

A History of Michigan's Controversial 1945 Emergency Powers Law

By Michael Van Beek

Introduction

On March 10, 2020, in response to the COVID-19 pandemic, Gov. Gretchen Whitmer signed an executive order that declared a state of emergency across all of Michigan.¹ Governors have declared statewide emergencies before — in fact, Gov. Whitmer did it the previous January in response to cold weather.² But Executive Order 2020-04 was different: Unlike previous executive orders, it cited a rarely used Michigan law from 1945 as the legal source of the governor's authority and actions.

That law is the Emergency Powers of Governor Act. It authorizes Michigan governors to proclaim a state of emergency and issue orders “to protect life and property or to bring the emergency situation within the affected area under control.”³

According to the act, such emergencies may only be declared and such orders are only in effect, “[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger

of a public emergency of that kind, when public safety is imperiled.”⁴ The state of emergency and related orders continue until the governor declares that emergency conditions no longer exist.⁵

Gov. Whitmer is making unprecedented use of the EPGA. She believes the law allows governors to maintain a state of emergency and issue orders that have the force of law for however long they choose. No other governor in Michigan history has attempted to use the law in this way.

Creation of the Emergency Powers of Governor Act

The EPGA was introduced in the Michigan Legislature by Sen. Charles Youngblood, a Democrat from Detroit, and Harry Hittle, a Republican from Lansing.⁶ The bill was allegedly written by Donald S. Leonard, who had served as a Michigan State Police district commander for the Detroit metropolitan area.⁷ The state police apparently felt restricted in their ability to contain a riot in Detroit two years earlier.⁸

The bill moved quickly through the Legislature and became law. Introduced on April 6, it passed both legislative chambers without any amendments in less

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1 “Executive Order 2020-04” (State of Michigan, March 10, 2020), <https://perma.cc/6KPN-2LDU>.

2 “Executive Order 2019-01” (State of Michigan, Jan. 29, 2019), <https://perma.cc/23BY-DTYT>.

3 MCL § 10.31(1).

4 Ibid.

5 MCL § 10.31(2).

6 “Measure Gives Governor Wide Emergency Powers” (Lansing State Journal, April 6, 1945), <https://perma.cc/PK43-GWLN>.

7 “Emergency Act Study Ordered” (Lansing State Journal, June 11, 1964), <https://perma.cc/732A-K42Z>; “Donald S. Leonard Papers: 1925-1966” (Bentley Historical Library at the University of Michigan), <https://perma.cc/J2HP-DAMP>.

8 “Governor Signs Emergency Act” (Lansing State Journal, May 26, 1945), <https://perma.cc/H5F5-4YH7>.

than three weeks' time. It was signed into law by Gov. Harry Kelly on May 25, 1945, seven weeks after it was introduced.⁹

Governors Toy With New Powers

There was not another riot in Michigan for more than two decades, fortunately. Nevertheless, Michigan governors considered using these new emergency powers for other purposes.

A year after it was enacted, Gov. Kelly threatened to use the EPGA to mitigate a potential statewide food shortage, which was feared to be a likely result of an ongoing, nationwide railroad strike. The governor considered forcing the state's 12,300 grocery stores to limit sales of certain food as a way of preventing consumers from hoarding them.¹⁰ But the railroad strike ended shortly thereafter, and Gov. Kelly never used the EPGA.¹¹

One year later, in April 1947, Gov. Kim Sigler toyed with using emergency powers, too. He aimed to end a strike by Michigan Bell Telephone workers that was hindering efforts to deal with widespread flooding occurring throughout the state.¹² Later in 1947, the governor considered invoking these powers to reduce the price of fuel oil.¹³ But a legislative committee studied the issue and determined there was nothing the governor nor the Legislature could do to force down fuel oil prices.¹⁴ Ultimately, Gov. Sigler never used these emergency powers either.

Over the next two decades, Michigan residents faced coal shortages, tornadoes, a high volume of traffic fatalities and other issues that were or could be viewed

as emergencies. But no Michigan governor exercised powers under the EPGA. The law would not be used until 19 years after it was enacted.

Gov. Romney and the Riotous 1960s

Gov. George Romney has the distinction of using the EPGA for the first time. He also used it on more occasions than any other governor. The first time was in 1964 when a labor strike at the Essex Wire Corporation led to violent confrontations in the city of Hillsdale. The city's mayor called on the state for aid, and Gov. Romney issued the emergency declaration, reasoning that local police authorities would not be able to maintain the peace.¹⁵

The governor's order prohibited picketing and public assemblies, temporarily closed the Essex Wire factory, restricted traffic, established a countywide curfew and called in about 1,000 National Guard troops to preserve peace between union strikers, nonunion workers and supporters of the company.¹⁶ The declared emergency came to an end in less than two weeks, as the union and company agreed to a new union contract.¹⁷

Gov. Romney's use of the EPGA was immediately called into question. In a column titled "The Questions Linger," the Detroit Free Press editorial board summarized their concern:

The Essex Wire Corp. strike in Hillsdale is over, but questions linger on. Many of the questions are aimed at the 19-year-old law that was used for the first time by Governor Romney to keep someone from being killed.

9 "Journal of the Senate of the State of Michigan: 1945 Regular Session" (State of Michigan, 1945), <https://perma.cc/RSX6-VPH9>.

10 "Kelly Fights Strike Panic" (The Herald-Press, May 24, 1946), <https://perma.cc/6HCB-98JC>.

11 "Break in Railroad Strike" (The Herald-Press, May 25, 1946), <https://perma.cc/S5LH-8BQ9>.

12 "Sigler Calls Phone Meet" (Lansing State Journal, April 7, 1947), <https://perma.cc/KQY4-4SW4>.

13 "Sigler May Get Tough Over Fuel Situation" (Lansing State Journal, Dec. 19, 1947), <https://perma.cc/8DHJ-ZSWP>.

14 "Oil Price Probe Off" (Lansing State Journal, Dec. 20, 1947), <https://perma.cc/H8WB-7GKB>.

15 "Bayonets Surrounding Hillsdale Bargaining" (The Herald-Press, May 29, 1964), <https://perma.cc/2ZGL-Y7AH>.

16 "Near Marial Law Declared in Hillsdale" (Lansing State Journal, May 28, 1964), <https://perma.cc/MJF2-7QE7>.

17 "Workers Return at Essex" (Lansing State Journal, June 10, 1964), <https://perma.cc/JKK4-NKK5>.

[...] During the crisis, Attorney General Frank Kelley told Romney the law empowered him to act as he did, but no one knows for certain. Was the closing of the plant an unconstitutional seizure of private property? Was the freedom of the press illegally curtailed? Was the restriction on picketing a violation of freedom of speech?¹⁸

These questions were serious enough that Attorney General Kelley appointed a panel of 11 legal scholars to review the constitutionality of the EPGA and suggest any changes that may be needed. The attorney general said the state “should have any legal doubts settled to the greatest extent possible” before the next crisis.¹⁹ Unfortunately, newspaper accounts do not appear to have reported the results of this review.²⁰ The EPGA was left unchanged, so either these legal experts found no need to amend it or their recommendations were ignored for one reason or another.

Despite these legal concerns, Gov. Romney would use the EPGA seven more times. A large riot broke out in Detroit on July 23, 1967, and smaller ones emerged in Flint and Grand Rapids in the subsequent days. Gov. Romney declared separate, local emergencies in all three instances.²¹ The orders established curfews, forbid possessing a weapon in public, outlawed public assemblies and the sale of alcohol and limited the sale of gasoline. Those emergency declarations lasted about two weeks.²²

The next year, rioting broke out in cities nationwide after the assassination of Martin Luther King Jr. on April 4, 1968. The following day, Gov. Romney declared three separate emergencies: one for Wayne County, one for the cities and surrounding areas of Fraser and Mt. Clemens, and one for the cities and surrounding areas of Royal Oak and Clawson.²³ Later that summer, civil disturbances surfaced in Grand Rapids, and the governor again used the EPGA to declare an emergency there.²⁴

All told, Gov. Romney used the EPGA eight times between 1964 and 1968, all in response to local rioting or similar civil disturbances.

Gov. Milliken Bans Fishing

Gov. William Milliken used the EPGA twice, both in 1970. In the days leading up to the first Earth Day, the governor declared a state of emergency for Lake St. Clair and the St. Clair River and banned all fishing in those waters, effective April 15.²⁵ Two weeks later, he issued a similar order that banned commercial walleye fishing on Lake Erie.²⁶ The governor cited concerns about the level of mercury in these waters.²⁷

The ban was controversial and sport fishing organizations filed lawsuits against Gov. Milliken.²⁸ He responded by amending his initial ban and allowed for catch-and-release fishing on the waters, beginning May 30.²⁹

18 “The Questions Linger” (Detroit Free Press, June 22, 1964), <https://perma.cc/5GJ8-MWHU>.

19 “Emergency Act Study Ordered” (Lansing State Journal, June 11, 1964), <https://perma.cc/732A-K42Z>.

20 The feedback from this panel may be available in the historic papers of Gov. George Romney or Attorney General Frank Kelley that are housed at the Bentley Historical Library at the University of Michigan. Unfortunately, due to COVID-19 restrictions, the university does not currently allow visitors to the library.

21 “Executive Order No. 1967-3” (State of Michigan, July 23, 1967), <https://perma.cc/3AZ4-CTAH>; “Executive Order No. 1967-4” (State of Michigan, July 25, 1967), <https://perma.cc/3RNZ-JJZQ>; “Executive Order No. 1967-5” (State of Michigan, July 25, 1967), <https://perma.cc/QM6Q-SLJA>.

22 “Detroit Emergency Lifted; Last Troops Withdrawn,” (The Battle Creek Enquirer and News, Aug. 7, 1967), <https://perma.cc/W9AW-ZTPN>.

23 “Executive Order No. 1968-1” (State of Michigan, April 5, 1968), <https://perma.cc/4DB4-9NLE>; “Executive Order No. 1968-2” (State of Michigan,

April 5, 1968), <https://perma.cc/MR98-62K5>; “Executive Order No. 1968-3” (State of Michigan, April 5, 1968), <https://perma.cc/9W6P-SJGT>.

24 “Executive Order 1968-8” (State of Michigan, July 27, 1968), <https://perma.cc/KU3Q-T32A>.

25 “Executive Order 1970-6” (State of Michigan, April 14, 1970), <https://perma.cc/JE8F-AZW5>.

26 “Executive Order 1970-7” (State of Michigan, April 29, 1970), <https://perma.cc/JF4M-PJCR>.

27 “State to Ease Fishing Ban May 30” (Detroit Free Press, May 21, 1970), <https://perma.cc/2FJJ-6LAS>.

28 “Fishing Ban Legality to Face Test” (Traverse City Record-Eagle, Aug. 29, 1970), <https://perma.cc/CQF7-U3ED>.

29 “Executive Order 1970-11” (State of Michigan, May 20, 1970), <https://perma.cc/64TY-PFDQ>.

Although the Michigan Supreme Court dismissed an early lawsuit against the governor's ban, declaring it "without merit," lower courts would later determine the continued ban to be improper.³⁰ Three courts ruled against Gov. Milliken, and the orders became unenforceable.³¹ According to the Detroit Free Press, one judge ruled the ban unconstitutional because "the governor's year-old ban had been continued too long, and ... the Legislature should have acted if there was still an emergency."³²

Although Gov. Milliken never appears to have announced an official end to the emergency, he eventually opted for a different approach to mitigate concerns about mercury levels in these waters. The governor directed a regulatory agency to create rules about fishing safety and took a much more light-handed approach.³³ Instead of banning fishing when mercury levels were relatively high, the state chose to post warnings about the potential dangers of eating fish and let people take their own risks.³⁴

Gov. Milliken next used the EPGA in response to disturbances at Eastern Michigan University in May 1970. This was a week after four students, while protesting the Vietnam War, were killed at Kent State University by members of the Ohio National Guard. Riots developed at EMU, and Gov. Milliken declared an emergency for the city of Ypsilanti.³⁵ Fortunately, it was short-lived: He rescinded the emergency two days later.³⁶

The 1976 Emergency Management Act

Gov. Milliken faced numerous situations that could be viewed as emergencies after 1970, but he would not invoke the EPGA again. In the spring of 1972 and again in 1973, rain and snowstorms created widespread flooding and the governor declared a state of emergency in the affected areas. But he did not use the EPGA, instead relying on authority provided by a different statute to deploy the Michigan National Guard for disaster relief.³⁷ Gov. Milliken issued similar orders in response to other weather-related emergencies in the three years that followed.³⁸

This practice proved problematic, apparently. Legislation was introduced in 1975-76 legislative session that would create a new mechanism for dealing with emergencies. An analysis of that legislation described the problem:

Michigan's experience with 3 major disasters in the last 13 months has pointed up the inadequacy of the state's Civil Defense Act. The act has proven unwieldy to implement during disasters, largely because jurisdictional responsibility is not clearly defined. Further, the act, which became law in 1953, does not conform to current federal requirements which a state must meet in order to qualify for federal disaster assistance. While the state has been able to borrow federal funds during the recent disasters, it is unlikely that the ability to borrow would continue if Michigan's disaster

30 "State Court Upholds Fish Restrictions" (The Holland Evening Sentinel, Aug. 12, 1970), <https://perma.cc/Z9WV-FBFM>.

31 "Judge Ordered to Clarify Rule Against Fishing Ban" (Detroit Free Press, Jan. 12, 1971), <https://perma.cc/CT55-ZQC7>; "Lake Fishing Ban Rule Illegal Again" (The Battle Creek Enquirer and News, March 4, 1971), <https://perma.cc/ZT9U-VUZG>.

32 "State to Appeal Overturning of Fish Ban to High Court" (Detroit Free Press, April 9, 1971), <https://perma.cc/FK57-9J9T>.

33 "Mercury Fish Rules Requested" (The Benton Harbor News-Palladium, March 6, 1971), <https://perma.cc/4MRT-2PMZ>.

34 "State Junks Catch-Release Fishing Proposal" (Lansing State Journal, Nov. 22, 1971), <https://perma.cc/DAX5-BPSM>.

35 "Executive Order 1970-9" (State of Michigan, May 13, 1970), <https://perma.cc/74QV-5PDG>.

36 "Executive Order 1970-10" (State of Michigan, May 15, 1970), <https://perma.cc/Y8PQ-N4Z6>.

37 "Executive Order 1972-10" (State of Michigan, Nov. 14, 1970), <https://perma.cc/YQ7F-4ZQ5>; "Executive Order 1973-5" (State of Michigan, March 17, 1973), <https://perma.cc/5TLE-V9T8>.

38 "Executive Order 1974-9" (State of Michigan, Dec. 1, 1974), <https://perma.cc/KP4N-XUEK>; "Executive Order 1975-5" (State of Michigan, April 3, 1975), <https://perma.cc/7H4Z-WUZC>; "Executive Order 1976-1" (State of Michigan, March 3, 1976), <https://perma.cc/X7RY-MJPG>; "Executive Order 1976-10" (State of Michigan, Aug. 25, 1976), <https://perma.cc/G28E-7RRE>.

legislation is not changed. For these reasons, legislation has been proposed based upon a model bill which has proven effective in other states and which complements federal disaster law.³⁹

It is worth noting that elected officials did not consider using the EPGA for these types of emergencies, nor did they consider amending it to deal with the inadequacies of the Civil Defense Act. In the minds of lawmakers at the time, the EPGA must have had some limited, defined use that made it ill-suited for the types of emergencies this new legislation meant to address.

The proposed legislation listed several disaster situations that could be result in emergency declarations and empower the governor, similar to the EPGA, to issue temporary orders that have the force of law. These included fires, floods, windstorms, oil spills, water or air contamination, blight, drought, infestations and epidemics. Riots and “other civil disturbances” were explicitly exempted, suggesting lawmakers meant to leave the handling of those situations to the EPGA.⁴⁰

In fact, that is exactly what the Michigan State Police argued in their analysis of the bill. The language exempting riots from the proposed bill was removed while in committee. The MSP advised the Legislature to keep this language, arguing “previous legislation is already in effect which mandates certain powers and responsibilities to police agencies in the event of riots, strikes, and unlawful assemblies.”⁴¹ MSP warned the proposed legislation “would be in conflict with the previous riot and civil disorder legislation.”⁴² The

Legislature heeded this advice and reinserted this exemption for riots and civil disturbances.⁴³

Gov. Milliken signed into law on Dec. 30, 1976, what would become the Emergency Management Act of 1976. This law has been used regularly since its enactment: According to a 2019 report prepared by the Michigan State Police, Michigan governors declared 83 emergencies under the EMA from 1977 to 2019.

That same report claims the EPGA was used once over that period as well. Gov. James Blanchard supposedly declared an emergency under it in response to an ice storm in 1985.⁴⁴ However, such a declaration does not appear in any of the executive orders the governor issued in 1985, and newspaper accounts say Gov. Blanchard declared the emergency under the EMA.⁴⁵ It is possible, then, that the MPS report is incorrect, and Gov. Whitmer’s use of the EPGA is the first since 1970.

Conclusion

Before March 10, 2020, Michigan’s Emergency Powers of Governor Act was used 11 times in response to five emergency situations: labor unrest in Hillsdale in 1964, urban riots in 1967, more riots in 1968, high mercury levels in waters near St. Clair in 1970 and for a riot in Ypsilanti in 1970. Created in response to a 1943 Detroit riot, its use, with one exception, was limited to immediate and relatively short-lived civil disturbances. Its constitutionality was repeatedly challenged, especially when applied to situations that did not involve rioting. Whether it is appropriate to use in a long-term, statewide effort to mitigate the harms of a global pandemic is yet to be determined.

39 “House Bill 5314: First Analysis” (State of Michigan, June 24, 1976), <https://perma.cc/WE5F-TRQT>.

40 “House Bill No. 5314” (State of Michigan, June 5, 1975), <https://perma.cc/26QZ-X7L3>.

41 George Halverson, “House Bill No. 5314” (Michigan Department of State Police, July 29, 1975), <https://perma.cc/RPT3-QL5K>.

42 Ibid.

43 “Public Acts 1976-No. 390” (State of Michigan, Dec. 30, 1976), <https://perma.cc/WRM5-V85Y>. Later, in 1990, the Legislature added “hazardous

materials incident” to the EMA’s list of situations that could result in a declared emergency. The bill that made that happen also modified the language of the EMA to explicitly include riots and civil disturbances, exactly what the MSP warned against doing 15 years earlier. “Public Act 50 of 1990: (State of Michigan, April 6, 1990), <https://perma.cc/F2TY-7ZPA>.

44 Michigan Hazard Analysis” (Michigan Department of State Police, April 2019), <https://perma.cc/U9DT-VXUQ>.

45 “Blanchard Designates Ice Storm as Disaster” (Lansing State Journal, Jan. 16, 1985), <https://perma.cc/YL3A-7ZDA>.

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