Restore Freedom with Katherine Henry, P.C.

I was originally asked to address the legality of some issues related to the upcoming election of the officers of the Ottawa County Executive Committee. However, it has now been brought to my attention that a County Clerk has made grossly inaccurate and concerning statements (indicated in red text) in relation to holding county conventions and executive committee meetings (where officers are elected). Since the interests involved go to the very heart of our constitutional proclamation that "All political power is inherent in the people" (Const 1963 Art I Sec 1), it is imperative that these inaccuracies are corrected. Indeed, with our constitutional republic on the brink of collapse, our best defense is arming the politically active with knowledge of what our constitution and laws require.

"1) Meetings of the executive committees of county political parties do not fall under the statutory requirements of the Open Meetings Act, as they are not public bodies. I don't believe we would want State law regulating how private organizations conduct their meetings."

Executive committees of county political parties *are* public bodies under the requirements of the Open Meetings Act. In the OMA, a 'Public body' means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function." MCL 15.262(a).

One might think of political parties as being private, or nonpublic, in nature. However, Michigan law has deeply intertwined political parties in the election and general governmental processes of our state. A large portion of our state's election laws create a separate set of regulations for those associated with a "major" political party from those who are not. *See, e.g.,* Act 116 of 1954. Indeed, party affiliation is written into the very words of our state constitution as a method of determining eligibility for various positions, etc., such as the board of canvassers (Art II Sec 7), redistricting commission (Art IV Sec 6 (1), (2) and (13)), state transportation commission (Art V Sec 28), civil rights commission (Art V Sec 29), and civil service commission (Art XI Sec 5). Indeed, it is at a political party's state convention that the delegates will debate and adopt a platform, nominate candidates for Supreme Court Justices, State Board of Education, and university boards, and select presidential electors. (*See* MCL 168.558 (1) acknowledging the candidates "nominated for a federal, state, county, city, township, or village office at a political party convention or caucus.") Since our US Constitution guarantees us a republican form of government (Art IV Sec 4), this means that political parties have been given a crucial - and constitutional - role in our government (determining which candidates will make it to the ballot for several state offices).

In a "private" organization, such as Catholic Charities, Mel Trotter or the Salvation Army, our state laws do not dictate all of the logistics of the elections for and requirements of their board members. On the contrary, the requirements for the precinct delegates and executive committee members of political parties are largely regulated by our state laws, including, but not limited to, a precinct delegate's age (MCL 168.612), manner of resignation (MCL 168.624a), and write-in candidate documentation (MCL 168.737a). Moreover, when a duly-elected precinct delegate resigns, he or she must not only provide written notice to the chairperson of the county committee, but also the county clerk. MCL 167.624a (1). This obviously differs from when you resign from the board of a church or boy scout troop, as you are not required to provide notice to the county clerk when resigning from those "private" organizations. Indeed,

if you break any of these state laws as a candidate for political party precinct delegate, such as in falsifying an Affidavit of Identity, you may be fined up to $1,000 and sent to prison for up to 5 years. MCL 168.933 and 936.

In looking at these Affidavits of Identity that must be filed with the clerk's office, you can see that candidates for precinct delegate are required - just like virtually all other candidates for public office - to swear, under penalty of perjury, to his or her status as a citizen of the United States and meeting the "constitutional and statutory qualifications" of the office. MCL 168.558. If that alone does not demonstrate the "public" nature of the office of precinct delegate, and the body which they together comprise, not much else would.

Indeed, in the Legal Defense Fund Act of 2008, precinct delegates are identified, among federal officials and certain public school board members, as the public offices excluded from regulation and reporting in "defending an elected official." MCL 15.523. Likewise, state law also categorizes precinct delegates, just like federal officials and certain public school board members, as public officials who are excluded from campaign finance reporting. MCL 169.205. Additionally, in determining eligibility to receive a casino license, state law categorizes precinct delegates, as well as officers and employees of federally recognized Indian tribes, as elected officials exempt from automatic ineligibility. MCL 432.206. And, perhaps even more telling, is that the MMFL Act of 2016 recognizes elected precinct delegates as officials "of a governmental unit of this state . . ." who are exempt from automatic ineligibility of marihuana licensure. MCL 333.27402.

But, quite frankly, aside from all the constitutional and statutory provisions involved, it is absurd to assert that an organization which has its membership determined by a ballot of qualified voters in a government election would be categorized as "private" for the purpose of determining if its meetings should be open to the public. I think we can all agree that state law should not regulate how private organizations conduct their meetings. However, county GOP official voting and functions are inherently governmental in nature, as is the office held by each of its members (precinct delegate). And transparency in the government process should be revered by *each* political party.

"2) In October of this year, the legislature passed amendments to the Open Meetings Act to allow for meetings to be conducted remotely under certain circumstances (state and local states of emergency being one of them) You can find that information here in PA 228 of 2020: http://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0228.pdf"

Holding the Meeting by Zoom

Zoom meetings for governmental bodies started happening in the Spring when the Governor's EO 2020-15 (and subsequent EOs) purported to allow governmental meetings to happen by video conferencing methods. Interestingly enough, the Governor herself admits that she could not make those changes to the law. Indeed, in the Motion she filed on November 17th in the Michigan Court of Appeals to contest the language to recall her, she states "the Board's June 8 meeting was held in violation of the OMA because the OMA does not permit remote meetings." *Plaintiff-Appellant Governor Gretchen Whitmer's Motion,* last accessed on November 29, 2020; available at https://restorefreedomkh.com/documents/Plaintiff_Appellants_Motion_for_Immediate_Consideration_-_Case_No_353878-17Nov2020.pdf, p. 2.

The Open Meetings Act has now been modified to attempt to allow public bodies to meet by video conferencing methods, but certain conditions have to be met. Most county GOP committees have *not* met those conditions, which include, but are not limited to: establishing procedures pursuant to Section 3(2) or providing notice pursuant to Section 3a(4). Thus, it is important to note that officials violating the law will be held individually responsible. MCL 15.272 imposes up to $2,000 in fines and 1 year in prison. MCL 15.273 also makes an official "personally liable in a civil action for actual and exemplary damages."

To the extent the Open Meetings Act now allows public bodies to limit public participation to electronic methods only due to a "state of emergency or . . . disaster," it is unconstitutional in violation of Article IV Sec 39 of our state Constitution, which requires "continuity of government in emergencies [and] disasters." Moreover, the Michigan Supreme Court clearly explained on October 2, 2020 that the declaration of state of emergency and state of disaster in Michigan legally ended on April 30, 2020.

Additionally, our republican form of government (guaranteed to us in Article IV Section 4 of our US Constitution) *requires* open access for and participation by the people in all functions of government, even in local settings like the county GOP meetings. The precinct delegates of the county GOP committee are voted on by the people in the August elections, and those people are guaranteed the right to participate in those subsequent county GOP meetings. Moreover, as declared in our Michigan Constitution, "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963 Art I Sec 1. The republican form of government put in place to allow the people to exercise their inherent political power necessitates citizen participation and the ability to hold government officials accountable, for which specific tools were preserved for the people to exercise. These tools include, for example "[the unabridged] right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (US Const Am. I) and the people's "right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances" (Const 1963 Art I Sec 3). How can the people "instruct their representatives" in the county GOP meetings if they are precluded from attending?

"I am on the side of conducting a meeting virtually, because it is vitally important that we do not disenfranchise people from participating in the process."

Meetings of public bodies by Zoom harbor inherent equal protection violations. Both Article I Section 2 of the Michigan Constitution and the 14th Amendment of the US Constitution prohibit the state from denying the people "the equal protection of the laws." Yet, in holding a public meeting in part or in whole by Zoom (and allowing some or all members of the body to participate without being physically present), you are necessarily excluding all those people who:

- Don't have reliable, ready access to the internet *or* an internet-ready device.
- Are hard of hearing or deaf, and rely on the reading of lips, facial expressions and body language to communicate with others.
- Are not knowledgeable of or comfortable with the use of electronic devices.
- Experience technical difficulties during the meeting.
- Do not understand the specific manner in which the person running the meeting has established to recognize speakers from the public.

There are also several due process issues with holding a county party convention or meeting by Zoom. So, by virtue of holding these meetings virtually, many *will be* unnecessarily excluded and disenfranchised from participating in the process.

"I am on the side of conducting a meeting virtually, because . . . people are not comfortable attending a meeting . . . because they believe that attending the meeting would be in violation of the law."

MDHHS Order

Some have referenced the MDHHS Orders as the basis for declaring an in-person meeting "illegal." However, that basis is unfounded in the US Constitution, the Michigan Constitution, and the MDHHS order itself.

While the statute relied upon by the MDHHS Director in drafting his orders (MCL 333.2253) purports to allow the MDHHS Director to issue orders that "prohibit the gathering of people for any purpose," that is blatantly unconstitutional. The US Constitution guarantees "[the unabridged] right of the people peaceably to assemble, and to petition the Government for a redress of grievances." US Const Am. I. Likewise, the Michigan Constitution guarantees the people the "[undiminished] right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances." Const 1963 Art I Sec 3. No state statute or MDHHS order can constitutionally "prohibit the gathering of people for any purpose."

Additionally, the text of the MDHHS Order demonstrates that the attempts to prohibit the gathering of people do not even apply to meetings like this to elect party officers pursuant to state law. Section 2(d) clearly states the gathering limitations do *not* apply in the context of "voting or official election-related activities." Moreover, section 10 of the MDHHS Order admits the order cannot "interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority." The role of MIGOP is a unique one, but a governmental one nonetheless, and no order of MDHHS may interfere with the legal duties of MIGOP (such as in holding the election for officers).

Law Enforcement Officers and Legislators

Some have expressed concern over law enforcement officers and legislators participating in an unlawful event. A good point is raised here. Law enforcement officers and legislators are bound by their oaths to uphold the US and Michigan Constitutions. Any legislator, law enforcement officer, public official or public employee participating in a Zoom meeting of a public body would be directly violating that very oath of office, as described throughout. So, to make sure you are not putting them in that unnecessary legal and constitutional bind, holding the meeting in person is the only choice.

"[Some] people are not comfortable attending a meeting because of health concerns . . . out of a mutual respect for one another, we should conduct the meeting [virtually]."

Everyone involved should remember that ALL public officials (appointed and elected) and public employees are bound by the terms of the US and Michigan Constitutions, according to Article VI of the US Constitution, Article XI Section 1 of the Michigan Constitution, and MCL 15.151. With ALL precinct delegates and all executive committee members being duly elected (or appointed, in the event of a vacancy), each person with voting privileges in electing party officers has taken an oath to uphold the US and Michigan Constitutions, whether they like certain provisions or not.

As each of you takes an oath to uphold the US and Michigan Constitutions, you have no choice but to conduct public meetings in a manner that is truly open to the public. Holding these traditional, in-person, public meetings is the only way to respect our republican form of government; respect both the

enumerated and unenumerated rights of the people; protect the right of the people to peaceably assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances; and avoid due process and equal protection violations.

So, please *do* show respect for your fellow citizens and abide by your oath of office - regardless of how inconvenient or uncomfortable that might be. After all, with the GOP being the party of faith in our Savior, we must remember "God did not give us a spirit of fear, but of power, of love, and of a sound mind." II Timothy 1:7. Instead, we must all literally come together, especially during such a trying time, to fight for the preservation of our constitutional republic, and all that it entails.

Sincerely,

Katherine L. Henry, Constitutional Attorney
and Republican Precinct Delegate