Voters to Consider Constitutional Amendment Limiting Gov’s Emergency Powers

The proposed amendment would add new sections to the Constitution of the commonwealth of Pennsylvania regulating the governor’s emergency powers under emergency declarations.

By Kevin M. Levy  |  February 11, 2021 at 12:03 PM

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Pennsylvania voters will soon consider a proposed constitutional amendment that, if passed, could drastically change how the Pennsylvania state government is equipped to respond to the COVID-19 pandemic. The proposed amendment would add new sections to the constitution of the commonwealth of Pennsylvania regulating the governor’s emergency powers under emergency declarations.

Under existing public health and emergency laws, the governor of Pennsylvania has the authority to declare disaster emergencies when responding to certain dangers posed to the people of Pennsylvania. These declarations, sometimes referred to as proclamations, open up certain emergency funds for disaster relief and provide Pennsylvania governors certain emergency powers to address those emergencies. Declarations can be issued due to many situations, most often natural disasters such as storms and floods, but are also used to respond to civil unrest and disturbances.
Emergency powers are normally tailored to the disaster as in declaring high speed reductions during a snowstorm or prohibiting access to a flood zone after a flood, and these event-specific declarations are normally limited to just a few days or weeks to address the event and its aftermath. Importantly, declaring disaster emergencies authorizes the governor to issue executive orders which can suspend any number of statutes, rules or regulations if those laws "would in any way prevent, hinder or delay necessary action in coping with the emergency." See, 35 Pa. C.S. Section 7301(f)(1). Since the initial outbreaks of COVID-19 in Pennsylvania, Gov. Tom Wolf has relied on his emergency powers under the commonwealth's emergency management code.

Beginning in March 2020, Wolf and his administration issued many executive orders regulating businesses and individuals, ranging from mandatory mask-wearing orders and required quarantining for out-of-state travelers, to implementing the commonwealth's Red-Yellow-Green Phased Reopening Plan used over the summer of 2020. The Pennsylvania General Assembly, the state's legislative branch, has voted a number of times to overturn some of Wolf's specific executive actions, including attempts to declare gun and sporting shops essential businesses and to allow restaurants to open at higher indoor dining capacity, or to terminate the declaration of disaster emergency altogether, failing to override Wolf's veto each time.

Seeking to reassert the General Assembly as a co-equal branch of government, the Pennsylvania legislature has passed on a bi-partisan basis Senate Bill 2 to put a constitutional amendment to Pennsylvania voters on the May 18, 2021, primary election. If passed, the amendment would have major governmental ramifications and would dramatically alter Wolf's powers to respond to the COVID-19 pandemic, as well as the ability of future Pennsylvania governors to respond to their eventual disaster emergencies.

**Twenty-One Day Sprint to Resolution**

Under current emergency powers laws, the governor of Pennsylvania may declare disaster emergencies for 90 days and may renew the declarations for however long as the disaster persists. Wolf declared his initial disaster emergency on March 6, 2020, and has extended it three times (on June 3, Aug. 31 and Nov. 24). The current disaster declaration is set to expire on Feb. 27, 2021, unless renewed again.

The proposed constitutional amendment would set a hard 21-day limit on the length of time that Wolf or a future Pennsylvania governor could govern under emergency powers. Twenty-one days after a governor issues such an emergency declaration, the governor's emergency powers would expire unless the Legislature passes (in both houses) a resolution to extend the declaration.

**Nullifying the Governor's Veto**

On June 9, 2020, the Pennsylvania General Assembly adopted a concurrent resolution to terminate the COVID-19 disaster declaration. Wolf ultimately vetoed the resolution which led to a major constitutional lawsuit between the legislative and executive branch in *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), where the Pennsylvania Supreme Court upheld the governor's veto.

This controversy stemmed from an obscure provision in Pennsylvania's emergency management code, which authorized the General Assembly to vote to terminate a disaster declaration by passing a concurrent resolution. Even though the emergency management code does not define “concurrent resolution,” the Pennsylvania Constitution does, and it requires a governor to sign or veto them before they take effect. The legislature argued in *Wolf v. Scarnati* that providing the governor the
ability to veto a legislative vote taking his emergency powers away would be a lowercase d-democratic anathema, but the Pennsylvania Supreme Court disagreed.

Senate Bill 2 would rewrite a portion of the Pennsylvania Constitution to specify that the governor would not be able to veto any General Assembly resolutions to terminate an emergency declaration. The General Assembly also acted to plug a loophole—under the proposed amendment, the governor would be prohibited from issuing a new disaster declaration “based upon the same or substantially facts and circumstances without the passage of a concurrent resolution of the General Assembly expressly approving the new disaster emergency declaration.”

**Effect of Passage**

It is not immediately clear what would occur if Pennsylvania voters voted to adopt the proposed amendment. Would Wolf’s orders immediately expire because we have been in a COVID-19-related disaster emergency for over 21 days? Would he have the ability to issue one last COVID-19 executive order for 21 days? Would the Pennsylvania legislature vote to extend any existing or future COVID-19 declarations? What would happen if the General Assembly failed to act on Wolf’s COVID-19 mitigation orders? These are just some of the legal, political, and public health questions that will need to be answered if the amendment is adopted in May. As of today, Wolf’s orders regulate restaurant dining capacity, business operations, and establish maximum capacity limitations for events and gatherings across the state.

But passing this amendment would not mean an end to COVID-19 restrictions as we have come to experience them. Under the Pennsylvania Disease Prevention and Control Law, 35 P.S. Section 521.1, the Pennsylvania secretary of health has separate and distinct statutory authority to issue quarantine measures. That’s why Secretary of Health Rachel Levine has issued concurrent orders with Wolf at almost every step of the way during the COVID-19 disaster emergency. Even if all of Wolf’s orders become ineffective after the passage of the proposed amendment, the Department of Health orders related to mandatory mask wearing, vaccine distribution, elective procedures, and some business operations would remain in effect. Continued reliance on the Secretary of Health’s orders may lead to additional legislative oversight in the future, though.

And since President Joe Biden’s inauguration in January, observers have noticed a stronger federal involvement in COVID-19 guidance: Biden recently directed the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration (OSHA) to consider whether to issue mandatory emergency temporary workplace standards. OSHA is expected to issue such mandatory standards by March 15, 2021.

**Four Months of Election Season**

Pennsylvania voters will soon be deluged by campaigns on either side of this important issue. Should the governor of a state be able to govern unilaterally without legislative input on what the laws should be, especially for an extended period of time? Should a state’s chief executive officer be hamstrung by legislative procedures during the middle of a public emergency, just because it has lasted longer than 21 days? Is it appropriate to do nothing in response to a public health disaster just because of partisan bickering in a state capitol?

The commonwealth of Pennsylvania will become a battleground state again—this time considering the appropriate separation of constitutional powers during a public health disaster. Voters head to the polls on May 18, 2021.

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The ERA does not create additional procedures, although the absence of those procedures may make a statute or regulation unconstitutional.

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