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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 381

JAN 03 1984
Dec. 30, 1983 HR

-----David W. Breiner-----

OPENING BRIEF OF GOVERNOR RICHARD D. LAMM AND THE OTHER
EXECUTIVE BRANCH DEFENDANTS
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,

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.

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I N D E X

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3-22
SUMMARY OF ARGUMENT	22-23
ARGUMENT	
I. THE TRIAL COURT ERRED IN HOLDING THE TRANSFER STATUTES UNCONSTITUTIONAL.	23-36
II. THE GOVERNOR HAS INHERENT CONSTITUTIONAL AUTHORITY TO MAKE THE CHALLENGED TRANSFERS.	36-41
III. WHETHER AUTHORIZED BY LEGISLATIVE DELEGATION OR BY INHERENT EXECUTIVE POWER, THE CHALLENGED TRANSFERS WERE LAWFUL.	42-46
IV. THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S FIRST COUNTERCLAIM.	46-49
V. WHERE DEFENDANTS PRESENTED EVIDENCE THAT THE GENERAL ASSEMBLY ARBITRARILY CUT THE GOVERNOR'S BUDGET, THE TRIAL COURT ERRED IN DISMISSING THE SECOND COUNTERCLAIM FOR FAILURE TO PRESENT A PRIMA FACIE CASE.	49-52
CONCLUSION	52-53

CASES

Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978)	33, 36, 47
Advisory Opinion In Re Separation of Powers, 295 S.E.2d 589 (N.C. 1982)	37
Bussie v. McKeithen, 259 So. 2d 345 (La. App. 1972)	38

I N D E X

	<u>Page</u>
Colorado Auto and Truck Wreckers Assoc. v. Dept. of Revenue, 518 P.2d 646 (Colo. 1980)	28
Commonwealth v. Welosky, 276 Mass. 398, 400 (1931)	41
County of Cook v. Ogilvie, 50 Ill. 2d 379, 280 N.E.2d 224 (1972)	39
Dileo v. Board of Regents of the University of Colorado, 196 Colo. 216, 590 P.2d 486 (1978), cert. denied 441 U.S. 927	25
Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied 436 U.S. 907 (1978)	26
Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), judq. vac., 444 U.S. 996 (1979)	26
Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977)	26
In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 1, 536 P.2d 308, 318 (1975)	29
In re Priority of Legislative Appropriations, 19 Colo. 58, 34 P. 277 (1893)	30
I.N.S. v. Chadha, 103 S.Ct. 2764, 2784 (1983)	27,30
Lincoln v. Secretary of the Commonwealth, 326 Mass. 313 (1950)	41
Lujan v. Colorado State Bd. of Education, 649 P.2d 1005 (Colo. 1982)	28
MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972)	27
McGowan, Congressmen in Court: The New Plaintiffs, 15 Ga. L. Rev. 241 (1981)	26
Nance v. Stuart, 7 Colo. App. 510, 44 P. 779 (1896)	56
Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978)	41,48

I N D E X

	<u>Page</u>
People v. Blue, 190 Colo. 95, 544 P.2d 385 (1975)	25
Ramos v. Lamm, 495 F. Supp. 122 (D. Colo. 1979)	10,44
Ramos v. Lamm, 639 F.2d 559, 586 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)	11,44
Reed v. Dolan, 195 Colo. 193, 577 P.2d 284 (1978)	25
Riegler v. Federal Open Market Committee, 656 F.2d 373 (D.C. Cir. 1981)	26,55
Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963)	51
State ex rel. Mesnel v. Keip, 66 Ohio St. 2d 379, 423 N.E.2d 50, 65 (1981)	44
State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786 (1975)	38
State ex rel. Schneider v. Bennett, 222 Kan. 11, 564 P.2d 1281 (1977)	38,57
Wallace v. Baker, 336 So. 2d 156 (Ala. 1976)	39
Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977)	25,27

STATUTES

House Bill

23	56
----	----

1261	19
------	----

Senate Bill

I N D E X

:

Page

185	33
412	55
485	33

Colo. Sess. Laws

1941 ch. 2, sec. 11, pp. 51-52	31
1941 ch. 2, sec. 12, p. 54	31
1941 ch. 2, sec. 17, pp. 56, 57	31
1947 ch. 118, p. 222	32
1953 ch. 32, sec. 3, at 122	32
1974 at 450	42
1976 ch. 34, sec. 47, p. 307	32
1981 ch. 6, p. 125	33
1981 at 5 and 7	54
1981 Colo. Sess. Laws 2065	55
1982 Colo. Sess. Laws 717	55

C.R.S. 1963:

3-3-1(1)	32
----------	----

C.R.S. 1973:

13-4-102(1)(b)	7
17-1-110	18

I N D E X

	<u>Page</u>
24-3-201(1)(b)	55
24-30-201(1)(b)	2, 24, 31, 33
24-30-206	31
24-30-206(3)	54
24-37-405(1)(k)	2, 23
28-2-106(4)	54

C O N S T I T U T I O N

Colo. Const.

art. III	25, 47
art. IV, sec. 2	47
art. IV, sec. 10	55
art V, sec. 1	26
art. V, sec. 7	45
art V, sec. 33	29
art. V, sec. 39	55
art. X, sec. 16	30
1974 amendment to sec. 33 of art. V	42
art. 24 of title 17, C.R.S. 1973	53

O T H E R A U T H O R I T Y

I_N_D_E_X

	<u>Page</u>
Colorado Legislative Council, Report to the General Assembly: Simplification of State Government Organization Part II, Research Publication No. 63 (December 1962) at pp. 10, 11 and 47	56
Compiled Statutes 1883 ch. XXXII, sec. 1198	56
J. Story, I Commentaries on the Constitution of the United States, 393 (5th ed. 1891)	29
James Madison in the Federalist No. 47	29
Mills, Ann. Stat. 1891, sec. 1929	56
North Carolina statute (G.S. 143-23)	37
Rocky Mountain News, March 2, 1941, p. 2	32
The Federalist, Number 48	50,52
The Federalist Papers, at 246 (Bantam Books Inc. 1982)	45-46,51 52

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R. GARRETT MITCHELL, Executive Director of the Department
of Administration of the State of Colorado, and
LUMBERMANS MUTUAL CASUALTY COMPANY,

Defendants-Appellants.

-

This opening brief is submitted on behalf of defendants-ap-

pellants: Governor Richard D. Lamm, Treasurer Roy Romer, State Controller James A. Stroup and R. Garrett Mitchell, former Executive Director of the Department of Administration (also referred to collectively as the "executive branch defendants") by their attorney, Duane Woodard, attorney general for the State of Colorado.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that C.R.S. 24-30-201(1)(b) and 24-37-405(1)(k) were unconstitutionally void as unlawful delegations of the legislative function of appropriation.

2. Whether the trial court erred in ruling unlawful the three sets of executive transfers between appropriations which were specifically challenged in these consolidated lawsuits.

3. Whether the trial court erred by dismissing appellants' first counterclaim which alleged that the general assembly violated the constitutional separation of powers by enacting a negative supplemental appropriation measure which interfered with the executive authority to administer the state budget.

4. Whether the trial court erred by dismissing appellants' second counterclaim which alleged that the general assembly arbitrarily underfunded the office of the Governor in violation of the separation of powers.

STATEMENT OF THE CASE

A. The nature of the case.

This appeal raises fundamental issues of separation of powers and the proper role of the judiciary in resolving disputes between the legislature and the Governor. The general assembly filed these two consolidated lawsuits to challenge the lawfulness of Governor Lamm's decisions to make specified transfers of funds and spending authority between certain line item appropriations previously enacted by the legislature. Also attacked was a 1982 executive decision to spend, without legislative appropriation, moneys received by the State of Colorado from a consent decree between a federal administrative agency and a private oil company.

The general assembly contended that the specified transfers and expenditure without appropriation were unconstitutional encroachments upon the legislative power of appropriation. It also argued that the Governor's decisions violated specific statutory provisions. The Governor and other executive branch defendants answered that the general assembly had authorized the transfers by express statutory provision, and, in any event, the challenged transfers fell within the inherent constitutional executive authority to expend the state budget once appropriated.

The executive branch defendants also contended that certain of the challenged transfers were necessitated by legislative

encroachment upon the executive branch. Two counterclaims alleged that the general assembly violated the separation of powers by arbitrarily underfunding the budget of the Governor's office and by enacting a negative supplemental appropriation which interfered with executive administration of the budget. The relief sought as to all claims and counterclaims was declaratory judgment and injunctive relief.

After trial to the court, the district judge ruled that the challenged transfers were unlawful, expressly holding that the two statutory provisions relied upon by the Governor were unconstitutional. The court declined to grant injunctive relief because defendants had acted in good faith and in reliance upon statutes held unconstitutional after the event. The court upheld the challenged expenditure without appropriation as a proper exercise of executive power.

B. The course of proceedings.

This dispute was initiated by the general assembly, which filed a complaint in Civil Action No. 81 CV 010058 on November 19, 1981. It sought a ruling that Governor Lamm acted unlawfully 14 months earlier when on August 28, 1980 he authorized the transfer of \$2,475,000 for use by the Department of Corrections.^{1/}

The Governor filed a motion to dismiss on December 30, 1981

raising issues of standing, justiciability and failure of the complaint to state a claim upon which relief could be granted. On April 26, 1982, the general assembly filed a motion for summary judgment.

While both motions were still pending in 81 CV 010058, the general assembly filed a second lawsuit, 82 CV 05005, which challenged several transfers approved by Governor Lamm in May of 1982 and added a claim alleging the unlawful executive expenditure of certain moneys received from Chevron, U.S.A., Inc. (the "Chevron moneys") without prior legislative appropriation. Several executive branch officials were named as additional defendants. The initial complaint also alleged claims against two surety companies which had issued bonds for state officials. Both these claims were resolved prior to trial and are not at issue on appeal. No claim for monetary damages was asserted by either side at trial.

On June 17, 1982 a hearing was held on the general assembly's motion for a temporary restraining order in the second transfer lawsuit. Chief Judge Clifton A. Flowers denied the motion. On August 24, 1982 Judge Flowers consolidated the two cases in courtroom 9, Judge Harold D. Reed presiding.

A motion to dismiss the amended complaint in Civil Action No. 82 CV 05005 was filed on August 30, 1982. This motion raised most of the same grounds alleged to dismiss the complaint in the

first lawsuit.

A hearing was held before Judge Reed on December 13, 1982 on all pending motions in both consolidated cases. The court then denied defendants' two motions to dismiss and plaintiff's motion for summary judgment. On January 7, 1983 defendants filed answers in both cases, and added the two counterclaims in 82 CV 05005.

Trial to the court commenced on June 20, 1983 and continued through June 28, 1983, encompassing about five days of testimony. The general assembly called as its witnesses: 1) Robert E. Smith, Jr., deputy state auditor and 2) Robert G. Moore, staff director to the Joint Budget Committee. Defendants called the following witnesses: 1) Honorable Richard D. Lamm, Governor of the State of Colorado; 2) William H. Becker, former Colorado state representative and former chairman of the general assembly's Joint Committee on Corrections; 3) James G. Ricketts, former executive director of the Colorado Department of Corrections; 4) George H. Delaney, director, Division of Correctional Industries, Colorado Department of Corrections; 5) J. D. MacFarlane, former attorney general for Colorado; 6) James A. Stroup, state controller for Colorado; 7) John Lay, former executive assistant to the Governor; and 8) Matthew Lee White, former executive director of the Colorado Office of State Planning and Budgeting.

At the close of defendants' evidence in support of its two counterclaims, Judge Reed dismissed the second counterclaim (dealing with alleged underfunding of the Governor's office.) On July 5, 1983 the court's written order issued, ruling that the challenged transfers were unlawful because the statutes relied upon by defendants were unconstitutional. Judge Reed rejected defendants' remaining counterclaim. The court further ruled that the executive branch lawfully expended the Chevron moneys without legislative appropriation.

Both parties subsequently filed motions to alter or amend the judgment or, alternatively, for a new trial. Both motions were denied. Defendants timely filed a notice of appeal on August 12, 1983. Plaintiff filed a notice of appeal on August 25, 1983. Appeal is taken directly to this court pursuant to C.R.S. 1973, 13-4-102(1)(b).

On July 20, 1983, the district court partially stayed enforcement of its judgment pending determination of defendants' motion for new trial. This partial stay was extended on July 29, 1983 for thirty days. On September 22, 1983, upon motion made by the Governor, this court ordered that execution of the trial court's judgment be stayed until further order of the court.

: C. Statement of Facts

1. The corrections transfer of 1980.

On August 28, 1980 Governor Lamm authorized the transfer of \$2,475,000, previously appropriated for other purposes, for expenditure by the Colorado Department of Corrections to meet extraordinary needs arising out of funding shortfalls for both construction of new prison facilities by Correctional Industries (a division of the Department of Corrections) and the operating budget of the Division of Correctional Industries. Jt. exhibit I. These transfers were effective for the state fiscal year ended June 30, 1980. The source of the transferred amounts were reversions, that is, amounts appropriated for other purposes which were identified at the end of the fiscal year as not needed for those purposes and which otherwise would have reverted to the state general fund. Jt. exhibit II.

Governor Lamm testified at trial that this transfer between appropriations was made as the only viable alternative to enable the Division of Correctional Industries of the Colorado Department of Corrections to complete construction of the New Close Security Prison ("New Close") by the critical scheduled completion date of December 30, 1980. This decision was made after consultation with the Joint Budget Committee of the general assembly. The urgency was precipitated by a federal court order .

requiring closure of the Old Maximum Security Prison ("Old Max") for unconstitutional conditions of confinement, an order under appeal to the Tenth Circuit Court of Appeals at the time the transfer decision was made. Lamm, R. 127-140; see defendants' exhibit 1 (chronology of major events in the corrections transfer).

On May 22, 1980 Governor Lamm learned for the first time that scheduled completion of New Close by December 30, 1980 was endangered by a very substantial funding shortfall in the budget of Correctional Industries. Lamm, R. 131. Closure of Old Max, and transfer of the prisoners confined there, was only possible if New Close could be completed at the same time as a new maximum security prison ("New Max") then under construction by a private contractor. Lamm, R. 129. The legislature had previously appropriated funds to the Department of Corrections to fund a construction contract providing that Correctional Industries was to build New Close, and other related prison facilities, with inmate labor. Construction began in March of 1979, but in May of 1980 increased costs of construction and financial problems in Correctional Industries as a whole, threatened to put that agency out of business. Delaney, R. 363-365.

The Governor's urgency to complete new prison facilities was necessitated by ongoing litigation in the federal courts over the constitutionality of conditions of confinement at Old Max. A

lawsuit initiated in 1977 by one prisoner, Fidel Ramos, had expanded in 1978 to a class action joined in by the American Civil Liberties Union and the National Prison Project. On December 20, 1979 Federal District Judge John L. Kane, Jr. concluded that plaintiffs had established by overwhelming proof the unconstitutionality of the conditions of confinement at Old Max. The remedy fashioned by the court required closure of Old Max. Ramos v. Lamm, 465 F. Supp. 122 (D. Colo. 1979).

Former Colorado Attorney General J. D. MacFarlane testified at trial that the ordered closure of Old Max came as a bombshell to the state. The state had recognized that there were serious problems with the prison, but had argued to the court that the state was well on its way to correct these conditions by a massive program which included ongoing construction of new prison facilities. MacFarlane, R. 445-450. To obtain an appellate court stay of Judge Kane's order of closure and to press for his order to be reversed on appeal, MacFarlane urged state executive and legislative officials to establish the state's good faith by insuring that the new facilities under construction were completed as scheduled. MacFarlane believed that shutting down prison construction would be interpreted as bad faith. In June of 1980, MacFarlane appeared at oral argument in the Ramos appeal and personally represented to the Tenth Circuit that the new prisons would be completed by January 1, 1981. These representa-

tions by the executive branch were joined in by the general assembly, which filed an amicus brief with the appellate court urging the inappropriateness of immediately closing Old Max. MacFarlane, R. 445-460.

These representations, and the state's efforts to complete the prisons on schedule, made a significant impact on the Tenth Circuit. In its opinion dated September 25, 1980 (and modified on rehearing November 16, 1980) the court reversed Judge Kane's remedy, and remanded for reconsideration in light of recent developments, stating:

We must agree that the developments in the construction of the new prison facilities are extremely relevant in fashioning an appropriate remedy for the constitutional violations which exist in this case.

Ramos v. Lamm, 639 F.2d 559, 586 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

Throughout the Ramos litigation both the executive and the legislative branches of government had represented to the federal courts that direct federal intervention in the state prison system was unnecessary and inappropriate. This argument was premised on the imminent solution to unconstitutional conditions of confinement available upon completion of the new facilities. Judge Kane's order of closure of Old Max was never put into effect because the Tenth Circuit recognized that long-planned state measures to remedy the problem were near completion. Gov-

Governor Lamm's decision to transfer between appropriations made this result possible.

On May 22, 1980, the executive director of the Department of Corrections, James Ricketts, advised Governor Lamm that the financial problems of Correctional Industries required funds beyond those then available to the department. Dr. Ricketts testified that he told the Governor that he intended to close down every construction project in which Correctional Industries was involved unless additional funds were made available.

Ricketts, R. 343-347.

Since the general assembly had adjourned for the year on May 7, 1980, Governor Lamm and Dr. Ricketts met on May 27 with the legislature's Joint Budget Committee to discuss the funding shortfall and possible solutions. The Governor viewed that committee as the fiscal agent of the legislature. At that meeting the Governor raised the possibility of transferring funds from reversions to provide the necessary financing. Both officials recalled at trial that no member of the Joint Budget Committee objected to the proposed use of transfers. No member of the committee requested the Governor to call the general assembly back into special session to deal with this problem. Lamm, R. 133-134. Ricketts, R. 346-347. Dr. Ricketts testified that the possibility of shutting down prison construction by Correctional Industries was discussed at the meeting and committee members

stated that the projects should not close down. Ricketts, R. 348. Dr. Rickett's conclusion at the end of the meeting was that the Joint Budget Committee viewed the matter as an "executive problem" which the executive was supposed to manage. Ricketts, R. 346.

The general assembly had long been committed to the construction of New Close and other prison facilities by Correctional Industries. George H. Delaney, present director of Correctional Industries, testified that construction had begun on New Close in March of 1979 based upon a budget of \$4.4 million appropriated for that purpose by the legislature. The New Close project was only one of several business enterprises engaged in by Correctional Industries, the state agency charged with statutory responsibility for prison inmate work programs. Although Correctional Industries was engaged in other construction projects, New Close was larger by many degrees of magnitude than any previous such project undertaken with inmate labor. Delaney, R. 363-365.

In 1978 the general assembly enacted C.R.S. 1973, 17-1-110 creating a joint review committee composed of legislators for the purpose of providing guidance and direction to the Department of Corrections concerning a new maximum security prison facility. In 1980 the chairman of that committee was William H. Becker (R.-Colorado Springs). Mr. Becker testified at trial that during .

the summer of 1980 the Joint Review Committee on Corrections was informed of the financial problems faced by Correctional Industries and discussed those problems at its meetings. Defendants' exhibits 7, 8 and 9 are summaries of the committee's meetings held in June, July and August of 1983.

In July of 1980, this joint review committee, upon a unanimous vote, wrote a letter to Governor Lamm inquiring about the possibility of making transfers from reversions to the Department of Corrections to prevent stoppage of the prison construction. Def. ex. 8, pp. 2-3. Def. ex. 6. Mr. Becker testified that this letter was intended to indicate committee approval of the transfer of necessary funds. Becker, R. 166. He further testified that committee members were well aware of the need to coordinate completion of New Close with that of the new maximum security prison to make possible a coordinated transfer of prisoners. Becker, R. 170, 172. Committee members were also concerned by the possibility that the federal court might close Old Max without alternative facilities for the prisoners. Becker, R. 173. No member of that committee requested that the Governor call a special session of the general assembly to discuss additional funding. No member objected to the Governor's transfer of reversions for use by the Department of Corrections. Becker, R. 174-175. As chairman of the committee, Mr. Becker felt that there was nothing wrong with the Governor's use of transfers to

solve this problem of underfunding. Becker, R. 183.

The nature of the financial problems faced by Correctional Industries in 1980 and the reasons leading to this underfunding crisis were complex. Defendants called several witnesses who were personally familiar with these problems and who testified at length about them. This testimony was not rebutted.

Dr. Ricketts explained that construction estimates for the New Close facility proved too low for several reasons: 1) three times the number of bad weather days originally estimated resulted in higher labor costs; 2) unanticipated high rates of inflation in the cost of building materials; 3) inmate sabotage which resulted in work being done several times; and 4) inability to hire enough skilled electricians and plumbers from the noninmate labor market. Ricketts, R. 332-336. Correctional Industries in 1979 and early 1980 had inadequate financial recordkeeping and management, making it practically impossible to determine the actual financial status of Correctional Industries at any given time. Delaney, R. 401-411. Correctional Industries had been established by the general assembly in 1977 as a self-supporting business enterprise to employ prison inmates in a variety of activities, one of which was construction. Delaney, R. 410. Although the general assembly had provided it with cash spending authority, the state controller testified, Correctional Industries had never been successful enough at its business

activities to earn sufficient revenues to spend its entire cash appropriation. Stroup, R. 506. If Correctional Industries ran out of funds in its revolving account, the state controller would refuse to issue warrants to pay suppliers, resulting in unpaid vendors who would not do business with Correctional Industries. The business activities, including construction, could not continue without a subsidy. At the end of the fiscal year on June 30, 1980, Correctional Industries as a whole had a cash deficit of \$800,000. Delaney, R. 377-379.

Compounding the problem was the fact that the division's poor financial records made it impossible to determine the full magnitude of the financial problem until almost two months after the end of the fiscal year. As early as January or February of 1980 an internal team in the Department of Corrections attempted to investigate possible financial problems arising from the prison construction projects. After consulting with James Stroup, then deputy state controller assigned to investigate this problem, the Department of Corrections and Mr. Stroup concluded that Correctional Industries could finish the fiscal year within its budget. Delaney, R. 401-411; Stroup, R. 495-497. Continual scrutiny of the problem by the Corrections Department and Mr. Stroup later revealed that the March estimate was inaccurate as a forecast and over-estimated the effectiveness of available cost-cutting measures. Stroup, R. 494-504.

By: May 22, 1980 when the Governor was advised of these problems, it was known that a significant underfunding problem existed. The summer was spent by representatives from the Corrections Department and outside management advisors appointed by the Governor, analyzing and reanalyzing the financial records to determine how much money was actually necessary to make up the cash flow deficit for the 1980 fiscal year and to enable Correctional Industries to complete the prison construction projects. The changing figures were finalized on August 26, 1980, two days before the transfer was formally authorized by the Governor. Delaney, R. 366-373.

Wherever the fault lay for the financial problems threatening to close Correctional Industries, between May and August of 1980 the Governor found himself facing the alternatives of: 1) finding additional funds or 2) closing down Correctional Industries, and thereby halting the construction of New Close. Sufficient reversions were identified by the end of the fiscal year to fund the Department of Corrections shortfall. Jt. ex. I. The attorney general was consulted and he advised the Governor that he had statutory authority to make these transfers between appropriations. MacFarlane, R. 464-465. Def. ex. 15. The Joint Budget Committee had been advised of the possible use of transfers and had not objected. Lamm, R. 133-134. In fact not until after the transfers had been completed did any member of the general

assembly object to that executive measure. Lamm, R. 137.

The Governor testified that he saw no need to call the general assembly back into special session because he felt he had legislative support to complete the new prisons. Lamm, R. 138-139. The alternative of shutting down construction of New Close meant the state would have to run both Old Max and New Max security prison without sufficient funds, and that alternative, testified Governor Lamm, "was about as close to unthinkable as you can come." Lamm, R. 139.

2. The transfers in May of 1982.

On May 14, 1982, at the recommendation of State Controller James Stroup and of Lee White, executive director of the Office of State Planning and Budgeting, Governor Lamm approved transfers between appropriations to different departments totaling \$1,177,482 in general fund moneys, and \$1,492,219 in cash spending authority.^{3/} Joint exhibit IV. The general fund moneys were transferred from anticipated reversions identified and agreed to by the departments losing the money.^{4/} Cash spending authority (but not the cash) was transferred from agencies which had not raised enough cash to be able to use their full spending authority. Stroup, R. 516-537.

By far the largest portion of the transfers was used to cure a shortfall in appropriations for personal services. With-

out the transfer from reversions in other budget items, the state faced laying off almost 500 state employees for the last month of the fiscal year, only to rehire them on July 1, 1982, the start of the new fiscal year. Jt. ex. IV. Def. ex. 27.

Lee White, who in 1982 was executive director of the State Office of Planning and Budgeting, testified that transfers were necessary to correct a substantial shortfall in appropriations available for personal services in various state departments. This shortfall was caused, stated Mr. White, by supplemental appropriations bills enacted in the spring of 1982 by the general assembly which had the effect of reducing appropriations below the level necessary to fund personal services as required by statutory and constitutional provisions of law. Despite continued warnings from the executive branch that personal services-related appropriations already were insufficient, the general assembly enacted H.B. 1261 in April of 1982, effecting an additional \$2 million negative supplemental from moneys available in the central pots for personal services-related appropriations.^{5/} With virtually no time left in the fiscal year to accomplish further personal services savings, the executive branch faced only two alternatives: lay off a large number of state employees for the remainder of the fiscal year or transfer from reversions in other items in the state budget. White, R. 621-661, Jt. ex. IV. Def. ex. 23, 24, 25, 26, 27 and 31.

A much smaller portion of the general fund moneys involved in the May 1982 decision, \$300,000, was transferred to the appropriation previously made for the Governor's office. Jt. ex. IV. At trial, Governor Lamm testified that this money was essential to keep the Office of the Governor operating through the fiscal year after it had been deliberately under-funded by the general assembly for political reasons. Lamm, R. 142-144. This underfunding of the appropriation for his personal staff had occurred annually since his decision in the spring of 1979 to veto a controversial bill concerning annexation in Colorado Springs. The Governor testified that prior to his decision to veto this bill, a member of the general assembly personally threatened to cut the budget of the Governor's office if he vetoed the bill. The Governor ignored this warning, and the Long bill appropriation for his office for fiscal year 1979-1980 was slashed substantially from his request. The 1979-80 Long Bill appropriation then became the base upon which future budgets were determined by the general assembly, resulting in an annual funding problem which in 1982 required additional moneys to continue the office at the same level Governor Lamm inherited from his predecessor. Lamm, R. 142-144.

John Lay, the Governor's former chief of staff, testified that prior to the gubernatorial veto in 1979 the general assembly's appropriation for the Governor's office varied only

slightly from the Governor's request. In the budget for 1979-80, that situation changed dramatically when, following the controversial veto, the appropriation cut \$275,000 from the Governor's request. Although some funds were later restored, the result was a substantial reduction in the base amount used for the determination of the Governor's office budget for future years, including 1981-82. Lay, R. 559-575. Def. ex. 20 and 31. The transfer of \$300,000 to the Governor's office was essential to fund continued operation of the Governor's personal staff through the end of the 1982 fiscal year.

3. Expenditure of the Chevron funds.

On July 27, 1981 the United States Department of Energy entered into a proposed consent order with Standard Oil Company of California ("Chevron") to settle litigation over Chevron's compliance with federal petroleum price and allocation statutes and regulations. Under the consent order Chevron agreed to pay \$25 million to states, territories and the District of Columbia, in which Chevron marketed certain petroleum products. Jt. ex. VI.

Under the terms of the consent order Colorado was informed that it was entitled, along with other states, to a percentage of the fund as specified in the order. To qualify for its share of \$305,300 Colorado, under the terms of the consent order, was

required to submit a plan to insure that the funds would be used to benefit consumers of designated petroleum products. One of the approved uses was for energy conservation or energy research offices.

On September 29, 1981 the Office of State Planning and Budgeting submitted a proposed plan which subsequently was approved by the U.S. Department of Energy. Jt. ex. VIII and IX. The consent order became final. Chevron sent the state a check for \$306,783 (including interest). As certified in advance by the Office of State Planning and Budgeting, the Chevron funds were expended to support activities of the Colorado Office of Energy Conservation. The Chevron funds were expended by the executive branch without a legislative appropriation since they were custodial or federal funds received under the terms and conditions of a federal administrative consent order. Stroup, R. 537-539. Jt. ex. VII, X and Def. ex. 19.

SUMMARY OF ARGUMENT

1. The trial court erred in holding the transfer statutes unconstitutional.
2. The Governor has inherent constitutional authority to make the challenged transfers..
3. Whether authorized by legislative delegation or by inherent executive power, the challenged transfers were lawful.

4. The trial court erred in dismissing defendant's first counterclaim.

5. Where defendants presented evidence that the general assembly arbitrarily cut the Governor's budget, the trial court erred in dismissing the second counterclaim for failure to present a prima facie case.

ARGUMENT

I.

THE TRIAL COURT ERRED IN HOLDING THE TRANSFER STATUTES UNCONSTITUTIONAL.

A. Executive transfer authority is recognized by express statutory provisions which the trial court erroneously ruled unconstitutional.

The general assembly has recognized broad executive authority to make transfers between appropriations in two general statutes.^{5/} The responsibilities of the division of budgeting in the office of state planning and budgeting include assisting the Governor in his responsibility to administer the executive budget. One specific duty is as follows:

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

C.R.S. 1973, 24-37-405(1)(k). The powers and duties of the state controller include:

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

C.R.S. 1973, 24-30-201(1)(b). These two statutes will be referred to collectively as the "transfer statutes."

The Governor also has certain transfer powers which are inherent in his constitutional responsibilities for managing the state budget (see the discussion in Argument II, infra). However, the lawfulness of the challenged transfers need not rest on an analysis of the limits of the Governor's inherent constitutional transfer authority because, in the above-quoted statutes the general assembly has expressly authorized these transfers.

The trial court resolved the lawfulness of the challenged transfers by concluding that the transfer statutes were an unconstitutional delegation of a legislative function. R. 570-572. He declined to discuss what types of transfers might be constitutionally or statutorily authorized, viewing the adoption of such criteria to be a legislative function. R. 572.

The effect of this decision is to preempt the legislative role by repealing statutes that have existed for over 40 years, statutes which the legislature itself has been unable or unwilling to change through the normal democratic processes. The Governor and other executive branch defendants submit that the court's holding erroneously applies the applicable principles of the separation of powers and dramatically changes the existing

balance between the legislative and executive powers. The trial court properly should have declined the legislature's invitation to enter into a political dispute between the other two branches of government.

B. The general assembly lacks standing to challenge the constitutionality of statutes which it enacted into law and has the power to repeal.

To have standing to challenge the constitutionality of a state statute, a party must be personally adversely affected by the particular constitutional defect asserted. Dileo v. Board of Regents of the University of Colorado, 196 Colo. 216, 590 P.2d 486 (1978), cert. denied 441 U.S. 927; Reed v. Dolan, 195 Colo. 193, 577 P.2d 284 (1978); People v. Blue, 190 Colo. 95, 544 P.2d 385 (1975). Article III of the Colorado Constitution, which establishes the separation of powers among the three branches of government, precludes a court from determining an issue where the standing doctrine is not satisfied. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977).

These consolidated cases were brought in the name of the Colorado General Assembly as plaintiff.^{7/} Throughout the course of this litigation, the executive branch defendants have asserted that the general assembly does not have standing to attack the constitutionality of statutes which it enacted, and which it has

the power to amend or repeal. Art. V, sec. 1 of the Colorado Constitution vests the legislative power of the state in the general assembly subject to the check of the gubernatorial veto. There can be no adverse injury sufficient to confer standing where the challenged statutes were enacted by the party now attacking them.

Appellants are not aware of any precedent for the legislature to attack the constitutionality of its own statutes. The closest analogy exists in federal cases where individual legislators have filed suits to attempt to circumvent the political process and have the courts determine matters which are rightfully settled on the floor of the legislature. Under such circumstances, courts have refused to hear those issues, relying on such varying grounds as standing, ripeness, political question and separation of powers. See Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), judg. vac., 444 U.S. 996 (1979); Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied 436 U.S. 907 (1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977). See also, McGowan, Congressmen in Court: The New Plaintiffs, 15 Ga. L. Rev. 241 (1981).^{3/}

By ruling favorably on the general assembly's claim that the transfer statutes are unconstitutional, the trial court assumed the legislative role of repealing statutes. If the gen-

eral assembly believes that the transfer statutes confer an overly broad grant of powers, it has the power to repeal that grant or to make it more specific. The encroachment of the judicial branch into this legislative process is the very danger which the standing doctrine exists to prevent. See Wimberly v. Ettenberg, supra.9/

C. The statutes which authorize executive transfers are constitutional.

The district court concluded that the challenged transfer statutes impermissibly delegated the legislative function of appropriation and therefore were invalid. R. 570-572. The trial court thereby attempted to solve a very difficult problem of defining the separation of powers by erecting a rigid, artificial boundary between the legislative and executive branches. This result has the virtue of easy application, but overlooks both the facts presented to the court and the applicable principles of law.

The powers of each branch of government are functionally identifiable, but they are not "hermetically" sealed from one another. I.N.S. v. Chadha, 103 S.Ct. 2764, 2784 (1983). In MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (1972) this court recognized that issues concerning separation of powers cannot be viewed in terms of black or white. Justice Groves stated for the

court: :

The Colorado Constitution merely states in effect that the legislature cannot exercise executive or judicial power; that the executive cannot exercise legislative or judicial power; and that the judiciary cannot exercise executive or legislative power. It does not prescribe exact limits of the respective powers. The dividing lines between the respective powers are often in crepuscular zones, and, therefore, delineation thereof usually should be on a case-by-case basis. State ex rel. Meyer v. State Board of Equalization and Assessment, 185 Neb. 490, 176 N.W.2d 920 (1970).

179 Colo. at 221. In contrast to this statement of the law, the trial court obviously felt that the particular circumstances of the challenged transfers were irrelevant to whether executive transfers were ever valid as a matter of law.10/

Every statute is presumed constitutional unless proven beyond a reasonable doubt to be unconstitutionally invalid. Lujan v. Colorado State Bd. of Education, 649 P.2d 1005 (Colo. 1982). As does any party which attacks the constitutionality of a statute, the general assembly has the burden to establish invalidity beyond a reasonable doubt. See e.g., Colorado Auto and Truck Wreckers Assoc. v. Dept. of Revenue, 618 P.2d 646 (Colo. 1980).

The district court was troubled by the possibility that the challenged transfer statutes delegated to the executive branch some portion of the general assembly's power to appropriate state moneys. Such a delegation is contemplated, however, by Colo.

Const. art. V, sec. 33, which states:

No moneys in the state treasury shall be
disbursed therefrom by the treasurer except
upon appropriations made by law, or other-
wise authorized by law....

(emphasis added).

The fact that one branch may exercise some powers ordinarily exercised by another branch does not constitute a violation of the separation of powers. This court has had occasion previously to refer to the observations of James Madison in the Federalist No. 47 and conclude that "a relaxation of a rigid separation of powers, and an overlapping of the various functions, was indeed necessary for a workable governmental scheme."

In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 1, 536 P.2d 308, 318 (1975). The court there quoted from J. Story, I Commentaries on the Constitution of the United States, 393 (5th ed. 1891) that separation of powers does not mean that the branches must be kept "wholly and entirely separate and distinct...", rather:

The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.

536 P.2d at 318 (emphasis deleted.)

The challenged transfer statutes do not delegate to the Governor the whole of the appropriation power. Nor do the cir-

cumstances of the transfers considered in this case suggest that the Governor has attempted to exercise the whole of the appropriation power. Where the general assembly disagrees with executive expenditures in one fiscal year, it has the power to make adjustments in the next budget cycle.

The error in the trial court's reasoning is the assumption that the powers of the different branches may never overlap. As a consequence, the court failed to consider that this delegation plays an extremely important role in allowing government to function with a part-time legislature and a budget prepared and adopted over a year before it is completely expended.

D. Statutory transfer authority is a legislative means to provide for flexibility in budget management.

Colo. Const., art. X, sec. 16 prohibits the general assembly from incurring a deficit obligation extending beyond a particular fiscal year. The executive branch has a coequal constitutional responsibility to avoid a deficit by insuring that appropriations which exceed revenues are not expended. See e.g. In re Priority of Legislative Appropriations, 19 Colo. 58, 34 P. 277 (1893). The history of the statutory language authorizing executive transfers strongly supports the conclusion that the statutes were enacted to facilitate flexible and responsible management of the budget within the constitutional requirement that

overall expenditures must not exceed available revenues.11/

The statutory language which now authorizes the controller to recommend transfers between appropriations with the approval of the Governor, first appeared in the Administrative Code of 1941, a major reorganization of state government. Language identical to that now contained in C.R.S. 1973, 24-30-201(1)(b) was included among the powers of the division of budgeting, part of the statutory executive department established in 1941. 1941 Colo. Sess. Laws ch. 2, sec. 12, p. 54.

A separate provision of the Administrative Code of 1941 explicitly authorized the Governor to transfer money from the "contingent and incidental fund" of any department with a surplus in that fund, to any other department having a deficit in its contingent and incidental fund. 1941 Colo. Sess. Laws ch. 2, sec. 11, pp. 51-52. Yet another provision of the same bill reenacted provisions of law dating back to 1933 with amendments giving the Governor authority to establish appropriation reserves in the various departments and to transfer such reserves in order to provide flexibility to meet emergencies arising during the fiscal year. 1941 Colo. Sess. Laws ch. 2, sec. 17, pp. 56, 57. This additional transfer authority now appears in substantially the same language at C.R.S. 1973, 24-30-206.

The Administrative Code of 1941 was controversial legislation, judging from the front page news it made in Denver news-

papers. The issue of the Governor's transfer authority was disputed. An amendment was offered and defeated, which would have eliminated executive authority to transfer surplus appropriations between departments. Rocky Mountain News, March 2, 1941, p. 2.

Eventually the authority to recommend transfers between appropriations was included among the powers of the state controller. 1947 Colo. Sess. Laws ch. 118, p. 222. The review function of the office of state planning and budgeting was enacted later. See 1976 Colo. Sess. Laws ch. 34, sec. 47, p. 307. In 1963, the legislature deleted the language which expressly authorized the Governor to transfer surpluses between the contingent and incidental funds of different departments. 1963 Colo. Sess. Laws ch. 32, sec. 3, at 122. The legislative history of this 1963 measure suggests that the language was deleted because it was viewed as redundant and unnecessary since authority to recommend transfers with the Governor's approval existed under the controller's statutory responsibilities.^{12/}

Transfer issues are not novel to the current administration. In a 1968 opinion to the Joint Budget Committee of the general assembly, Attorney General Duke Dunbar opined that the state controller had statutory authority to employ transfers to increase a specific appropriation sum for a specific project. The general assembly could prohibit such transfers, he suggested, by repealing the authorizing statute, then C.R.S. 1963, 3-3-1(1)

(now C.R.S. 1973, 24-30-201(1)(b)). See Attorney General Opinion No. 58-4239, August 12, 1968. R. 150-153.

In recent general appropriation bills, the general assembly has continued to rely upon executive discretion to identify surplus appropriations (reversions) made to one executive department for transfer to other departments when an appropriation proves insufficient. For example, a 1981 supplemental appropriation measure, Senate bill No. 485, expressly conditioned a general fund appropriation of \$750,000 to Correctional Industries, as follows:

THESE MONEYS SHALL BE OUT OF MONEYS PREVIOUSLY APPROPRIATED FROM THE GENERAL FUND, WHICH MONEYS ARE REVERTING TO THE GENERAL FUND AT THE CLOSE OF THE FISCAL YEAR, EXCEPT THAT SUCH FUNDS SHALL BE AVAILABLE ONLY TO THE EXTENT THAT REVERSIONS EXCEED \$5,500,000.

1981 Colo. Sess. Laws ch. 6, p. 126. The general assembly, thereby employed a note in the appropriation bill to direct the executive branch to make transfers from other departmental appropriations to Correctional Industries.

The Colorado Constitution prohibits the enactment of substantive legislation in an appropriation bill. See e.g. Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978). This note to S.B. 185 demonstrates legislative acknowledgement that the executive branch does have authority to transfer among appropriations made to different departments, and that authority must arise elsewhere .

than in the appropriation bill.

E. The challenged transfer statutes delegate broad transfer authority to the Governor.

It is apparent from even a cursory reading of the challenged transfer statutes, quoted in argument I, section A above, that the express statutory language encompasses each of the transfers challenged in this lawsuit. To date, the legislature has not limited the type or amount of transfers "between appropriations" which the Governor is authorized to approve upon recommendation by the controller. The general assembly did not dispute at trial that each of the challenged transfers was in fact reviewed by the office of state planning and budgeting, recommended by the state controller and approved by the Governor, all as required by the transfer statutes.

This is not to say, however, that the power of the Governor to transfer appropriations is unlimited. It is significant to understand that all of the challenged transfers involved transfers between appropriations previously approved by the general assembly for existing programs. None of the challenged transfers involved executive creation of spending authority for a program not funded previously by the legislature. None had the effect of increasing the overall level of appropriations enacted by the general assembly in the state budget for the fiscal year. This

case does not require that the court speculate as to what limits might be placed upon the Governor by the state constitution or by the general assembly's statutory delegation.

One of the general assembly's witnesses, Robert Moore, staff director for the Joint Budget Committee, acknowledged that some type of executive transfers between appropriations is necessary to manage the budget. Mr. Moore's quarrel was with the size of the amounts transferred and the fact that transfers were made between departments or for what he termed different "purposes."

R. 291-295.

In response to a question from the court about the types of executive transfers he viewed as appropriate, Mr. Moore replied:

I think it's necessary for the State to be able to have the flexibility to transfer small amounts of money. I don't think you can hit your appropriation exactly on the nose within your agency.

R. 294.

If the constitutional defect in the transfer statutes is that the Governor is thereby permitted to increase spending above the level of a specific appropriation set by the general assembly, then does that violation not occur regardless of the amount transferred or the fact that the transfer is between appropriations made to the same department? The paradoxical aspect of the trial court's decision is that the judge strikes down the transfer statutes as unconstitutional, but then suggests that the

legislature could delegate "relatively insignificant transfers" to the executive. R. 572. Perhaps the general assembly might limit the scope of the delegation to protect Mr. Moore's concerns, but it does not follow that the court must void the statute because the general assembly has failed to exercise such restraint.

II.

THE GOVERNOR HAS INHERENT CONSTITUTIONAL
AUTHORITY TO MAKE THE CHALLENGED TRANS-
FERS..

Appellants argued throughout this lawsuit that even in the absence of the transfer statutes, the inherent constitutional authority of the Governor to administer the budget, once appropriated, makes the challenged transfers lawful. This argument was largely ignored by the trial court, perhaps because the court was not comfortable with the Madisonian concept that powers among the different branches of government must overlap to make government workable.

When the Governor acts, he is presumptively exercising the power delegated to him by the state constitution. See I.N.S. v. Chadha, supra. In Anderson v. Lamm, supra, this court discussed the constitutional executive authority as follows:

In order to fulfill this duty to faithfully execute the laws, the executive has the

: authority to administer the funds appropriated by the legislature for programs enacted by the legislature.

579 P.2d at 623. This court has not previously had occasion to apply this principle to executive transfers between appropriations. Other jurisdictions, however, have concluded that such transfers are part of the inherent executive authority. It was these cases that the district court declined to follow.

The Supreme Court of North Carolina upheld the constitutional authority of the executive to approve transfers between line item appropriations as inherent in the executive authority to administer the budget. Advisory Opinion In Re Separation of Powers, 295 S.E.2d 589 (N.C. 1982). Since 1929 North Carolina had had a statute (G.S. 143-23) which provided in pertinent part:

Transfers or changes as between objects and items in the budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget.

In 1981, the legislature amended that statute to provide that no transfer could be made which exceeded ten percent of the total appropriation for a particular "program line item" for the fiscal year, unless prior approval were obtained from a designated legislative committee. The court held that this legislative condition on transfers was an impermissible intrusion on the executive power to make transfers. 295 S.E.2d at 594.

The Louisiana Court of Appeals has recognized that it was common practice for state agencies there to transfer funds between line items to solve problems of deficits and surpluses. It concluded that an agency's use of funds transferred from a different line item did not violate the state constitutional requirement that funds be appropriated. Bussie v. McKeithen, 259 So. 2d 345 (La. App. 1972).

In State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 785 (1975) (Schneider I) the Kansas Supreme Court determined that the power of a state agency to transfer funds from one item to another within that agency's appropriation is essentially an executive power which is not subject to control by a legislative body. In a later related case, the Kansas court reaffirmed this principle and carved out a limited exception for matters of particular legislative concern. State ex rel. Schneider v. Bennett, 222 Kan. 11, 564 P.2d 1281 (1977) (Schneider II). The central question presented by the Kansas cases was the extent to which the legislature could interfere with inherent executive authority to make transfers. The delegation there was one from the legislature as a whole to a legislative committee, rather than a delegation to the executive branch.

In the decision below, the trial court erroneously relied on Schneider I, even though a close reading demonstrates that the case supports the Governor's position. Schneider I held that

transfers between line items within one agency's program were essentially executive in nature and could not be subjected to the control of a legislative finance council without violating the separation of powers. 547 P.2d at 797. Neither case considered whether the legislature could enact a statute which expressly authorized the executive branch to make transfers. Consequently those cases cannot be read to preclude the possibility of such a statute.¹³

The other cases relied upon by the district court simply are not applicable to the circumstances of this case. In Wallace v. Baker, 335 So. 2d 156 (Ala. 1976) the court held in a one page decision that even in an emergency the Governor could not appropriate public funds for education by executive order when the legislature had adjourned without passing an appropriation bill. That case did not involve a transfer of funds between appropriation items. The court quite properly held that the Governor could not spend state funds where the legislature had failed to pass any appropriation for the purpose for which the funds were spent.

The Illinois case of County of Cook v. Quilvie, 50 Ill. 2d 379, 280 N.E.2d 224 (1972) did involve a transfer issue, but one that arose under circumstances quite distinguishable from those in this appeal. There a county sued for payment of welfare moneys funded by state appropriations. The state had appropri-

ated insufficient moneys to fund fully all the welfare programs established by state and federal requirements. A state statute permitted the Governor to reapportion appropriations among the various welfare programs as required. Accordingly, money was transferred from the General Assistance Appropriation to the federally-matched Aid to Families with Dependent Children Fund.

As a consequence of this transfer Cook County was paid an amount from the General Assistance Fund which was insufficient to meet the requirements of the state Public Aid Code, resulting in a proposed reduction of 60 percent in all county welfare checks issued for the month of November. Cook County brought suit alleging that the statute authorizing executive reapportionment of funds among welfare appropriations was an unconstitutional delegation of legislative power to the executive branch.

The court agreed with Cook County. It concluded that the only way in which moneys appropriated for one welfare program could be used for another program would occur if the legislature duly passed an appropriation act making the change. Delegating the authority to the executive to determine on the basis of need, said the court, "would frustrate the clear legislative intent to appropriate according to the fiscal requirements of each specific program" 280 N.E.2d at 227.

In the circumstances presented by this appeal it is not disputed that all the funds transferred by the Governor were

moneys not needed to carry out existing programs, i.e., moneys which otherwise would have reverted to the general fund. Unlike the situation Cook County faced, no Colorado program was deprived of funds necessary to carry out legal requirements. The danger of frustrating legislative intent is not the concern here that it was in the Cook County decision.

There is language in Opinion of the Justices to the Senate, 375 Mass. 827, 375 N.E.2d 1217 (1978) which disapproves transfers. The broad language is dicta concerned with the dangers of frustrating legislative intent to fund competing social programs. 375 N.E.2d at 1222, n.2. Additional language in that case states that transfers between agencies or programs would be appropriate under some circumstances, such as when a revenue deficiency occurs. 375 N.E.2d at 1226. The case does not involve the issue of the validity of a legislative delegation of transfer authority. Moreover, under Massachusetts law that opinion, like all "opinions of the justices," is only advisory. It is not stare decisis even in future cases decided by the Massachusetts Supreme Judicial Court. Commonwealth v. Welosky, 276 Mass. 393, 400 (1931); Lincoln v. Secretary of the Commonwealth, 326 Mass. 313 (1950).

III.

WHETHER AUTHORIZED BY LEGISLATIVE DELEGATION OR BY INHERENT EXECUTIVE POWER, THE CHALLENGED TRANSFERS WERE LAWFUL.

The proposition that the power of appropriation is inherently a legislative power is not in dispute in this appeal. The cases cited by the trial court (R. 567) concerning the plenary nature of this power and the limited definition of an appropriation are of limited value, however. Both cases were decided long before the 1974 amendment to sec. 33 of art. V of the Colorado Constitution which added language providing that moneys in the state treasury could be disbursed by appropriation, "or as otherwise authorized by law" 1974 Colo. Sess. Laws at 450.

The decision of the trial judge reflects his conclusion that a line must be drawn which requires that no change be made in a line item appropriation without a new legislative appropriation. In a state which has a legislature which sits only part of the year this decision makes practical government unworkable. Robert Moore, staff director for the Joint Budget Committee, recognized this impracticality in his own testimony concerning the need to make at least some transfers. R. 249. See argument I.E., supra. Governor Lamm testified that in his view the only alternatives to the use of executive transfers between appropriations in a total budget of 2 1/2 to 3 billion dollars would be a full-time legislature, or a series of special legislative ses-

sions. Gamm, R. 123, 145.

The idea that the executive may never, under any circumstances, spend more than the amount specified in a particular line item appropriation has been rejected in the jurisdictions cited above. The corollary, that the governor may never spend less than the specific line item appropriation, was rejected in the Massachusetts case relied upon in support of the trial court's decision. Opinion of the Justices to the Senate, supra.

The more serious question posed by this appeal is, did the challenged transfers pose a substantial interference with the legislative power of appropriation. The answer is, of course not. None of these transfers resulted in an increase in the overall level of appropriations enacted in the state budget for the fiscal year. Nor were any legislative programs frustrated by the loss of funds, since the transferred amounts would have reverted to the general fund. Amounts were moved from one legislatively approved purpose where they were not required to another legislatively approved purpose which could not be accomplished without additional funding. In no instance did the Governor transfer funds to create a program for which no legislative appropriation had been made.

A recent Ohio case involved a question of legislative delegation of authority to make executive transfers of appropriations from one fiscal year to another. The Supreme Court of Ohio con-

cluded that such a broad delegation was permissible, without specific standards, concluding:

When an appropriation is made for a specific year, the general assembly implicitly indicates an intent to appropriate those funds for the designated year. The Controlling Board can transfer those funds to another year only if there is some indication, implied or express, of a legislative intent to allow such action. Such an intent is often implicit in the program goals which lie behind the appropriation.

State ex rel. Meshel v. Keip, 65 Ohio St. 2d 379, 423 N.E.2d 60, 65 (1981). (Emphasis supplied.)

The Corrections transfer provides the best example of how an executive transfer may serve to advance a legislative purpose, not frustrate it. It was unrebutted at trial that the general assembly was committed to completion of the New Close prison by the scheduled completion date. The general assembly said as much in its amicus brief filed with the Tenth Circuit in the Ramos v. Lamm appeal in 1980. Former Rep. Becker, then chairman of the joint committee designated by statute as the legislative authority on prison construction, testified to the urgency with which his committee viewed the problem and his personal approval of the use of executive transfers. Governor Lamm testified to his belief that he had legislative support for the use of transfers after his meeting with the Joint Budget committee. Dr. Ricketts testified that the Joint Budget Committee wanted the prison construction to continue, and that he concluded that the committee

viewed the matter as an "executive problem." No objections were raised by legislators to the use of executive transfers to solve this problem until after the reversions had been identified and the problem solved! The general assembly could have called itself into special session as provided for by art. V, sec. 7 of the Colorado Constitution if it thought this problem was solely a legislative matter, but it did not do so.

With the money made available by executive transfer, Correctional Industries was able to continue as a viable enterprise, satisfying the legislative mandate to keep prison inmates employed and completing New Close on schedule. Governor Lamm's decision to authorize transfers between appropriations, far from frustrating legislative intent, actually made possible the accomplishment of legislative goals which otherwise would have been thwarted.

As a proposition of constitutional law, nothing precludes the general assembly from delegating authority to the executive branch to transfer between appropriations, so long as this delegation does not include the whole of the appropriation power. After reviewing the constitutions of several states which had laid down the axiom of separation of powers in unqualified terms, James Madison stated in the Federalist No. 47: "/T/here is not a single instance in which the several departments have been kept absolutely separate and distinct." The Federalist Papers, at 246 .

(Bantam Books Inc. 1982).

The challenged transfers are lawful because the general assembly has made that delegation, and the appropriate way to restrict the delegation is by additional legislation. In any event, the executive transfers which are specifically challenged in this lawsuit fall within the inherent executive power to manage the state budget, since none resulted in a frustration of legislative intent. The Governor argues not that he has unlimited authority to transfer between appropriations, but that these specific challenged transfers were necessary to perform his constitutional responsibilities.

IV.

THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S FIRST COUNTERCLAIM.

As their first counterclaim, defendants alleged that the general assembly's passage of a negative supplemental reducing the central pots appropriation by approximately \$2 million with only a quarter of the fiscal year left, constituted an impermissible intrusion into the executive power to manage the budget once appropriated. After trial, the trial court ruled that defendants had failed to establish this counterclaim. The court held that the general assembly had the power to make supplemental appropriations and found no evidence that the 1982

supplemental appropriations, as a whole, impaired the functions of the executive branch. R. 572-573.

This ruling erred as a matter of law and overlooked the evidence of legislative interference presented by defendants. Art IV, sec. 2 of the Colorado Constitution vests the executive power of the state in the governor. Art. III of the constitution prohibits the general assembly from exercising the powers of the executive. In Anderson v. Lamm, supra, this court found specific instances where the legislature had interfered with the executive branch. The limits on the legislature were described as follows:

Thus, it follows that the general assembly is not permitted to interfere with the executive's power to administer appropriated funds, which includes the making of specific staffing and resource allocation decisions.

In addition, the legislature may not attach conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character.

195 Colo. at 442.

As the Anderson decision recognized, staffing decisions are the heart of the executive power to manage. At trial Mr. White, former executive director of the Office of State Planning and Budgeting, testified that in 1932 the executive branch repeatedly requested additional funds to meet the legally-mandated personal services expenses for which the central pots appropriations were made. This testimony established that instead of appropriating

the requested positive supplemental, the general assembly actually enacted a negative supplemental of some \$2 million in the funds previously appropriated. Mr. White further testified that the timing of this measure at the last minute in the fiscal year precluded the usual administrative cost-cutting measures. The only alternatives available to executive administrators were, 1) layoffs of 500 state employees for the last month of the fiscal year, or 2) the transfer of funds and cash spending authority from reversions elsewhere in the budget. Only because the Governor exercised his legal authority to transfer between appropriations was the executive able to avert the crisis of mass layoffs. Now the general assembly attacks that decision as outside the governor's authority. The trial court erred in overlooking this evidence of the impairment of the executive function by the leverage of last-minute budget cuts. In discussing the powers of the executive to choose not to spend appropriated moneys, the Massachusetts Supreme Judicial Court has made the following observations:

We begin with the observation that the activity of spending money is essentially an executive task.

....

The executive branch is the organ of government charged with the responsibility of, and is normally the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions.

376 N.E.2d at 1222, 1223.

Defendants' claim is not that the general assembly must always grant everything the executive seeks. Once the appropriation has been made, however, and the executive has undertaken to administer to that budget, the general assembly may not interfere with those executive decisions and cut funds late in the fiscal year over the objections of the branch best acquainted with expenditures.

V.

WHERE DEFENDANTS PRESENTED EVIDENCE THAT THE GENERAL ASSEMBLY ARBITRARILY CUT THE GOVERNOR'S BUDGET, THE TRIAL COURT ERRED IN DISMISSING THE SECOND COUNTERCLAIM FOR FAILURE TO PRESENT A PRIMA FACIE CASE.

Defendants' second counterclaim alleges that as part of a continuing course of action, the general assembly arbitrarily refused to appropriate sufficient moneys for the Governor's office to permit him to effectively carry out his executive powers, thereby unconstitutionally encroaching upon the separation of powers. At the conclusion of defendant's case-in-chief on its counterclaims, the trial court concluded that no evidence had been presented that the Governor's office was underfunded for the fiscal year 1981-82 or its functions impaired. R. 553.

Defendants respectfully submit that the trial court's

ruling was error because it overlooked the testimony of Governor Lamm, supported by that of John Lay, former chief of staff, that his budget was in fact underfunded to perform its functions and that that underfunding was the direct result of an arbitrary budget decision in 1979 based upon political retaliation for an executive veto. The trial court erred as a matter of law in failing to permit the case to proceed and placing the burden upon plaintiff to explain the reasonableness of its budget cuts.

The grant of the plenary power of appropriation to the legislature carries with it the duty to exercise that power in a responsible manner. When the appropriation power is abused against a coequal branch of government, the balance of government is fundamentally weakened by that incursion. Such an usurpation of executive authority occurred in 1979 when the general assembly arbitrarily slashed the budget of the governor's personnel office staff in response to a gubernatorial veto. Even the threat that such retaliation would be attempted is an impermissible encroachment upon executive authority.

In The Federalist, Number 48, Madison identified this danger as a matter of concern for a new nation, writing:

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments

: which it makes on the coordinate departments. ... (A)s the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

The Federalist Papers, supra, at 251-252. (Emphasis added.)

Faced with a similar threat the judicial branch has recognized a defense based upon the constitutional principle of separation of powers, the doctrine of inherent judicial power. In Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963), county court judges argued that they had innerent authority to fix the salaries of court employees. The county commissioners replied that their legislative power included discretion to set the salaries of those employees. The Colorado Supreme Court agreed with the judges that Colorado courts have inherent power to incur necessary and reasonable expenses. Those who control the purse have a ministerial duty to pay those expenses. An independent judiciary requires this rule. Most important, the decision held that the burden is not on the courts to establish that their expenses are reasonable, but on the holder of the purse strings to demonstrate that judicial expenses are arbitrary or unreasonable.

The importance of an independent judiciary is no greater than the necessity of an independent chief executive. The personal staff of the Governor cannot arbitrarily be underfunded

without an interference with executive authority. Where defendants presented evidence of a significant reduction in the budget of the Governor's own office, the legislature then must be given the burden to demonstrate affirmatively that the Governor's budget request was unnecessary and unreasonable.

CONCLUSION

These consolidated lawsuits have been presented by plaintiff general assembly in terms of recovering its plenary power of appropriation from executive usurpation. In fact, these lawsuits seek to extend legislative power to areas recognized for the last 40 years as properly within the authority of the executive to manage expenditure of the state budget. The trial court's decision would establish a theoretical approach which makes the everyday administration of Colorado state government unworkable. That a legislature would ask the judicial branch to expand legislative power in this manner would have come as no surprise to Madison, who observed in Federalist No. 48: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." The Federalist Papers, supra at 250-251.

For all the reasons stated above, defendants pray this court to reverse the decision of the trial court and either dismiss the case for lack of standing or hold that the challenged

transfers were lawfully made. Defendants further pray that this court rule that they were entitled to judgment on their first counterclaim and remand on the second counterclaim with directions that the trial proceed with plaintiff having the burden to establish the reasonableness of its reductions in the budget of the Governor's office.

1/ The general assembly had attempted previously to bring the issue directly to this court for review by filing on or about June 30, 1981, a petition asking this court to assume original jurisdiction. That petition was denied on July 1, 1981 by order of the court, en banc, in Case No. 81 SA 274.

2/ At that time, Correctional Industries had a construction business serving as the contractor to build the New Close Security Facility, complete dormitory renovation at the Fremont Correctional Facility, do inmate service renovation at Fremont and construct the minimum security facility at Rifle. R. 317. The New Close Facility was later named Shadow Mountain Correctional Facility. R. 318. In order to replace the facilities of the old maximum security prison, it was necessary to complete construction of these facilities as well as the new maximum security prison. Ricketts, R. 341, 342. The statutory authority establishing Correctional Industries appears in art. 24 of title 17, C.R.S. 1973.

3/ The transfer of general fund moneys involved transfer of both money and the authority to spend it. The transfer of cash spending authority involved the transfer of spending authority between two agencies which were involved in enterprise activities which raised cash, without any actual exchange of cash. Such a transfer enables a self-supporting enterprise activity to spend the income it has generated and thereby enables it to provide the services for which it charged a fee. State Controller James Stroup testified that transfers of cash spending authority had been occurring for several years prior to 1982. Stroup, R. 516-537.

4/ An austerity program was implemented by the executive branch in December of 1981 in anticipation of a tight budget. That program had resulted in savings in operating expenses,

travel and capital outlay in several agencies which were available for transfer to solve this crisis in the personal services area. See def. ex. 27.

5/ "Central pots" is a term of art referring to a fund or pot of money centrally appropriated to the State Department of Administration for dispersal to all state agencies. In 1982, the central pots for personal services comprised a number of components required by law to be included in the salaries of state employees, apart from the base salary, which were appropriated to the Department of Administration. Central pots included: 1) group health and life insurance premiums, 2) annuitants' health and life insurance premiums, 3) workmen's compensation premiums, 4) emeritus retirement, 5) employment security premiums, 6) salary survey adjustments, 7) staff salary increases, 8) shift differential and anniversary increases. See def. ex. 22, (1981 Long Bill, 1981 Colo. Sess. Laws at 6 and 7). Base salaries were included in the personal services appropriations made to each department in their respective budgets. The central pots appropriation was made centrally to the Department of Administration to enable the executive branch to allocate those moneys to the various departments for expenditure as actual needs became known during the fiscal year. The amount required for central pots could not be determined in advance of the fiscal year, so the initial appropriation represented an estimate of actual need which provided the executive branch flexibility to allocate among the departments. In Mr. White's experience the general assembly historically had underfunded appropriations in this area, providing only 80 percent of actual needs and thereby forcing state agencies to use funds from their personal services line item appropriations, money which was saved by keeping positions vacant for a time. White, R. 623-640.

6/ The general assembly has also enacted other statutes which authorize executive transfers in circumstances not applicable to the transfers challenged in this case. In the event of a disaster emergency, C.R.S. 1973, 28-2-106(4) authorizes the Governor to transfer into the disaster emergency fund, moneys appropriated for other purposes. C.R.S. 1973, 24-30-206(3) authorizes executive transfers among allotments in order to provide flexibility to meet emergencies arising during the fiscal year. The general assembly has not questioned the validity of those statutes.

7/ The executive branch defendants contend that these lawsuits were never properly authorized because the general assembly failed to comply with the presentment clause of the Colorado Constitution. The two joint resolutions which the trial court concluded were sufficient to authorize the bringing of this lawsuit

in the name of the Colorado General Assembly are Senate Joint Resolution No. 12 (1981 Colo. Sess. Laws 2066) and Senate Joint Resolution No. 24 (1982 Colo. Sess. Laws 717). As is evident from the face of those legislative resolutions, neither was presented to the Governor for approval as contemplated by Colo. Const., art. V, sec. 39. By use of this resolution process, the proponents of this litigation needed only a simple majority vote to bring this problem to the courts. This fact strengthens the Governor's argument that members of the legislature are attempting to circumvent the normal legislative process by improperly asking the judiciary to intervene.

8/ Courts have used different theories to dismiss these cases, but the underlying rationale is that stated in Riegle, supra, as follows:

Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action.

656 F.2d at 881.

9/ In 1979, a proposal was introduced in the general assembly which would have narrowed the statutory executive transfer authority. Senate bill 412 would have amended C.R.S. 1973, 24-3-201(1)(b), the controller's transfer authority, by explicitly limiting permissible transfers to those made within a particular department. The bill passed both houses, was vetoed by the Governor, and the general assembly did not override the veto as provided for by Colo. Const., art. IV, sec. 10. Copies of S.B. 412 and the veto message appear at R. 24-26. These circumstances underline the fact that the district court was asked to perform a role more properly exercised by the general assembly.

10/ In his order the trial judge noted that he had allowed defendants considerable latitude in the presentation of evidence, and stated:

Much of the defendant's evidence related simply to the merits or salutary purposes of the challenged executive action. That evidence and issue is neither justiciable or relevant.

11/ Despite this constitutional limitation, research of state budget documents for the years 1921 through 1953 (stored in the state archives) demonstrates that during those years appropriation deficits occurred routinely. The 1923 budget request sought a "deficiency appropriation" for the state penitentiary due to insufficient appropriations during the preceding 2-year budget period, among other problems. The state budget for 1935 showed deficiencies of more than \$150,000 compared to total expenditures of \$7.8 million. By 1939 the budget request for the next budget period showed a general fund deficit of \$5.2 million! The 1943 budget request stated that the declaration of war had resulted in unexpected deficits after the legislature had adjourned with the budget balanced.

Appropriation deficiencies were probably a regular occurrence when the state budget period was two years and the fiscal year ended on December 31, prior to the convening of the legislature in January. In the 1952 budget, the Governor recommended an end to the practice of "deficiency appropriations."

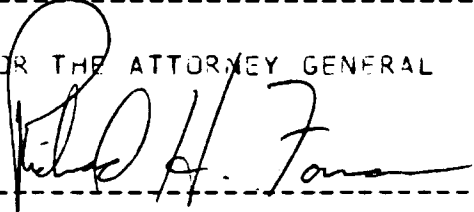
During even earlier periods of Colorado's history, the general assembly attempted to deal with deficits by enacting statutes which provided for issuance of "certificates of indebtedness" to state creditors for valid claims that could not be paid because the appropriation made for that purpose had been exhausted. See Compiled Statutes 1883 ch. XXXII, sec. 1198. Such certificates contemplated the necessity that an unanticipated claim would arise from some event happening after the appropriation was made. Mills, Ann. Stat. 1891, sec. 1829. An illustration of the problems faced by a state creditor whose warrant for his salary as a judge was not paid because the treasury was exhausted, may be found in Nance v. Stuart, 7 Colo. App. 510, 44 P. 779 (1896).

12/ The 1963 amendment to the Administrative Code of 1941, H.B. No. 23, was designed to strengthen the Governor's executive authority by abolishing the old statutory executive department. In fact that department was only a part of the entire executive branch. A report of the Legislative Council's Committee on Administrative Organization of State Government recommended a draft version of H.B. No. 23. The report stated that the bill was introduced to make evident that the Governor's executive authority extended to the entire executive branch of government. Colorado Legislative Council, Report to the General Assembly: Simplification of State Government Organization Part II, Research Publication No. 63 (December 1962) at pp. 10, 11 and 47.

This legislative history provides no express reasons why the reference to transfers of surpluses between contingent and incidental funds was deleted in the recommended draft bill. Since the only stated intent of the committee was to strengthen the Governor's executive authority, it seems unlikely that the bill was intended to reduce the Governor's transfer authority. The most reasonable explanation is that the language was deleted because it was redundant and unnecessary once the law was clarified that the Governor had authority over all executive branch departments. The authority to recommend transfers among appropriations upon approval of the Governor continued to exist in other express statutory language, that which is challenged in this lawsuit.

13/ Significantly, the Kansas Supreme Court concluded that in applying the separation of powers doctrine, "a usurpation of powers exists only where there is significant interference by one department with operations of another department." Schneider II, 564 P.2d at 1291.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within OPENING BRIEF OF GOVERNOR RICHARD D. LAMM AND THE OTHER EXECUTIVE BRANCH DEFENDANTS upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 30th day of December, 1983, addressed as follows:

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