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Michigan Supreme Court Upholds Separation of Powers

By Michael Van Beek

Summary

The Michigan Supreme Court unanimously ruled that Gov. Gretchen Whitmer acted without constitutional authority by unilaterally issuing COVID-related executive orders after an initial 28-day period. In doing so, the court upheld the separation of powers, a key constitutional protection for citizens.

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Governors must work with legislators, the state Supreme Court says.

The Michigan Supreme Court, in a unanimous decision, ruled that Gov. Gretchen Whitmer violated state law by declaring emergencies and issuing executive decrees without legislative approval. The governor's unilateral control over the daily lives of 10 million people has come to an end. No matter one's opinion of the threat of COVID-19, this decision protects Michiganders against another real threat: abuse of executive power.

Although every governor in the country has declared an emergency and helped craft policies for this coronavirus pandemic, Gov. Whitmer blazed a different trail. Instead of working with her state Legislature, as other governors did, she attempted to go it alone. But Michigan's Emergency Management Act of 1976 requires the governor to get legislative approval, and all seven justices at the state's highest court ruled that Gov. Whitmer flouted this law.

Specifically, the EMA says that a governor may declare an emergency for 28 days and issue executive orders during that period. After 28 days, though, these unilateral powers may only continue if the Legislature approves. Gov. Whitmer attempted to bypass this requirement with a stroke of her pen: She simply terminated the original emergency and declared a new one. Poof! Another 28 days of complete control.

A fourth grader could see through this trick and, not surprisingly, so did the Michigan Supreme Court. The justices wrote, "The governor possesses no authority — much less obligation — to redeclare the same state of emergency or state of disaster and thereby avoid the Legislature's limitation on her authority under the EMA." Although Gov. Whitmer is the first Michigan governor to try this gimmick, the court's ruling secures a separation of powers between branches of government in these situations moving forward.

Recognizing the weakness of her legal case for continuing to use the EMA, Gov. Whitmer created a backup plan. She also declared emergencies under the Emergency Powers of Governor Act of 1945, a rarely used law meant to deal with urban riots. It was passed in response to violence in Detroit in 1943 and its greatest use was during the 1960s, when riots occurred in several Michigan cities.

The governor used the broadly worded language of the EPGA to argue that she could maintain a state of emergency and issue unilateral orders for however long she wanted. No other governor has interpreted the law

this way, which is likely why the Supreme Court had not previously scrutinized it closely.

The court, in a narrower 4-3 decision, ruled the EPGA unconstitutional. The four justices highlighted Gov. Whitmer's unique interpretation, writing, "Almost certainly, no individual in the history of this state has ever been vested with as much concentrated and standardless power to regulate the lives of our people." The majority opinion said the law was "extraordinary" for the "expansiveness of the authority it concentrates in a single public official." In other words, the EPGA fails to provide protections or guardrails against it being abused by a governor bent on maintaining unilateral and unconstitutional control.

Because Michigan's pandemic mandates were dictated exclusively by Gov. Whitmer, there are many questions about what happens now that the rug is pulled out from under her. More than likely, public health departments will play a large role in responding to COVID-19. After all, state law grants powers to these entities to contain pandemics, and even requires the state to maintain a pandemic influenza plan. This plan largely relies on local public health departments to issue orders to limit the community spread of a virus. Oddly, Gov. Whitmer ignored these laws almost entirely when she crafted her own COVID-19 response.

Other government entities could take action as well. Local school districts may still require students to wear masks, for instance, and the Michigan Occupational Safety and Health Administration may create new rules that businesses would have to follow. And, of course, the governor and the Legislature, working together, can now use our normal lawmaking system to combat COVID-19.

Michigan is a diverse and dynamic state, making it an extreme challenge to design mandates that work equally well everywhere. To cite just one example of the difficulty, Gov. Whitmer, in trying to respond all by herself, needed to write more than a thousand FAQs to address the confusion her rules generated. Moving forward, the state will have a better chance of meeting the diverse needs of all Michiganders in the face of this serious pandemic by relying on a more locally focused and democratic approach.

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