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Del. Cox says Hogan orders overreach authority, but scholars side with governor

Steve Bohnel

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As protests to reopen states occur nationwide, a local Republican delegate penned a letter to the governor questioning his executive orders and power during the coronavirus pandemic.

State law gives Gov. Larry Hogan (R) broad powers during this pandemic, however, and his actions fall within those powers, several state scholars said.

Del. Dan Cox (R-Frederick and Carroll) sent the letter to Hogan earlier this month, claiming the governor had suspended the Bill of Rights and that requiring individuals to wear "face coverings" when entering essential businesses was power not granted to him during a public health crisis.

Cox said this week the point of the letter was to ask Hogan to cite where in state law it says he has the authority to issue many of his executive orders.

"We see with some of these orders going beyond the statute as it is now, and resting upon a broad statement of Title 14 without specific reference, [which] I think is a dangerous precedent to set," Cox said. "Because then, if the governor believes he has unlimited authority to make executive orders, then we're in a situation where the statute really is irrelevant."

Part of Cox's letter questioned the authority of the governor's executive order requiring face coverings for residents entering essential businesses like grocery stores.

"Yesterday you took another unprecedented unilateral action to force 'face coverings' to be worn by all Marylanders and others in order to enter into commerce in this state, allegedly because of an ongoing health catastrophe with coronavirus," Cox wrote.

Cox said this part of the letter wasn't meant to imply the coronavirus isn't a public health crisis, or that Gov. Hogan was implementing the order with an ulterior motive.

"I'm not explaining any intent or motive of the governor, and that's why I was trying to explain it in that way ... I would like to know: why he is doing it, and why does he think he has the statutory authority to do that?" Cox said of the face covering executive order.

But multiple scholars this week said that according to Title 14 of the state's Public Safety Article, Hogan or any other Maryland governor has broad powers during a state of emergency to protect the state's population, including requiring face coverings.

Walter Olson, who lives in New Market and is a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies in Washington, D.C., said the founding fathers considered

the threat of public health pandemics when drafting the constitution, and allowing for states and local governments to have police powers during those times.

Olson added there is a "clash of rights" during these periods — like for instance, the freedom of assembly under the First Amendment and governors prohibiting large gatherings of people during a pandemic.

But he disagreed with Cox that the Constitution and Article 14 of the state's public safety statute is being violated.

"You can make a moral argument, I ought to have these rights, the government ought to recognize these rights," Olson said. "Go ahead and make that argument. What you can't argue is the constitution has been violated, you can't argue that the founders would be turning over in their graves if they knew what was happening."

Todd Eberly, a longtime political science professor at Saint Mary's College of Maryland, also said state law gives Hogan and any other governor broad powers during a state of emergency.

The U.S. Constitution's 10th Amendment reserves police power to the states and local governments during emergency periods caused by a public health pandemic, Eberly said.

"It's pretty clear that [Hogan is] exercising authority granted to him," he said. "Pretty much everything that he has ordered can be traced back to this section of Maryland code."

Cox, who has also championed a campaign which included protests in Annapolis over the weekend to reopen Maryland businesses amid the crisis, said Hogan's actions are preventing citizens from providing for their families and could lead to an economic collapse as small businesses close.

But Michael Greenberger, a law professor at the University of Maryland Francis King Carey School of Law, also said Hogan has broad powers under Title 14 in order to ensure public safety during a pandemic.

"Buried within Title 14 is a provision that the governor can disregard any Maryland law that interferes with his ability to deal with the emergency ... Title 14 is a very, very broad measure, once the emergency is declared," Greenberger said.

Greenberger, who also is director of the Center for Health and Homeland Security at the law school, said this power applies to requiring masks or face coverings and requiring healthy people to isolate and even vaccinate themselves if necessary.

Regarding that latter point, he pointed to a 1905 Supreme Court case, *Jacobsen vs. Massachusetts*, which upheld that states can require vaccinations in order to protect the state's residents.

"It's not just an individual's concern in these cases," Greenberger said of the governor's emergency powers. "It's what the state is trying to do to protect the entire populace, and that's balanced against the individual's rights. What COVID-19 has brought to life is what these powers are, and how they're exercised."