Minnesota Supreme Court's decision on COVID response should lead to reform

On May 10th, the Minnesota Supreme Court issued what it characterized as a narrow opinion about whether Governor Walz possessed the authority to declare a state of emergency to address the COVID-19 pandemic. In that opinion, the Court held that Minnesota's Emergency Management Act (MEMA) properly allowed the Governor to authorize such an emergency.

While affirming the Governor's ability to use MEMA to declare an emergency for an "act of nature" such as the COVID outbreak, the opinion made clear that it was not addressing "the legality of any other executive orders" issued by Governor Walz during the pandemic. And — while absent from the majority opinion — a concurrence by Justice Anderson invited the legislature to examine "serious concerns" about executive power raised during the COVID era by reviewing MEMA itself.

MEMA is a state statute that confers certain emergency powers upon the governor, and the scope of those powers was greatly expanded by the COVID management approach taken by the Walz administration. Concerns about MEMA's use are legitimate, and require a full and fair review by lawmakers to avoid future governmental overreach.

MEMA's use during COVID

The use of MEMA during the COVID era revealed two key problems:

1. The governor was willing to wield his emergency powers much more
2. expansively than any previous executive;

2. MEMA's design was insufficient to provide a practical check on the governor's actions.

Prior to the Walz administration, MEMA's emergency management powers were more narrowly utilized, and localized in application. The statute had

been invoked to address a number of "acts of nature" beyond COVID-19 — including droughts, wildfires, and snowstorms. It had also been used as the basis for responding to localized civil unrest, and to assist law enforcement during certain police operations.

In those situations, MEMA's statutory provisions were primarily used to quickly marshal state assets, or to provide supplemental support to National Guard missions or local authorities.

To be sure, some of the Walz executive orders (EOs) operated in this more traditional fashion — granting extra flexibility to state agencies, or providing additional resources during the COVID outbreak. Where the administration left tradition behind, though, was in its embrace of eleven specific words in the statute, which are cited again and again in the state's COVID-era orders: "direction and control of the conduct of persons in this state." Those words only appear in one section of MEMA that relates to the governor's cooperation with federal authorities in emergency management activities. However, the Walz administration read them to authorize governor-directed control of "the conduct of persons" in the broadest possible sense.

By taking this interpretive approach, the Governor could exert his authority over any activity in Minnesota, as each was related to the "conduct of persons." And, in the flurry of EOs that followed the initial emergency declaration, the Governor imposed operational mandates on virtually everything occurring within the state. The broadest order — EO 20-20 — forbade citizens from leaving their homes for several weeks, except for specific, government-approved reasons.

Subsequent EOs (enacted during the so-called "re-opening" phase) placed attendance limitations on some activities, but not on others. Big-box stores such as Walmart had scant limits imposed on them (save for "social distancing" guidelines), while churches, mosques, and synagogues had to operate at a substantially reduced capacity. It was here, in particular, where MEMA's application began to run into significant constitutional problems.

Constitutional problems

MEMA, as employed by the Walz administration, resulted in certain executive orders that violated constitutional rights. For instance, allowing citizens to frequent some retail stores in unlimited numbers — while at the same time constraining the number of individuals who could gather for religious purposes — violated the First Amendment. This was recognized by the United States Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo* — a COVID-era case that examined a New York State directive similar to the Walz executive orders. After the Court enjoined the State of New York's discriminatory capacity limits in *Roman Catholic Diocese*, a federal district court judge declined to dismiss free exercise and freedom-of-assembly claims brought against Governor Walz by a coalition of churches and small businesses. The state then moved to settle those First Amendment claims, ending the litigation in a negotiated settlement.

In addition, certain EOs violated the "takings" clause of the Fifth Amendment. Under various iterations of the COVID orders, certain big box stores were allowed to operate (subject to "social distancing" requirements) while smaller competitors that sold similar products were shuttered. These kinds of lop-sided regulations — where the costs of public actions are imposed upon a limited subset of the population — are recognized as "regulatory takings" under Fifth Amendment case law. And when the government engages in takings, persons who forfeit their property rights must be paid "just compensation."

This was examined by a three-judge panel of the Eighth Circuit Court of Appeals in the *Heights Apartments, LLC v. Walz* case. There, the panel held that a Minnesota property owner properly pled a regulatory takings claim related to a COVID-era eviction moratorium, and allowed litigation on the matter to continue. (The case has since arrived back at the Eighth Circuit, on appeal over a question of sovereign immunity, with oral arguments coming soon).

In short, the *way* that MEMA was applied during the COVID emergency led to specific constitutional problems, even if its initial invocation was lawful. To avoid future problems, the statute should be revisited and modified.

Changing MEMA's design

In re-writing MEMA, the first issue to address would be to cabinet the scope of powers that a governor could lay claim to. After the Walz-era assertions that MEMA's language authorizes the governor to "control the conduct of persons in this state" — full stop — the statute needs to be clarified to ensure that such breadth can no longer be read into its text. While legislatures may properly allow the executive branch to undertake certain emergency management responsibilities, no legislature should give a governor carte blanche authority. Specific provisions should remain to address the kinds of emergencies that confront the state from time-to-time (including disaster response and civil unrest) but language that has been interpreted as open-ended must be removed to avoid governmental overreach.

Secondly, Minnesota's experience with MEMA has demonstrated that the statute's built-in "check" on the executive — allowing the legislature to terminate a governor's emergency powers — is ineffective when certain political realities are present. MEMA allows a governor to initially wield "peacetime" emergency powers for five days, and then the executive council can extend emergency declarations for up to 30 days. To terminate emergency powers extending beyond 30 days, a majority vote by *both* legislative bodies is required.

On paper, this may seem like a reasonable check. However, Minnesota's experience shows that during certain political conditions, emergency powers can linger on for many months without effective review. Even in the face of vociferous differences of opinion about the prudence of executive actions, a governor can continue to exert emergency powers, so long as a politically-aligned executive council backs the governor, and the full legislature fails to muster the votes needed to end the emergency declaration.

Such an arrangement does not inspire confidence — nor does it provide a workable check on executive authority. Accordingly, the statute should be modified to automatically terminate a governor's emergency powers after a set, limited period, and to require legislative review and supermajority approval to permit any extensions.

Need to rise above partisanship

To properly reform MEMA, lawmakers must take a clear-eyed view of the current law's structural problems, while leaving partisan considerations behind. In the current political environment, that may be difficult work, given the profound partisan split that the COVID-era executive orders produced.

Such work is necessary, though, in order to avoid systemic dangers. The same is true with any other statute — state or federal — that enables overly-expansive executive power. In Washington, for instance, some members of Congress are presently — an appropriately — seeking to place limits on the president's ability to invoke the post-Civil War Insurrection Act to allow

active duty troops to exercise police powers in certain emergency circumstances. After former President Trump's controversial near-use of this Act during his administration, it would be prudent to place more stringent limitations on this federal statute.

Our nation's founding was grounded in a significant and healthy skepticism of concentrated power. To ensure that its carefully crafted checks-and-balances survive, both Democrats and Republicans must return to an American tradition which recognizes that overbroad executive power is dangerous, no matter which political party wields it. In Minnesota, both parties should begin that process by jointly working to reform MEMA.

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