provided in subsections (2) and (3) when it is determined to be in the best interests of the state. Appropriations for fixed capital outlay shall not be expended for any other purpose, and appropriations shall not be transferred between state agencies unless specifically authorized by law.

(2) The head of each department, whenever deemed necessary by reason of changed conditions, may transfer appropriations funded from identical sources and transfer the amounts included within the total approved budget and releases as furnished pursuant to §§ 216.181 and 216.192, as follows:

(a) Between categories of appropriations within a budget entity, if no category of appropriation is increased or decreased by more than five percent (5%) of the approved budget by all action taken under this authority.

(b) Additionally, between budget entities within identical categories of appropriations, if no category of appropriation is increased or decreased by more than five percent (5%) of the approved budget by all action taken under this authority. Such authorized revisions, together with related changes, if any, in the plan for release of appropriations, shall be transmitted by the state agency to the comptroller for entry in his records in the manner and format prescribed by the department of administration in consultation with the comptroller. A copy of such revision shall be furnished the department, the chairmen of the legislative committees, and the auditor general.

(3) Transfers of appropriations in excess of that provided in subsection (2) but within a state agency may be authorized by the commission,\* pursuant to the request of the agency filed with the department, if deemed necessary and in the best interests of the state. (Florida Statutes, § 216.292)

(4) The department shall report all such approvals and the reasons for such approvals to the legislative appropriations committees. The committees may advise the commission relative to any transfers made hereunder. (Florida Statutes, § 216.292)

South Dakota. Transfers of money appropriated on a program basis are allowed in South Dakota:

...Moneys appropriated on a program basis by the general appropriation act may be transferred between program accounts within or between departments and bureaus only at the written request of a department secretary or bureau commissioner, or his designee, in accordance with procedures established by the bureau of finance and management. Moneys appropriated by the general appropriation act may be transferred between institutions of the state only upon written request of the appropriate governing board, and upon specific written approval of the bureau of finance and management. The bureau of finance and management shall keep a record of all such authorizations of transfers and make

\*Governor and his cabinet

them available for public inspection. The bureau of finance and management shall also submit an informational report detailing all transfers approved to the special legislative committee established in § 4-8A-2.\* (South Dakota Statutes, § 4-8A-8)

#### Emergency Expenditures

Rhode Island. In Rhode Island, the following provisions cover transfers in unforeseen circumstances:

...In case of an emergency, or unforeseen circumstances not existing at the time of making an appropriation, any department may request the transfer of a portion of any item of appropriation to another item of appropriation made for the same department; and the budget officer with the approval of the governor, may issue an order for any such transfer; provided that no such transfer shall operate to increase the total of the amounts appropriated for any such department; and the budget officer shall record the same and cause the accounts of the appropriations affected to be changed accordingly; provided, however, that any transfer of funds between the general assembly, legislative agencies, and legislative committees and commissions, shall be approved only by the joint committee on legislative affairs. (Rhode Island Statutes, § 35-3-18)

Washington. The following Washington provision covers expenditures for emergencies:

Whenever an emergency shall arise necessitating an expenditure for the preservation of peace, health or safety, or for the carrying on of the necessary work required by law of any state agency for which insufficient or no appropriations have been made, the head of such agency shall submit to the governor, duplicate copies of a sworn statement, setting forth the facts constituting the emergency and the estimated amount of money required therefor. If the governor approves such estimate in whole or in part, the governor shall endorse on each copy of the statement the governor's approval, together with a statement of the amount approved as an allocation from any appropriation available for allocation for emergency purposes and transmit one copy to the head of the agency thereby authorizing the emergency expenditures. /1975-'76 2nd ex.s c 83 ss 1.7 (Washington Statutes, § 43.88.250)

\*Comprised of the House and Senate Appropriations' Committees

### Miscellaneous

The following provisions illustrate the different types of transferring authorities and their specific powers and duties.

Ohio. The Ohio law establishes a controlling board composed mainly of legislators to authorize different types of transfers:

The controlling board may, at the request of any state agency or the director of budget and management, authorize with respect to the provisions of any appropriation act:

(A) Transfers of all or part of an appropriation within but not between state agencies except such transfers as the director of budget and management is authorized by law to make; provided the transfer by the director of budget and management is not for the purpose of effecting new or changed levels of program service not authorized by the general assembly;

(B) Transfers of all or part of an appropriation from one fiscal year to another;

(C) Transfers of all or part of an appropriation within or between state agencies made necessary by administrative reorganization or by the abolition of an agency or part of an agency;

(D) Transfers of all or part of an appropriation in excess of needs from special accounts in the federal special revenue fund, the state special revenue fund, or the state intragovernmental service fund to the general revenue fund or to such other funds to which the money would have been credited in the absence of the special account;

(E) Transfers of all or part of those appropriations included in the emergency purposes appropriation account of the controlling board;

(F) Transfers of all or part of an appropriation or other moneys into and between existing funds, or new funds, as may be established by law;

(G) Transfer or release of all or part of an appropriation to a state agency requiring controlling board approval of such transfer or release as provided by law;

(H) Temporary transfer of appropriations included in the emergency purposes account of the controlling board. Such temporary transfers may be made subject to conditions specified by the controlling board at the time temporary transfers are authorized. No transfers shall be made under this division for the purpose of effecting new or changed levels of program service not authorized by the general assembly. (Ohio Statutes, § 127.14)

Maine. The transfer process in Maine involves both the governor and the legislature in large transfer amounts:

1. Transfers authorized. Any balance of any appropriation or subdivision of an appropriation made by the Legislature for any state department or agency, which at any time may not be required for the purposes named in such appropriation or subdivision, may be transferred at any time prior to the closing of the books, to any other appropriation or subdivision of an appropriation made by the Legislature for the use of the same department or agency for the same fiscal year subject to the limitations in subsections 2 and 3.

2. Governor. The Governor may transfer funds from one appropriation or subdivision of an appropriation to another appropriation or subdivision, if the aggregate sum of the funds transferred from the appropriation or subdivision or to another appropriation or subdivision in any one fiscal year does not exceed the smaller of:

A. \$100,000; or

B. 10% of the appropriation or subdivision in the appropriation, as approved by the Legislature, from which or to which the funds are to be transferred.

3. Governor and Legislature. A transfer of funds greater than that authorized in subsection 2 shall occur only after compliance with the following procedures.

A. If a department or agency head desires a transfer of appropriated funds, he shall recommend the transfer to the Governor. If the Governor desires such a transfer, he shall recommend the transfer to the Legislature.



B. Included with any recommendation for a transfer described under paragraph A, shall be a written statement as to why the funds to be transferred are not needed in the appropriation or subdivision of the appropriation for which they were appropriated, and a specification as to the uses to which the transferred funds shall be put.

C. When the Legislature is in regular or special session and the Governor desires to recommend a transfer of appropriated funds, the Governor shall recommend the transfer to the Legislature by submitting his written recommendation, including a written statement which contains the information set forth in paragraph B, to the Joint Standing Committee on Appropriations and Financial Affairs of the Legislature.

If the Legislature does not act by majority vote of both Houses to disapprove the recommended transfer within 30 days of the date of submission of the recommended transfer to the Joint Standing Committee on Appropriations and Financial Affairs, the transfer shall be deemed to have been approved.

D. When the Legislature is not in regular or special session and the Governor desires to recommend a transfer, the Governor shall submit his written recommendation to the Legislative Council, the members of the Joint Standing Committee on Appropriations and Financial Affairs and the Legislative Finance Officer. Included with the Governor's recommendations, shall be a written statement which contains the information set forth in paragraph B and the reasons why the need for the transfer could not have been anticipated while the Legislature was in session and why the transfer is essential before the Legislature will be in session.

Transfers recommended while the Legislature is not in session shall also take effect 30 days after the date of submission of the recommended transfer to the Legislature, unless disapproved by majority vote of both houses. (Maine Statutes, § 1585)

Wisconsin. A joint committee on finance composed of seven senators and seven representatives is empowered to supplement or transfer appropriations:

(3) The committee may supplement the appropriation of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made, if the committee finds that:

(a) An emergency exists;

(b) No funds are available for such purposes; and

(c) The purposes for which a supplemental appropriation or transfer is requested have been authorized or directed by the legislature.

(4) The committee may transfer between appropriations and programs if the committee finds that unnecessary duplication of functions can be eliminated, more efficient and effective methods for performing programs will result or legislative intent will be more effectively carried out because of such transfer and if legislative intent will not be changed as the result of such transfer. No transfer between appropriations or programs may be made to offset deficiencies arising from the lack of adequate expenditure controls by a department, board, institution, commission or agency. The authority to transfer between appropriations shall not include the authority to transfer from sum sufficient appropriations as defined under s. 20.001(3)(d) to other types of appropriations. (Wisconsin Statutes, § 13.101)

#### Specific Provisions Regarding Transfer of Appropriations into Construction Funds

The following provisions from California and Utah are included because of their specific mention of appropriation transfers relating to construction funds.

##### California:

The unexpended balance in any appropriation heretofore or hereafter made payable from the State Construction Program Fund which the Director of Finance, with the approval of the State Public Works Board, determines not to be required for expenditure pursuant to the appropriation, may be transferred on order of the Director of Finance to an in augmentation of the appropriation made by Section 16354. (s 16333 California Statutes)

§ 16354

There is hereby appropriated from the State Construction Program Fund, without regard to fiscal years, any amounts transferred to this appropriation in accordance with the provisions of Section 16353, and such amounts may be expended for acquisition of real property or for construction and equipment of state public works projects for which an appropriation has been made from the State Construction Program Fund. Expenditures shall be made pursuant to allocations made by the Director of Finance upon approval of the State Public Works Board.

Allocations may be made for expenditure upon any state public works project in augmentation of appropriations made from the State Construction Program Fund, where such project cannot be undertaken because the estimate exceeds the amount available for such construction bids received are in excess of the estimate, and upon such augmentation, contracts may be awarded therefor, notwithstanding the provisions of Section 14275 or of Section 25235 of the Education Code.

Allocations may be made for acquisition of real property in augmentation of appropriations made from the State Construction Program Fund for acquisition of real property and which cannot be acquired because acquisition costs are in excess of the amounts provided in the appropriation.

Allocations may be made for purchase of equipment in augmentation of appropriations made from the State Construction Program Fund from which purchase of equipment is authorized.

Allocations made pursuant to this section shall be included in the total amount of annual Budget Act appropriations in the same manner and with the same effect as if such allocations had been included in a section of the annual Budget Act as provided in the State Construction Program Bond Act of 1958 (Statutes of 1958, First Extraordinary Session Chapter 88). (California Statutes, § 16353 and 16354)

Utah:

No amounts shall be transferred from an item of appropriation of any department, institution or agency into the building board construction fund or any other fund without the prior express approval of the legislature. (Utah Statutes, § 63-38-3)

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 27th day of February, 1984, addressed as follows:

Philip G. Dufford, Esq.  
Gregory A. Ruegsegger, Esq.  
Welborn, Dufford & Brown  
1700 Broadway  
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Dale Dill