

— LEGISLATIVE —
TESTIMONY

May 7, 2025

MICHAEL VAN BEEK

Lessons from the COVID-19 Emergency Response

**Michigan House Oversight Committee:
Weaponization of State Government**

Chair Rigas and committee members:

Thank you for dedicating your time to studying this important issue. My name is Michael Van Beek, and I am the director of research at the Mackinac Center for Public Policy, located in Midland. Starting in March 2020, I have closely studied Michigan's emergency power laws and the state's response to the COVID-19 pandemic. I want to share with you some of what I've learned.

Four takeaways

There are four main takeaways from my testimony.

1. The separation of powers guards against the weaponization of state government.
2. Unilateral executive control violates separation of powers and paves the way for government weaponization.
3. Michigan officials may grant themselves unilateral control with the stroke of a pen via emergency powers.
4. Policymakers should make and enforce an emergency pandemic plan.

The separation of powers guards against the weaponization of state government.

What is the purpose of the American governing tradition of maintaining a strict separation of powers between the three branches of government? The Founding Fathers committed themselves to this governing principle not in hopes it would make the government more efficient or representative or just. Instead, they used separation of powers to prevent problems like the one contemplated by this committee: the weaponization of government.

The Michigan Constitution makes this clear. Article 3, Section 2 says, "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Notice how absolute and complete this prohibition is: "no person ... except as expressly provided in this constitution." This is meant to be ironclad.

Weaponization of government often occurs when one branch of government — and it can be any of the three — gains too much authority. This creates an imbalance among the branches. Respecting separation of powers means balancing and clearly delineating government authority. Without it, one branch could use its expanded powers for something other than fulfilling its public duty, which is a form of weaponizing government.

The biggest threat to separation of powers today may be the use of emergency powers.

Unilateral executive control violates separation of powers and paves the way for government weaponization.

One of most dangerous violations of separation of powers is the inappropriate use of emergency authority by the executive branch. This is a lesson of the COVID-19 pandemic response. The Whitmer administration

exercised an unprecedented level of unilateral lawmaking authority for 18 months. The administration easily sidestepped a Michigan Supreme Court ruling meant to reestablish checks and balances.

The use of emergency powers does not always lead to weaponization of government. Many emergency power laws limit the scope and duration of the unilateral authority state officials can grant themselves. But Michigan law contains several emergency powers that permit state officials to exercise expansive unilateral control for long periods of time — even indefinitely.

I reviewed the entirety of Michigan statutes a few years ago and found about 30 emergency power laws on the books. While all these laws permit governors or state officials to grant themselves unilateral authority to issue mandates that have the force of law, most of them properly limit this authority by restricting the scope of authority or its duration or by requiring some other check on this use of power. But there are three big emergency power laws that give the executive branch dangerous levels of unilateral authority.

These big three are the epidemic powers granted to the state health director in the Public Health Code, the emergency rules contained in the Administrative Procedures Act that any regulatory agency may use and the governor's broad authority in the Emergency Management Act of 1976. These allow the governor or the directors of state agencies to act unilaterally as lawmakers, to take on the proper role of the Legislature.

The governor's power under the Emergency Management Act is perhaps the least worrisome, because a governor can only act unilaterally for 28 days before needing legislative approval. The Legislature could, however, extend lawmaking authority to the governor indefinitely through this statute. It contains no limit on these legislative extensions of emergency authority. The statute could also be used for virtually any situation. While it includes a long list of incidents and conditions that could justify its use — floods, fires, tornados, infestations, explosions, etc. — it also says that it is “not limited to” these listed examples.

Under the Administrative Procedures Act, state officials may grant themselves unilateral authority to issue emergency rules that have the same force of law for up to a year. Departments can use these emergency rules to give themselves sweeping powers that they would not have otherwise.

During the COVID-19 emergency, for instance, the Michigan Occupational Safety and Health Administration, or MIOSHA, issued emergency rules that regulated every social interaction in a Michigan workplace. (The department even tried to turn those emergency rules for COVID-19 into permanent ones.) The Legislature almost certainly never intended to give the department this extraordinary power. But the statute that authorizes the agency to write rules is so broadly worded that MIOSHA can grant itself the power under these emergency rules to require employers to do anything.

The epidemic powers in the Public Health Code are the most dangerous, as the statute provides virtually no limit to their use. The health director used them to regulate every social interaction in the entire state during the COVID-19 pandemic. It allowed her to close schools, businesses and churches and restrict family gatherings, force parents to mask their toddlers and subject healthy teenage athletes to weekly testing.

These big three emergency power laws are problematic not only for the sweeping lawmaking authority they hand over to the executive branch, but also for the ease with which they can be used.

Michigan officials may grant themselves unilateral control with the stroke of a pen via emergency powers.

Triggers in emergency power laws define the conditions or situations that permit government officials to grant themselves unilateral control. If governors or other government officials could become lawmakers whenever they wanted, under no direction or constraint from the Legislature, they would possess legislative power unconstitutionally. Many emergency power laws in Michigan have insufficient triggers, but the broadly worded and ill-defined ones in the Administrative Procedures Act and Public Health Code are particularly troublesome.

The Administrative Procedures Act's trigger reads: "If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule ... the agency may dispense with all or part of the procedures and file ... an emergency rule." That is all it requires. None of the important terms in this trigger are defined in the statute: "preservation," "public health," "safety" or "welfare."

This means that state agencies can give themselves this power whenever they want it. Department directors have full discretion to determine when emergency rules are necessary. They can simply declare that the public health or safety or welfare requires emergency action and then unilaterally issue new rules that can last for one year.

The scope of these rules is limited in one sense. Agencies can only create emergency rules concerning issues the Legislature has given them the power to regulate. The Legislature's grant of rulemaking power to some departments, however, is extraordinarily broad. The DNR, for example, may "promulgate rules to protect and preserve lands and other property under its control from depredation, damage or destruction." The health department's scope of authority is even broader: It may "promulgate rules to safeguard properly the public health."

A good example of an expansive use of these emergency rules is the Whitmer administration's attempt to ban flavored vaping products in 2019. To achieve this, state officials simply declared youth vaping to be a public health emergency in Michigan. This allowed the department to unilaterally and immediately ban flavored vapes under emergency rules. Amazingly, health officials failed to cite a single statistic about how many people in Michigan were at risk because of this supposed crisis. Nothing else in state statute, to my knowledge, gives the health department the authority to ban an otherwise legal product or to regulate what legal products retailers can sell. Only by declaring a public health emergency could the department expand its power to regulate.

(These emergency rules did not last long. Retailers filed lawsuits immediately as this was a threat to their livelihoods. A court stopped the rules' enforcement after only a month or so, but the legal case against them was not settled until a year later. The department proposed permanent rules to the same effect but eventually dropped those, too.)

The health department is not alone in misusing emergency rules. State officials have issued emergency rules even when the preservation of public health was clearly not at risk. Departments have used this mechanism simply to implement rules they felt were urgently needed, not necessarily ones that genuinely threatened public health, safety or welfare.

The trigger in the Public Health Code for epidemics is even less defined. It grants unilateral control to the health director "if the director determines that control of an epidemic is necessary to protect the public health." The statute does not define the important terms: "control," "necessary," "protect" and "public health." Even the term "epidemic" is undefined in statute. As a result, the health director has broad discretion to grant herself lawmaking authority under this statute whenever she determines it is necessary. (Local public health officials have the same powers in a separate statute to unilaterally issue epidemic orders.)

An epidemic order the health director issued in October 2022 provides a good example of the expansive interpretation state officials have given this statute. This was after the Biden administration formally announced the end of the COVID-19 emergency. Nevertheless, the state health department declared that "control of an epidemic is necessary to protect public health" and that "the COVID-19 pandemic continues to constitute an epidemic in Michigan." The department had no other orders in place at the time to control this ongoing epidemic. All this latest order did was require nursing homes to offer Covid shots to residents. How this could have possibly controlled an epidemic, especially one already declared to have ended, is hard to understand. This use of epidemic orders is, to say the least, a stretch.

This is not how government is meant to function. If the state health department wants to mandate that nursing homes offer residents Covid shots, it needs to follow the normal rulemaking process. That process

is there for a reason — administrative agencies are not meant to have the authority to issue dictates just whenever they think something is important. Our government is designed to require that these types of mandates be created only after deliberate and thorough review. That might frustrate policymakers who want to apply their will quickly, but it is a vital part of our checks-and-balance system that protects separation of powers.

The Public Health Code's epidemic powers section is so poorly designed and broadly worded that policymakers should focus on limiting these powers.

Policymakers should make and enforce an emergency pandemic plan.

The Public Health Code's grant of unlimited epidemic powers is ripe for abuse. One area of concern is that the power it authorizes is not necessarily limited to influenza pandemics or other contagious disease outbreaks. The statute lacks meaningful definitions of any of its essential terms and could theoretically be used for any number of issues. Increasingly, social ills are characterized as epidemics (e.g., opioids, obesity, bullying, homelessness, gun violence, child abuse, loneliness), even by public health officials. Increasingly, public health is used as a rationale for regulating individual behavior with rules and restrictions.

There are three other problems with the Public Health Code's epidemic powers. First, it creates a broad scope of authority by lacking meaningful definitions for the government actions it permits. That means the director can use these powers to regulate virtually anything. During 2020 and 2021, these orders were used to control whom you could legally host in your own private residence. Further, the statute includes this line: "Emergency procedures are not limited to this code." This appears to give the director additional, unspecific authority that exceeds even the Public Health Code.

The second problem is there is no limit to how long these orders may last. During the COVID-19 response, the Whitmer administration issued indefinite orders that contained no expiration date. They would expire only when the administration said they would expire.

The third problem is the absence of procedural requirements to exercise these epidemic orders. Many emergency power laws require state officials to follow a defined procedure for declaring an emergency and granting themselves unilateral control. The Public Health Code provides none — the health director can issue these orders at any time, at a moment's notice, with the stroke of a pen. There is no built-in oversight or check on the use of these broad and easily abused emergency powers.

Policymakers need to address this problem before the next pandemic emerges. The Michigan Supreme Court has already punted on the question of whether these epidemic orders are constitutional, so it is up to the Legislature to protect against this threat to the constitutional requirement to maintain a separation of powers.

One way to protect against these epidemic powers being used to weaponize government is to require the health department to execute a prepared pandemic plan.

This is what should have happened during the COVID-19 emergency. The state had plans in place to guide the government's response to an influenza-like pandemic, but the Whitmer administration completely ignored them. State officials have never explained why these plans were inadequate, at least not to my knowledge. To avoid this problem next time, the Legislature should require the health director (and governor) to follow a prepared plan during the next pandemic.

The Legislature should determine what is included in such a pandemic plan. It should precisely define what types of unilateral actions are allowed and under what conditions. It should limit how long these orders may last and balance civil rights and individual liberty with the state's emergency authority. It should create clear boundaries around what the director can and cannot do when issuing epidemic orders.

The health department already maintains a pandemic plan, which mostly endorses the ad hoc, make-it-up-on-the-fly type of response that the Whitmer administration used during the COVID-19 emergency. As is true of state statutes, the department's current pandemic plan is broadly worded and vague. The result is that the plan is no plan at all. It leaves all important decisions about what to do during the next pandemic to the discretion of state officials in the heat of the moment. This will likely result in another unpredictable, inconsistent, controversial and chaotic pandemic response.

Using a prepared and planned response during a pandemic has many benefits. Such a plan can better reflect the interests and values of Michigan's diverse population. It can incorporate views from people across the state. A planned response can be more thoughtful and thorough, developed under no pressure by cool heads. It can intentionally include bipartisan participation and input.

Using a planned response is good for state officials, too. It relieves them of having to take responsibility for health outcomes during a pandemic, which, as the COVID-19 experience demonstrated, are largely beyond their control. Officials will only be judged by how faithfully they executed the state's official planned response.

No one can predict who will hold the reins of power during the next pandemic. When deciding what unilateral authority to allow during a pandemic response, policymakers should imagine handing these powers to their most distrusted political opponent. This helps illuminate the importance of placing limits on the use of emergency powers. A planned response erects clear guardrails around unilateral authority and prevents against the weaponization of state government.

Conclusion

Thank you for your attention this morning.

I want to close by reiterating the importance of the work that you are doing. If Michigan doesn't protect against the weaponization of government by maintaining checks and balances during emergencies, it will only be a matter of time before these extraordinary powers are abused again. And if lawmakers fail to reform the state's epidemic powers, the next pandemic will be just as controversial as the last one – which is something we should try to avoid.

Michael Van Beek
Director of Research
Mackinac Center for Public Policy
mackinac.org



The Mackinac Center for Public Policy is dedicated to improving the understanding of economic principles and public policy among private citizens and public officials. A nonprofit and nonpartisan research and education institute, the Mackinac Center has grown to be one of the largest state-based think tanks in the country since its founding in 1987.

Additional information about the Mackinac Center and its mission to improve the quality of life in Michigan through sound public policy can be found at **www.mackinac.org**.

© 2025 Mackinac Center for Public Policy

140 West Main Street P.O. Box 568 Midland, Michigan 48640

989.631.0900 Mackinac.org mcpp@mackinac.org