



NEW YORK STATE SENATOR

Thomas F. O'Mara

## Senator O'Mara's weekly column 'From the Capitol' -- for the week of December 11, 2023 -- "A 'David v. Goliath' fight for constitutional rights"

THOMAS F. O'MARA December 14, 2023

| ISSUE: **EXECUTIVE MANDATES; EMERGENCY ACTIONS**



Senator O'Mara offers his weekly perspective on many of the key challenges and issues facing the Legislature.

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Senator O'Mara offers his weekly perspective on many of the key challenges and issues facing the Legislature, as well as on legislative actions, local initiatives, state programs and policies, and more. Stop back every Monday for Senator O'Mara's latest column...

This week, **“A ‘David v. Goliath’ fight for constitutional rights”**

One of the most detrimental failures of New York’s COVID-19 response was that this state fell under nearly complete executive control for over two years and we’re still facing the consequences.

While there was a need at the pandemic’s outset in March 2020 -- when so much was unknown -- for the Legislature to authorize emergency executive powers to confront COVID, ultimately a Democrat-controlled Legislature willingly ceded its authority and allowed these powers to remain in place for far too long until they became a mechanism of unprecedented political power for New York’s executive.

It would result in former Governor Andrew Cuomo and Governor Kathy Hochul issuing upwards of 100 executive orders that authorized massive state spending and changed hundreds of state laws without legislative approval. For over two years, legislative checks and balances went by the wayside. Local decision-making was ignored. It was simply executive order after executive order, executive mandate and after executive mandate, and executive dictate after executive dictate.

We still don’t know the full extent to which these emergency executive powers were abused. The Legislature’s Democrat majorities have refused to undertake any full-fledged or serious investigation of the COVID response. Governor Hochul has hired an outside consultant to undertake a review, but it’s been delay after delay and, in the end, many of us doubt whether

it will be anything more than another in-house whitewash.

One of these executive actions, however, continues to raise alarms.

In April 2022, the Hochul administration, through the state Health Department, issued an emergency regulation known as Rule 2.13. This new rule establishes a process, once again without legislative approval, authorizing the state and/or local health departments to order and enforce isolation and quarantine measures for people who are ill or suspected of being ill with a communicable disease.

According to one of the rule's specific provisions, "For the purposes of quarantine orders, quarantine locations may include home quarantine, other residential or temporary housing quarantine, or quarantine at such other locations as the public health authority issuing the order deems appropriate."

It's critical here to keep in mind that existing Public Health Law 2120, which has been in place for more than 70 years, already addressed the need for quarantine actions while ensuring due process protections. The new rule contradicts existing state law, thereby violating separations of powers by discarding these due process protections, and that's troubling at a time when we're likely to face other disease outbreaks, such as the current outbreak of pediatric pneumonia that emerged in China and has reached other places, including the United States.

In other words, under new Rule 2.13, health authorities would be authorized to mandate quarantine sites other than an individual's own home. While the Hochul administration denies it, the public outcry and fear has been that state and local authorities would be authorized to effectively establish "quarantine camps" during any future public health crisis.

Several of my Republican legislative colleagues, including Senator George Borello, filed a legal challenge to the new Rule 2.13, "Isolation and Quarantine Procedures," charging that it is unconstitutional on several levels. In July 2022, a state Supreme Court judge ruled in their favor and deemed that the new rule "ignores the balancing act between an individual's rights and the need for public safety" and that it "merely gives 'lip service' to constitutional due process."

Not surprisingly, Democrat state Attorney General Letitia James, on behalf of Governor Hochul, appealed the Supreme Court decision and recently a higher court, the Appellate Division of the Fourth Judicial Department, ruled in Hochul's favor.

Following this latest, disturbing court action, Senator Borello and the other plaintiffs stated, "We strongly disagree with their ruling and are concerned about the widespread implications of this erroneous decision. They have not only paved the way for Hochul and her Department of Health to re-issue this heinous Rule, but they have set a precedent to preclude citizens from rightfully challenging government overreach in court ... which is a decision that could open the door to further abuses of power. In light of Governor Hochul's other overreaches into the daily lives of New Yorkers, including her effort to ban gas stoves, her 'housing' plan that would eliminate local zoning, and her excessive mask mandates on children, to name a few, our concerns are well-warranted. This has been a 'David v. Goliath' fight from the beginning on many levels, so it is not surprising that the state, with its limitless resources, has effectuated a win this round. We will never stop fighting for New Yorkers against government overreach."

We plan to take this fight, on behalf of all New Yorkers, to the state's highest court. It's a fight worth waging.

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