

# Conservative justices express skepticism about Palm's authority in hearing on stay-at-home order lawsuit

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Justice Rebecca Bradley suggested the DHS secretary's stay-at-home order was a form of "tyranny" and argued the Legislature never intended to grant an unelected bureaucrat such expansive powers.

During oral arguments Tuesday in a GOP lawsuit seeking to prevent enforcement of the order, Bradley also peppered Assistant Attorney General Colin Roth on what limits exist to Andrea Palm's powers. She pressed him on whether Palm could order people rounded up and put into internment camps much like Japanese-Americans were during World War II.

Roth countered the state Legislature granted the Health Services secretary such expansive powers because lawmakers couldn't anticipate the actions necessary to deal with a quickly moving pandemic. What's more, he said courts over the past century have recognized that power.

He apologized if that sweeping authority made Bradley uncomfortable. But he warned of dire consequences if the court tossed the order, which extends through May 26, without a new plan in place. Roth said the state would see COVID-19 spread like "wildfire" while the state would be left without the needed tools to quickly deal with it.

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"People will die if this order is enjoined with nothing to replace it. That is exactly

what will happen,” Roth said.

Still, four of the five conservatives on the seven-member court expressed skepticism about the legislative and constitutional authority for Palm to issue such a sweeping order. Her order directed the closure of schools and many businesses while limiting public gatherings and banning non-essential travel.

Bradley was the most aggressive in questioning Roth, wasting little time in pressing him where the Wisconsin Constitution “confers authority on a single unelected cabinet secretary” to compel state residents to stay home and close their businesses under the threat of imprisonment if they don’t comply.

“Isn’t it the very definition of tyranny for one person to order people to be imprisoned for going to work or other ordinarily lawful activities?” she asked.

Meanwhile, Chief Justice Pat Roggensack and fellow conservatives Daniel Kelly and Annette Ziegler expressed concern about the criminal penalties for those who violated Palm’s order.

They suggested Palm had in effect created new law with the order because it came with criminal penalties that the Legislature hadn’t approved.

Several of the conservative members also regularly pressed Roth to state what limits — if any — existed for the powers he argued state law gave Palm. He argued those opposed to it could turn to the courts to overturn an order that went too far, but several conservatives weren’t satisfied with that answer. Roth said if justices were uncomfortable with the powers granted to the DHS secretary, they should lobby the Legislature to change the law.

Ziegler told Roth his argument boiled down to the state is in a horrible situation due to a pandemic and the court should say what Palm did was OK because it “makes sense.”

“Part of the problem we have is we may personally think things make sense,” Ziegler said. “But we have to apply constitutional principles and the language of the law to figure out whether or not it does make sense because tomorrow it could be a different situation.”

The arguments got contentious as justices talked over each other in asking Roth questions.

At one point, Roggensack interrupted her colleagues to set up an order in which they could pose their questions.

Liberal Justice Rebecca Dallet interrupted Kelly, expressing frustration that he kept cutting off Roth and she couldn't hear the assistant AG's response to her colleague's question.

"Justice Dallet, please allow me to conduct my own questions," Kelly responded.

The suit by GOP legislative leaders asks the court to declare the Evers administration should've issued the extended stay-at-home order as an emergency rule. That process would then give the Legislature oversight of the order.

Republicans originally asked in their suit for the court to issue an injunction, but stay it for six days to give the Evers administration time to promulgate an emergency rule guiding the state's response to COVID-19 going forward. In a follow-up filing, Republicans left it to the court's discretion to decide how long it should stay the proposed injunction.

Several justices questioned Ryan Walsh, the attorney representing GOP lawmakers, how long he believed it would take DHS to issue such a rule.

Walsh argued DHS should've already begun the rule process and could have a proposed framework for a rule by day's end. He estimated it would take 12 days from drafting the framework to having the rule in place. That then triggers a process that includes legislative oversight. Palm's extension expires on May 26.

GOP lawmakers have argued their suit was about giving them a seat at the table in laying out regulations related to COVID-19. Walsh acknowledged that input would occur once the rule goes into effect.

Bradley questioned why the court should allow "an unlawful order to stay in place" if the justices overturn it.

Liberal Justice Ann Walsh Bradley followed by asking Walsh what "chaos" would ensue if the court simply overturned the order and walked away.

"Ramifications are the governor and his agencies, which derive their power from the Legislature, would have to sit down with the Legislature to come up with a bipartisan, sensible response to this pandemic going forward," he said.

Watch the oral arguments:

<https://wiseye.org/2020/05/05/wisconsin-supreme-court-oral-argument-wisconsin-legislature-v-andrea-palm/>