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Michigan's Emergency Powers Law Was Always Controversial

But history shows no governor tried to stretch its use as far as Gov. Whitmer is trying now

By Michael Van Beek

Once a rarely used and obscure statute, the Emergency Powers of Governor Act of 1945 is the most talked about Michigan law in 2020. It's what Gov. Gretchen Whitmer is using to justify her unilateral control over the state's response to the COVID-19 pandemic. Her use of it has stirred up controversy and inspired a citizen-led initiative to repeal the law. But the history of the EPGA shows that it was repeatedly controversial, especially when applied to situations other than riots.

The law was conceived after riots in Detroit in 1943. Donald Leonard, a commander with the Michigan State Police, wrote the bill. He aimed to give governors temporary powers to issue executive orders that had the force of law during riots. He believed it would be easier for the police to control crowds under these orders.

When compared to modern-day legislation, the EPGA is short and sweet. But the language is broad and ill-defined. For instance, it says governors may use these powers "during times of great public crisis, disaster ... or similar public emergency within the state," but it does not define any of those terms. It states that the governor may control traffic, establish a curfew and issue similar orders to suppress riots, but adds that governors "are not limited to" the actions listed in the statute.

Perhaps due to its broad language, Michigan governors immediately began trying to make the most of the new law. In 1946, Gov. Harry Kelly nearly declared an emergency under the EPGA to force grocers to limit sales of certain foods and thus prevent a potential food shortage. The next year, Gov. Kim Sigler threatened to use the EPGA to force striking Michigan Bell Telephone employees back to work. He later pondered using it to lower fuel oil prices.

But as it happened, the EPGA just collected dust until 1964. That year, Gov. George Romney declared an emergency in Hillsdale due to violent confrontations resulting from a labor strike at the Essex Wire Corporation. The Detroit Free Press immediately called the constitutionality of the law into question. And Attorney General Frank Kelley announced that the law needed a thorough legal analysis.

Summary

The law Gov. Gretchen Whitmer is using to justify her unilateral COVID executive orders has historically been used primarily to deal with riots, and when it wasn't, it stirred controversy.

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Gov. Whitmer is basing her emergency orders on a 1945 law written in response to riots.

Despite these concerns, Romney would use the EPGA in 1967 and then again in 1968. There was less pushback against the law this time, but these were urban riots — clearly a situation the law anticipated.

Gov. William Milliken caused more legal controversy when he used the EPGA to ban fishing on Lake St. Clair and the St. Clair River. This came in response to relatively high mercury levels found in these waters. A group representing sport fishing interests sued the governor, and three courts ruled against the continued ban, and it became unenforceable.

Milliken must have believed there was a limit to the EPGA, because later he signed a law to create a new method for governors to handle emergencies and natural disasters. In creating this law, the Legislature chose not to amend the EPGA, but to instead create a new legal mechanism to grant governors emergency powers. It became the Emergency Management Act of 1976, and it specifically lists epidemics as one situation when it can be used.

After its enactment, the EMA was used regularly by Michigan governors. They have declared more than 80 emergencies under it, and even Gov. Whitmer used it repeatedly in 2019, her first year in office. Since 1976, there have been plenty of emergencies, but no riots, and so the EPGA has sat idle — until this year.

A look at the history of EPGA highlights how unprecedented Whitmer's use of the law is. With one exception, the law was applied before her term only to riots or civil disturbances. When applied more broadly, it was controversial and one application of it was even ruled unconstitutional.

Regardless of how effective this year's executive orders turn out to be, the governor should have known that trying to stretch the use of the EPGA in this way would widen the partisan divide in Lansing. The predictable legal controversy that followed created uncertainty in the public's mind, hardly helpful during a pandemic. Michiganders now seem more divided than ever, and at a time when trust — in each other and in our elected officials — may be needed more than ever.

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