

Legal Memorandum

DATE: June 11, 2020
TO: Idaho Freedom Foundation
FROM: Kory Langhofer and Thomas Basile¹
RE: Special Session of the Idaho Legislature

QUESTION PRESENTED

On March 13, 2020, Governor Little formally proclaimed a “state of emergency” in connection with the ongoing COVID-19 pandemic. A series of subsequent proclamations and executive orders predicated on this declaration instituted sweeping restrictions on the activities of citizens and private businesses in Idaho.

Does the Idaho Constitution permit the Idaho Legislature to convene a special session to consider, and potentially enact legislation pertaining to, issues arising out of the COVID-19 pandemic?

SUMMARY

It is our opinion that the Idaho Legislature may permissibly convene in a special session on June 23, 2020 to address issues pertaining to the pandemic and the Governor’s resulting executive actions.

Article III, Section 27 of the Idaho Constitution states, in relevant part:

The legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack or in periods of emergency resulting from the imminent threat of such disasters, shall have the power and the immediate duty . . . to adopt such other measures as may be necessary and proper for so insuring the continuity of governmental operations.

Whether the COVID-19 pandemic and its attendant social and economic repercussions constitute a “period[] of emergency resulting from disaster[] caused by enemy attack,” and whether legislative action is necessary to ensure “the continuity of governmental operations” are political questions entrusted to the plenary discretion of the legislative branch. Further, even if the existence of the requisite

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“emergency” and “attack” were amenable to judicial determination, there is at the very least a reasonable factual basis for the Legislature to find that the virus and the destruction it has wrought derived at least in part from the concerted hostile activities of foreign actors. Finally, Article III, Section 27 notwithstanding, no provision of the Idaho Constitution prohibits the Legislature from convening itself in a special session when it deems necessary for the effective discharge of its constitutional functions.

ANALYSIS

We believe that three conceptually distinct but overlapping theories can sustain any decision by the Legislature to convoke a special session relating to the pandemic and the pressing policy issues it has engendered.

I. The Prerequisites to a Special Session Pursuant to Article III, Section 27 Are Non-Justiciable Political Questions

Whether and to what extent the COVID-19 pandemic constitutes an “emergency resulting from disasters caused by enemy attack” that could adversely affect “the continuity of governmental operations,” IDAHO CONST. art. III, § 27, arguably are questions that the constitution commits to the sole and exclusive judgment of the Idaho Legislature. While interpretation of the constitution and laws is the purview of the judiciary, courts have long recognized that some disputes present questions that separation of powers principles or institutional constraints render inappropriate for judicial resolution. Among these are matters that “the constitution directs . . . be resolved by a coordinate branch of government” and issues that, if dictated by the courts, “would evince a lack of the respect due coordinate branches of government.” *In re SRBA Case No. 39576*, 912 P.2d 614, 629 (Idaho 1995) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). In deference to these strictures, the Supreme Court of Idaho “has consistently recognized that the separation of powers provided by Article II of our constitution prohibits judicial review of the discretionary acts of other branches of government.” *In re SBR A*, 912 P.2d at 629; *see also Tucker v. State*, 394 P.3d 54, 71 (Idaho 2017) (“The question is whether this Court, by entertaining review of a particular matter, would be substituting its judgment for that of another coordinate branch of government, when the matter was one properly entrusted to that other branch.” (quoting *Miles v. Idaho Power Co.*, 778 P.2d 757, 761 (Idaho 1989))).

Although the extent to which the political question doctrine insulates the decision to convene a special session under Article III, Section 27 is an issue of first impression under Idaho law, the Supreme Court’s disposition of substantially similar cases is illuminating. In the ordinary course, enacted legislation does not become effective until 60 days after the adjournment of the legislative session. *See* IDAHO CONST. art. III, §§ 1, 22. The Legislature can, however, provide for an immediate effective date by inserting into the bill a declaration of “emergency.” *Id.* § 22. Importantly, the Supreme Court has repeatedly rebuffed entreaties to adjudicate the veracity or merits of the Legislature’s assertion of an “emergency,” holding instead that “the legislature’s determination of an emergency is a policy decision *exclusively* within the ambit of legislative authority and the judiciary cannot second-guess that decision.” *Gibbons v. Cenarrusa*, 92 P.3d 1063, 1067 (Idaho 2002) (quoting *Idaho State AFL-CIO v. Leroy*, 718 P.2d 1129 (1986)). The existence of an “urgency” sufficient to dispense with the iterative readings of bills, *see* IDAHO CONST. art. III, § 15, likewise is “a purely legislative act. [Courts] cannot speculate either upon the adequacy of the facts before the Legislature or the motives of the legislators.” *Diefendorf v. Gallet*, 10 P.2d 307, 315 (Idaho 1932). In the same vein, “[t]he determination as to whether facts exist such as to constitute ‘an extraordinary occasion’” that justifies the Governor’s convocation of a special legislative

session pursuant to Article IV, Section 9 “is for him alone to determine. The responsibility and discretion are his, not to be interfered with by any other co-ordinate branch of the government.” *Id.* at 314-15.

The same rationale likely insulates the Legislature’s decision to assemble pursuant to Article III, Section 27. Like the provisions at issue in *Gibbons* and *Diefendorf*, Article III, Section 27 entrusts the Legislature with making a quasi-factual threshold determination (*i.e.*, does the requisite “emergency” exist) that is entwined with an implicit policy judgment (*i.e.*, is the convening of a special session warranted to ensure continuity in government). As in *Gibbons* and *Diefendorf*, the operative question is not whether the courts could in theory devise their own standard by which to gauge the existence of the requisite “emergency” or other condition precedent, but rather whether in doing so they would impinge on the constitutional domain of another branch. *See generally Beitelspacher v. Risch*, 671 P.2d 1068, 1069 (Idaho 1983) (“Art. 3, § 9, of our Constitution gives each house of the legislature the power to determine its own rules of proceeding. Thus, this power is specifically reserved to the legislative branch by the Constitution, and we cannot interfere with that power.”).

Here, ascertaining the existence and magnitude of the relevant variables (*i.e.*, an “attack” and resulting “emergency”), particularly in fluid and evolving circumstances such as a pandemic, necessarily entails inferential decisionmaking, the subjective assessment of somewhat nebulous criteria (*e.g.*, the nature of an “attack”²) and discretionary judgment calls. The point is not that a court is innately incapable of undertaking those tasks, but rather that doing so in this context—*i.e.*, essentially policing the Legislature’s exercise of its internal functions—would be an inappropriate judicial incursion into the affairs of an elected branch. *Cf. El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (deeming non-justiciable claims that would require court to determine whether U.S. military strike abroad was “mistaken and not justified,” and to otherwise “determine the factual validity of the government’s stated reasons for the strike”).

In sum, because the decision of whether and under what circumstances the Legislature should convene in special session is intrinsically a policy-laden, discretionary determination that is integral to the internal self-governance of a co-equal branch, Idaho courts have historically declined to intervene in such matters. We believe the same principles would likely lead the Supreme Court to conclude that the Legislature’s decision to convene a special session on June 23, 2020 pursuant to Article III, Section 27 presents a non-justiciable political question.

II. The Legislature Would Have a Reasonable Basis for Concluding That an “Emergency Resulting From Disasters Caused by Enemy Attack” Exists

Even if the Legislature’s decision to convene pursuant to Article III, Section 27 is justiciable, there is reasonable support for the Legislature’s determination that the factual predicates for a special session

² Although the Legislature has by statute formulated a somewhat more crystallized definition of the term “attack,” *see* Idaho Code § 67-415, this statutory denotation is not necessarily coextensive with the same term as used in Article III, Section 27. More fundamentally, in no event could any statute abridge or curtail a superseding constitutional provision. *Cf. Johnson v. Diefendorf*, 57 P.2d 1068, 1075 (Idaho 1936) (holding that statute could not validly truncate Legislature’s power to enact emergency legislation, explaining that “[a] legislative session is not competent to deprive future sessions of powers conferred on them, or reserved to them, by the constitution”).

are satisfied. As noted above, Article III, Section 27 is triggered by an “emergency resulting from disasters caused by enemy attack or . . . the imminent threat of such disasters.” It is presumably uncontested that the COVID-19 crisis is an “emergency;” indeed, the impetus for any special session is the Governor’s formal proclamation on March 13 that such an “emergency” exists. That the public health and economic crises precipitated by the virus constitute “disasters” is likewise beyond reasonable dispute. See Press Release, The White House, “President Donald J. Trump Approves Idaho Disaster Declaration” (Apr. 9, 2020) available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-idaho-disaster-declaration-5/>.

The exact origins of the novel coronavirus remain unknown. Credible evidence has emerged, however, that the pathogen may have its genesis in a Chinese laboratory. A recent report from British and Norwegian immunologists concludes that certain portions of the DNA on the virus were “inserted,” essentially that the virus was man-made. See B. Sørensen, A. Susrud, & A.G.Dalgleish, *Biovacc-19: A Candidate Vaccine for Covid-19 (SARS-CoV-2) Developed from Analysis of its General Method of Action for Infectivity*, QRB DISCOVERY, available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DBBC0FA6E3763B0067CAAD8F3363E527/S2633289220000083a.pdf/biovacc_19_a_candidate_vaccine_for_covid19_sarscov2_developed_from_analysis_of_its_general_method_of_action_for_infectivity.pdf. Meanwhile, according to U.S. Senator Tom Cotton, a member of the Senate Select Committee on Intelligence, “[t]h[e] evidence is circumstantial, to be sure, but it all points toward the Wuhan labs” as the origin of the virus. Tom Cotton, *Coronavirus and the Laboratories in Wuhan*, WALL ST. JOURNAL, Apr. 21, 2020, available at https://www.wsj.com/articles/coronavirus-and-the-laboratories-in-wuhan-11587486996?mod=opinion_lead_pos5. The Director of the National Institutes of Health has likewise acknowledged that possibility. See Zachary Brennan, *NIH Director: “No Way of Knowing” If Coronavirus Escaped from Wuhan Lab*, POLITICO, May 27, 2020, available at <https://www.politico.com/news/2020/05/27/nih-director-wuhan-coronavirus-collins-285681>.

Regardless of the virus’ provenance, the U.S. State Department has determined that hostile foreign actors have unleashed on Americans a concerted campaign of false propaganda through social media channels, which is intended to undermine the United States government and amplify social and economic instability inflicted by the pandemic. See Jessica Donati, *U.S. Adversaries Are Accelerating, Coordinating Coronavirus Disinformation*, Report Says, WALL ST. JOURNAL, Apr. 21, 2020, available at <https://www.wsj.com/articles/u-s-adversaries-are-accelerating-coordinating-coronavirus-disinformation-report-says-11587514724?mod=searchresults&page=1&pos=6>; see also Anna Schecter, *China Launches New Twitter Accounts, 90,000 Tweets in COVID-19 Info War*, NBC NEWS, May 20, 2020, available at <https://www.nbcnews.com/news/world/china-launches-new-twitter-accounts-90-000-tweets-covid-19-n1207991>. Nothing in the text or structure of Article III, Section 27 limits its application only to conventional military invasions of United States territory; orchestrated disinformation assaults by foreign governments to foment panic, confusion and distrust among Americans are an unfortunate variant of twenty-first century warfare, and there is a reasonable basis for the Legislature to conclude that recent events constitute an “attack” within the meaning of Article III, Section 27. We believe Idaho courts would be reluctant to embrace a contrary, more constrictive interpretation of Article III, Section 27 that constrains the Legislature from responding quickly and nimbly to acute and unforeseen crises afflicting the state.³

³ Although Idaho Code § 67-422 allots 90 days for the Governor to convene a special session in the event of an “attack,” Article III, Section 27 imposes on the Legislature an “immediate duty” to act.

III. No Provision of the Idaho Constitution Prohibits the Legislature From Convening in a Special Session

Article III, Section 27 notwithstanding, the Idaho Constitution seemingly vests in the Legislature a residual authority to convene itself in a special session. Article III, Section 8 provides that “[t]he sessions of the legislature shall be held annually at the capital of the state, commencing on the second Monday of January of each year, **unless a different day shall have been appointed by law**, and at other times when convened by the governor” [emphasis added]. Idaho Code § 46-1008(2), in turn, states that the “legislature by concurrent resolution may terminate a state of disaster emergency **at any time**” [emphasis added]. Interpreting these provisions as congruent and consistent with one another, see generally *State v. Edmonson*, 743 P.2d 459, 463 (Idaho 1987) (“When construing separate constitutional provisions, the general principles of statutory construction apply. Statutes must be construed, if at all possible, consistently and harmoniously.”), Idaho Code § 46-1008(2) represents the Legislature’s exercise of its constitutional authority to “appoint[] by law” a mechanism for convening to address a disaster emergency.

More fundamentally, Sections 8 and 27 of Article III establish only a baseline prescribing when the Legislature **must** meet; no provision purports to affirmatively prohibit the Legislature from convening at more frequent intervals or under circumstances not expressly contemplated in the constitution. To the contrary, the proviso clause in Section 8 (“unless a different day shall have been appointed by law”) affirmatively ordains legislative flexibility in determining the timing of its sessions. Notably, the Supreme Court of Idaho has held that “[o]ur Constitution is not a delegation of power, but a restriction, and, unless the Legislature is expressly prohibited by the Constitution, it has plenary power.” *State v. Johnson*, 296 P. 588, 589 (Idaho 1931) (internal citation omitted); see also *Luker v. Curtis*, 136 P.2d 978 (Idaho 1943) (explaining that, in the absence of a constitutional provision to the contrary, the Legislature could amend or repeal a statute enacted through the initiative process). To be sure, the separation of powers prevents the Legislature from usurping or constraining the Governor’s exercise of the executive power. But recognition of the Legislature’s residual authority to convene a special session in no way derogates the Governor’s prerogative to independently call a special session whenever he determines that “extraordinary occasions” require it. See IDAHO CONST. art. IV, § 9.⁴

CONCLUSION

In sum, we believe that the Legislature’s convocation of a special session on June 23, 2020 to address issues arising out of the COVID-19 pandemic and the Governor’s related proclamations and executive orders is authorized by, and consistent with, the Idaho Constitution.

Further, as noted above, no statute can ever curtail the Legislature’s constitutionally secured prerogatives. See *Johnson v. Diefendorf*, 57 P.2d 1068, 1075 (Idaho 1936).

⁴ Convening the legislature is not the exclusive province of the Executive Branch in any event. As discussed *supra*, Article III, Section 8 contemplates flexibility in the timing of legislative sessions, and Article III, Section 27 affirmatively requires the legislature to convene—with or without gubernatorial action—in “periods of emergency resulting from disasters caused by enemy attack.”