STATUTORY LIMITATIONS TO THE GOVERNOR'S AUTHORITY DURING AN EMERGENCY

Governor Gretchen Whitmer issued numerous executive orders regarding the COVID-19 pandemic. She cites Article V, Section 1 of the Michigan Constitution, MCL 30.401 et. seq., and MCL 10.31 et. seq. as the basis of her authority. Although the Governor holds enhanced authority under a state of emergency, this authority is not absolute.

THE GOVERNOR MAY NOT UNILATERALLY EXTEND A STATE OF EMERGENCY OR DISASTER INDEFINITELY

It is a well-settled principle that "courts will regard all statutes upon the same general subject matter as part of one system."[1] Individual statutes do not operate in a vacuum and are often defined, curtailed, or limited by other statutes.

The two statutes cited by the Governor, MCL 10.31 and MCL 30.401, must be read together as being a part of "one system." The Governor cannot choose to follow one statute while ignoring the other. MCL 10.31 (Emergency Powers of Governor) conveys the general power for the Governor to issue executive orders during an emergency or disaster. The statute is silent as to the maximum duration of a declaration of emergency or disaster. The Governor is wrong in her belief that the duration of her emergency powers may be continued in her sole discretion *ad infinitum*.

The other more recently enacted emergency statute, MCL 30.401 (Emergency Management Act), outlines the procedures and logistics during an emergency or disaster (specifically including epidemics), and it explicitly limits the maximum duration of an emergency order:

The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.[2]

Because Michigan's emergency powers statutes are considered "one system," the Governor is required to obtain an extension from the Legislature if she believes the emergency will last longer than 28 days. Failure to do so would violate MCL 30.403. The Michigan Supreme Court has held:

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested

---

[1] *Duffy v Michigan Dept of Natural Resources*, 490 Mich 198, 206; 805 NW2d 399 (2011).
[2] MCL 30.403

cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.[3]

The Governor's role in an emergency is to faithfully execute all emergency laws. A Governor may not, under the pretext of an emergency, execute the laws that enhance her authority while ignoring the laws that limit it. It is Governor Whitmer's responsibility to ensure that all laws are faithfully executed, even those laws which she may personally consider to be burdensome or unnecessary.

In addition, the foundational principle of "checks and balances" is furthered by requiring that the Governor's emergency orders be approved by resolution of the Legislature after 28 days. This ensures that all citizens of Michigan (through their representatives) have input into the management of an emergency, not just one sole executive.

Further, the Governor previously conceded that she needs Legislative approval to extend the state of emergency because she already requested, and the Legislature approved, an extension of her emergency powers until April 30, 2020. It would be nonsensical for the Governor to have asked for such an extension if she truly believed that it was not necessary.

SPECIFIC VS GENERAL

MCL 10.31 (enacted in 1945) is a general statute bestowing upon the Governor certain powers during a state of emergency or disaster. Again, it is silent as to the maximum duration of a state of emergency or disaster. To the contrary, MCL 30.403 (enacted in 1976) is a specific statute relating to the procedure of establishing a state of emergency or disaster, its maximum

duration, and the process of obtaining an extension. The Michigan Court of Appeals held:

*It is an established rule of statutory construction that a specific statute takes precedence over a general one and is viewed as an exception thereto. . . . "(W)here there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other is general, and would, if standing alone, include the same matter and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general act or provision, * * * as the legislature is not presumed to have intended conflict."* [4]

MCL 30.403 specifically provides that a state of emergency or disaster for an epidemic may only last for 28 days through an executive declaration and any further extension must be approved by the Legislature. In short, the specific language in MCL 30.403 "takes precedence" over the general language in MCL 10.31.

In addition, MCL 10.31 does not state that it specifically controls during an epidemic. However, MCL 30.402 specifically defines "disaster" to include "widespread or severe damage, injury, or loss of life, or property resulting from a[n] . . . epidemic." Therefore, MCL 30.403 specifically governs widespread epidemics and would control over any general authority conveyed in MCL 10.31.

The Governor must faithfully execute all laws and especially so when the Governor's actions require approval of another branch of government. Even during times of emergency, we must hold strong to our foundational principles. Despite the temptation to overlook unchecked

---

[3] *People ex rel Sutherland v Governor*, 29 Mich 320, 324-325 (1874).
[4] *Cyrus v Calhoun County Sheriff*, 85 Mich App 397, 400; 271 NW2d 249 (1978).

power given to a sole executive during an emergency in the name of expediency or convenience, it is particularly important during these times to uphold our constitutional principles and the Rule of Law.

OPTIONS

1. Legislative Veto of Executive Orders.

Article V, Section 2 of the Michigan Constitution provides that the Legislature has the authority to disapprove or veto an executive order within 60 days which changes the organization of the executive branch. Using this same legal theory, the Legislature could modify the emergency laws to authorize the Legislature to disapprove or veto any emergency executive order within 60 days of its issuance. Further, this authority should explicitly authorize a line item veto of any executive order.

This practice is already utilized in our Constitution regarding executive orders and would thus be constitutional regarding emergency powers. This would provide proper oversight of executive power during an emergency to safeguard against government overreach or abuse of this power. It would also encourage the Governor to openly communicate with the Legislature regarding the terms of future executive orders before they are issued.

2. Negotiate an Acceptable Extension of the State of Emergency.

If the Governor and the Legislature are able to come to an agreement as to a proper extension of the state of emergency, then the Legislature can extend the emergency via resolution beyond the 28 days provided in the statute. This should include terms as to which executive orders shall be continued and which executive orders shall be terminated. The terms should include provisions which would simultaneously protect the health and safety of all Michigan citizens while also permitting a common-sense reopening of the state.

3. Do Not Grant an Emergency Extension.

MCL 30.403 provides that if an extension is not approved by the Legislature, "the governor shall issue an executive order or proclamation declaring the state of emergency terminated."

This would legally require termination all executive orders issued regarding the COVID-19 emergency. Whether the Governor would follow the requirements of MCL 30.403 is another question. Obviously, it will be the courts who will settle this issue if the Governor contests it.

4. Enact New Emergency Laws.

If the Legislature does not approve an extension of her emergency powers, then it would require termination of both the questionable executive orders, as well as the legitimate and necessary ones. Some of the orders issued by the Governor during this emergency have been appropriate and necessary to combat COVID-19. In order to keep the provisions of the legitimate executive orders in effect during this pandemic, the Legislature could pass new laws directly addressing each issue.

Rather than amending or enacting new laws in each separate public act, the Legislature could enact a new comprehensive law with the exact same language as any provision from any of the legitimate executive orders.

Another option could simply authorize specific executive orders. For example, the new law could state that "the provisions contained in Executive Order 2020-24 (Unemployment Expansions) shall continue until June 1, 2020."

If enacted, all these new laws should include a sunset clause (i.e., these new laws could automatically expire on June 1, 2020).

The key difference in using this approach is that the Governor would not be operating under a self-declared state of emergency. Instead she would be operating under the specific provisions of this new law. This would also permit the Legislature to amend the law in the future if a further extension is required or modifications are necessary.

This method would provide for the extension of the good and appropriate emergency policies while curtailing and/or completely eliminating the questionable ones.

GREAT LAKES JUSTICE CENTER