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An Argument that Oklahoma's Mayors Acted Unlawfully During COVID-19 - Summary*

In Response to Covid-19, the Mayors of Oklahoma's Three Largest Cities Have Overstepped Their Legal Authority in III-Considered Ways

- Citizens of Oklahoma City, Tulsa, and Norman (about 2/3 of Oklahoma's population) were subjected to emergency decrees that severely restricted their freedom, damaged them financially, and undermined their constitutional rights.
- Mayoral decrees differed significantly from less restrictive policy judgments made by the governor, who was acting pursuant to constitutional and statutory authorities.
- The decrees were made under city ordinances and state laws that were intended to be used to control and prevent riots and looting, not to deal with an infectious disease pandemic.

Cities Do Not Have Inherent Power to Order Business Closures and Shelter in Place in Response to a Pandemic

- Under Oklahoma law, "home-rule" cities have some degree of local control, but can only pass city ordinances (1) on matters of "purely municipal concern," or (2) pursuant to authorization from the legislature acting through state statute.
- A pandemic, by definition, is not a purely municipal concern, but rather is a statewide concern.
- Forced business closures and ordering citizens to stay in their homes involve state and federal constitutional rights, so they, too, are matters of statewide concern.
- Therefore, to be legally valid, any city ordinance purporting to give a mayor emergency powers to respond to a pandemic must be authorized by state statute.

The City Ordinances Used Were Based on The Riot Control and Prevention Act of 1968, Which Was Never Intended to Apply to Pandemics

- Three Oklahoma laws confer emergency powers to government officials when activated:
 - The Catastrophic Health Emergency Powers Act of 2003 (CHEPA): gives expansive powers to governor, but *does not give any powers to cities*.

- The Oklahoma Emergency Management Act of 2003 (OEMA): gives some powers to cities, but *not* the types of powers claimed in relevant city ordinances. Gives cities flexibility in contracting and spending decisions; focused on disaster relief and emergency management architecture.
- The Riot Control and Prevention Act of 1968 (RCPA): gives the governor and cities emergency powers to respond to riots and other civil disorder, but was not intended to apply to pandemics.
- City ordinances used by the mayors during COVID-19, if valid, get their authority from the RCPA.
- City ordinances are legally valid on their face, but the mayors' *application* of them to a pandemic is legally suspect.

The Governor Never Invoked the RCPA During the COVID-19 Crisis

- In more than 20 executive orders, the governor has repeatedly and clearly invoked CHEPA and the OEMA, *never* the RCPA.
- While unclear how courts may rule, the best understanding of the law is that the RCPA delegates to cities the power to enact ordinances that *can only be used in the event the governor declares an RCPA-emergency*.
- *Even if* the RCPA could be said to be available for use in a pandemic, it was likely not available in *this pandemic* because the governor never declared an RCPA-emergency.

Recommendations:

The Governor and the Attorney General Should:

- Take a firm position with mayors, making clear that to the extent their orders contradict the state rules, they are legally invalid.
- Produce an Attorney General Opinion following the analysis contained in this paper that would be legally binding on the mayors, instantly resolving the state-local discrepancies in policies.

The Legislature Should:

- Codify existing Supreme Court precedent into statute, explicitly re-affirming that city ordinances inconsistent with state law are legally invalid.
- Evaluate whether any emergency powers statutes are necessary or appropriate.
 - If COVID-19 has demonstrated anything, it is that when given extraordinary powers, government officials overreach.
 - When normal processes are abandoned in the name of extenuating circumstances, the objectives those processes are designed to promote—transparency, careful deliberation, legitimacy in the eyes of the governed—are undermined.
 - American society experienced emergencies before there were emergency response statutes, and there is little indication government lacked the authority it needed to respond appropriately.

Conclusion

If the strongest legal argument justifying these mayors' actions is that it will be difficult for individual plaintiffs to hold them to account in court, it is no defense at all. Elected officials are sworn to uphold the law, not to uphold the law only to the extent someone can successfully prosecute a lawsuit against them.

Oklahomans should be asking questions of mayors, and the mayors should be providing detailed explanations of the legal authority for their actions. The fact that they have not already done so reflects poorly on their administrations as well as their legal positions.