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Wisconsin's Supreme Court Strikes Down Executive Branch's COVID-19 Stay-at-Home Order

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Governors, mayors, and other members of executive branches are contemplating leaving COVID-19 emergency stay-at-home orders, which have entered their third month, in place for months to come. This has led to public protests and push-back from the legislative and judicial branches. The latest example is from Wisconsin, where public protests against the stay-at-home orders have recently mounted and where the Supreme Court recently ruled in favor of the legislative branch by striking down a COVID-19 stay-at-home order issued by the executive branch.

The Supreme Court of Wisconsin struck down a broad COVID-19 stay-at-home order issued by the Acting Secretary of the Department of Health Services (DHS) because the court held the manner in which DHS issued the order did not follow required procedural safeguards and because the order was overreaching. The Wisconsin State Legislature brought this lawsuit as a check on the executive branch's very broadly asserted powers relating to COVID-19.

According to the court, "This case is about the assertion of power by one unelected official, [Acting Secretary of DHS] Andrea Palm, and her order to all people within Wisconsin to remain in their homes, not to travel and to close all businesses that she declares are not 'essential'" and purporting to establish criminal penalties of up to 30 days in prison for violation of that order. It is important to note that the Wisconsin order is similar to those issued in many other states in that it limited gatherings of 10 or more people, ordered all schools and libraries closed, and ordered all businesses closed unless designated by the executive branch as "essential."

DHS argued that its general authorization to limit the spread of communicable disease legitimized its broad-reaching COVID-19 order. The court rejected this argument by noting the order was "obvious overreach" and an unauthorized "vast seizure of power." The court explained the DHS Acting Secretary far exceeded her general authority because she did not "quarantine those infected or suspected to be infected" but instead quarantined "[a]ll individuals present within the State of Wisconsin . . . with exceptions she deems appropriate." Similarly, DHS's closing of businesses, prohibition of gatherings of people, and prohibition of travel even within Wisconsin "is not based on persons infected or suspected of being infected," but instead applies to all people who enter the State of Wisconsin.

The court further explained that the DHS Order was a "Rule" issued by a department of the executive branch, and is therefore subject to the same administrative rulemaking procedures and safeguards as any other administrative rule. Because DHS did not follow such rulemaking procedures, "Emergency Order 28 is unenforceable." The court noted that if it accepted DHS's broad interpretation of its power, a single unelected official such as Palm could create law applicable to every person who enters Wisconsin and subject them to imprisonment if they disobeyed her order. The court emphasized that the procedural requirements protecting against such orders exist "precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." In other words, "Rulemaking provides the ascertainable standards that hinder arbitrary or oppressive conduct by an agency."

Finally, it should be noted that while this case did not directly rule on separate COVID-19 orders issued by the Governor of Wisconsin, it does send a message that the Governor's powers are also not unlimited:

But the Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.

This case may be the clearest yet relating to checks on broad COVID-19 emergency powers claimed by executive branches around the United States over the last three months. This result makes it likely that many more such cases will be filed in the coming months as COVID-19 stay-at-home orders are extended.

For more information specific to this topic, or other relevant areas of litigation relating to COVID-19 issues, please contact [Stephen Pudner](#) or [Ivy Cadle](#) and visit our website's [Coronavirus \(COVID-19\): What You Need to Know information page](#).