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Michigan: Open or Not-Open?



PATRICK COLBECK · THURSDAY, APRIL 30, 2020 · 10 MINUTES

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Confused about what happened today in Lansing?

Please be aware that there are many who would prefer confusion, but it is really not all that confusing to anyone who has read the governing law.

Under current statute, the Governor may declare a state of emergency.

Under a state of emergency, the Governor is granted virtually unlimited powers. I say virtually, because all statutory power derived by the Governor is still subordinate to the constitution.

Under current statute, any extension of the Governor's declaration of a state of emergency beyond 28 days must be affirmed by the passage of a resolution to that effect by both the state senate and state house.

Governor Whitmer contends in [Executive Order 2020-59](#) that she has the authority to extend the state of emergency beyond the 28 days until May 15th.

The legislature has not authorized an extension of the state of emergency until May 15th. Without an extension of the state of emergency, the emergency powers under which she has issued a series of executive orders cease to be in effect at 11:59pm on April 30.

My attempt to back up this assertion is provided below for your reference.

Background

In our constitutional republic, there is a strict legal hierarchy.

1. All political power is inherent in the people
2. The people have instituted a state constitution whereby they delineate specific powers to various branches of our state government
3. The legislature has been authorized by the constitution to institute laws (aka statutes) for our mutual benefit

In much the same way that rock trumps scissors in rocks-paper-scissors, the constitution trumps statute. In other words, statute can never supersede protections inherent in our constitution.

Governor Whitmer derives the constitutional authority for her office via Michigan Constitution Article V Section 1.

Governor Whitmer's Executive Orders consistently refer to Article V Section 1 of the Michigan Constitution in conjunction with two statutes - [Act 302 of 1945](#) as well as [Act 390 of 1976](#). In a nutshell, Act 302 of 1945 defines the powers of the Governor during an emergency while Act 390 of 1976 defines, among other provisions, the provisions specific to legislative oversight of any declaration of emergency. Because both acts have provisions which delineate powers delegated to the Governor under an emergency declaration under different sections of law there is significant potential for confusion by those who seek to assert different positions.

I would submit that the clear intent of Act 390 of 1976 is to insert legislative oversight into a Governor's ability to declare a state of emergency. If this were *not* the case, MCL 30.403 governing legislative oversight of a Governor's state of emergency declaration would have no reason for its existence. Furthermore, the virtually unlimited power granted to the Governor under Act 302 of 1945 demands legislative oversight in order for us to maintain a republican form of government as guaranteed under Article IV Section 4 of the U.S. Constitution.

Those who seek to continue Governor Whitmer's virtually unlimited power maintain choose to ignore the provisions of MCL 30.403 instituted via Act 390 of 1976 that limit the duration of her emergency declarations to 28 days. Under MCL 30.403, subsequent extensions of this emergency declaration would require approval by both the House and Senate of a resolution granting an extension. Despite referencing this section in her Executive Orders as the basis for her emergency powers, Governor Whitmer insists that the state of emergency is to stay in effect until she says it is no longer in effect. This position is consistent with the position taken by dictators throughout history and is inconsistent with the governance principles inherent in our constitutional republic.

The key sections of the referenced public acts are copied and pasted below for your reference. Review them for yourselves and come to your own conclusions.

Act 302 of 1945 Emergency Powers of Governor

10.31 Proclamation of state of emergency; promulgation of orders, rules, and regulations; seizure of firearms, ammunition, or other weapons.

Sec. 1. (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. Those orders, rules, and regulations may include, but are not limited to, providing for the control of traffic, including public and private transportation, within the area or any section of the area; designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated; control of places of amusement and assembly and of persons on public streets and thoroughfares; establishment of a curfew; control of the sale, transportation, and use of alcoholic beverages and liquors; and control of the storage, use, and transportation of explosives or inflammable materials or liquids deemed to be dangerous to public safety.

(2) The orders, rules, and regulations promulgated under subsection (1) are effective from the date and in the manner prescribed in the orders, rules, and regulations and shall be made public as provided in the orders, rules, and regulations. The orders, rules, and regulations may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the duration of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists.

(3) Subsection (1) does not authorize the seizure, taking, or confiscation of lawfully possessed firearms, ammunition, or other weapons.

History: 1945, Act 302, Imd. Eff. May 25, 1945; CL 1948, 10.31; Am. 2006, Act 546, Imd. Eff. Dec. 29, 2006

NOTE: If you are concerned about the optics of individuals carrying guns into the MI State Capitol today in accordance with their constitutional rights, please note the they are merely ensuring that Subsection (3) is not neglected in much the way that all of the protesters were helping to ensure that ALL of our constitutional rights are protected.

Act 390 of 1976 Emergency Management Act

30.403 Responsibility of governor; executive orders, proclamations, and directives; declaration, duration, and termination of state of disaster or state of emergency; contents and dissemination of executive order or proclamation. Sec. 3. (1) The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency.

(2) The governor may issue executive orders, proclamations, and directives having the force and effect of law to implement this act. Except as provided in section 7(2), an executive order, proclamation, or directive may be amended or rescinded by the governor.

(3) The governor shall, by executive order or proclamation, declare a state of disaster if he or she finds a disaster has occurred or the threat of a disaster exists. The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the disaster prevent or impede its prompt filing.

(4) The governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists. 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. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and shall be promptly filed with the emergency management division of the department and the secretary of state, unless circumstances attendant upon the emergency prevent or impede its prompt filing. History: 1976, Act 390, Imd. Eff. Dec. 30, 1976; □ Am. 1990, Act 50, Imd. Eff. Apr. 6, 1990; □ Am. 2002, Act 132, Eff. May 1, 2002

What Happens on May 1st?

The Governor can still issue Executive Orders which are binding. These Executive Orders, however, need to comply with existing provisions of statute NOT the virtually unlimited powers authorized under a state of emergency.

Restrictions upon citizens and organizations instituted via the Governor's Executive Orders which derive their statutory authority from the powers granted to the Governor under a state of emergency are effectively rescinded.

The Governor will continue to contend that she has the legal authority to assert her emergency powers until May 15th.

The MI Attorney General and other sympathetic government authorities such as local municipalities will likely prosecute violations of her executive order and file court actions necessary to assert Governor Whitmer's legal authority.

Any business which open its doors in violation of the Governor's Executive Order 2020-59 may be charged with violation of the law by various governing authorities.

Most schools will likely continue compliance with Governor Whitmer's Executive Order.

The United States Attorney General William Bahr has issued a [letter](#) directing Federal Prosecutors to protect civil liberties during COVID-19. In this light, it is reasonable to assume that any attempts to infringe upon our civil liberties due to enforcement of the Governor Whitmer's Executive Order will be subject to legal action by the federal government.

One thing is for sure. There will be a flurry of court activity likely culminating in one or more decisions by the MI Supreme Court. These decisions will likely forever change the landscape of our body politic for years to come - for good or for bad.

Summary

Each of us will need to choose a side - 1) the rule of law or 2) acquiescence to fear of COVID-19 and the subversion of our constitutional rights.

Due to the unfolding of events in Lansing today, it is clear to me that Michigan is open for business as of 11:59 pm April 30.

Having said that, in light of the Governor's refusal to relinquish her emergency powers, there is significant risk of punitive action from government officials towards any individual or business which fails to comply with the provisions of [Executive Order 2020-59](#).

Life is not without risk.

There are many who assert that the risk of COVID-19 justifies the need to close businesses, churches, and schools as well as restrict the movement of our citizens.

Other such as myself, assert that the risk of COVID-19 pales in comparison to other risks in our society.

So...much as our Founders intended, how you conduct yourself between now and May 15th is up to you.

The choice is yours - 1) freedom or 2) compliance with Governor Whitmer's Executive Order.

There are risks no matter how you proceed.

I for one refuse to accept the implications of a "New Normal" devoid of the constitutional protections that so many people before us have died to protect. This "New Normal" has risks to life documented through out human history that far outweigh the risks associated with COVID-19.

I choose freedom.