

STATE OF EMERGENCY?

SAFEGUARDING THE CONSTITUTION
DURING TIMES OF CRISIS

INTRODUCTION

Consolidating the legislative and executive powers in the hands of one person is the very definition of tyranny¹. It has also been the normal state of affairs for the past year under Governor Steve Sisolak, who has asserted the power to regulate everything from the number of family members you can spend Thanksgiving and Christmas with, to what kinds of businesses that are permitted to stay open, and even the manner in which churches can operate.

Because the Nevada Constitution prohibits the Executive Branch from exercising legislative functions, the vast majority of Governor Sisolak's Executive Orders have been unlawful edicts. Unfortunately, the ability to mount legal challenges is extremely costly and time-consuming, which has allowed these edicts to act as *de facto laws*, even if they lack legitimate authority.

Governor Sisolak and many others believe these edicts are authorized by NRS 414.060 and NRS 414.070, which are collectively known as the Emergency Powers of the Governor Act (EPGA). Yet, a close reading of the statute suggests otherwise. Moreover, to the extent a statute could be interpreted to authorize the limitless powers currently asserted by Governor Sisolak, it would be an unconstitutional violation of Nevada's Separation of Powers Doctrine. As the Nevada Supreme Court previously explained, the Legislature is "powerless" to transfer its lawmaking authority to the executive or any other non-legislative body.²

Ensuring that a Governor never again acts in such a tyrannical fashion is vital to the health of our constitutional republic. Many Nevadans have rightfully begun ignoring the increasingly arbitrary and unlawful rules promulgated by the Governor, which is of course understandable and even necessary in some circumstances. Yet, it is difficult to sustain a well-functioning society without respect for the rule of law and a belief in the legitimacy of those who claim the awesome power of lawmaker.

To help prevent future administrations from operating in such an unconstitutional manner and, consequently, undermining the fabric of civil society, the Legislature should enact the following amendments to the EPGA.

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SOLUTIONS

STEP 1: MAKE IT HARDER TO MISREPRESENT THE ACT

While it is conceivable that the available evidence in early March *might* have justified the invocation of the EPGA in response to what was then known about COVID-19, the continued, ongoing and indefinite emergency powers related to the preventing of COVID-19 are not authorized by the text of the statute. The EPGA expressly refers to catastrophe or disasters when *immediate* action is needed. While the original version enacted in 1953 referred only to military “civil defense” actions that would need to be taken quickly in response to a foreign attack of some kind, the subsequent amendments replacing “civil defense” with “emergency actions” still maintain that sense of immediacy, both in statute and legislative history.

The statutory definition of emergency management, reproduced in full below, demonstrates that while the modern version of the EPGA has been expanded beyond emergencies related to military attacks, the additional emergencies covered still all share the same features related to immediacy:

“Emergency management” means the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to minimize injury and repair damage resulting from emergencies or disasters **caused by** enemy attack, sabotage or other hostile action, by fire, flood, earthquake, storm or other natural causes, or by technological or man-made catastrophe, including, without limitation, a crisis involving violence on school property, at a school activity or on a school bus. (NRS 414.035, emphasis added.)

The text of the statute makes clear that limiting the spread of infectious disease is a different *type* of emergency from those authorized by the statute, which, while they differ in degree, are all identical in *kind*, as they are all characterized by an immediacy of action required in order to save lives from an immediate threat that could not otherwise reasonably be defended against without state intervention. An unforeseen missile attack, earthquake, flood, etc. threatens the lives of Nevadans in a way in which those affected are almost certain to die without immediate government intervention. Efforts designed to reduce the spread of an infectious disease are distinctly different from the kinds of emergencies defined in statute — requiring masks to be worn, businesses closed, etc. in an effort to possibly *reduce* the spread of an infectious disease, which *may* lead to illness and, in extremely rare cases³ *may* lead to death, is fundamentally dissimilar to evacuating citizens from an area under siege from missile attacks, earthquakes, etc.

“... *limiting the spread of infectious disease is a different type of emergency from those authorized by the statute...*”

Thus, if properly interpreted in a way that respects both the intent of the Act and Nevada’s Separation of Powers Doctrine, most⁴ of the EPGA would probably pass constitutional muster. Unfortunately, Governor Sisolak has taken an incredibly permissive view of the statute, which is consistent with the principle that government rarely if ever restrains itself. Perhaps the clearest example of this can be found by comparing the text of a recent Executive Order against the statute it cites as its purported authorization.

Governor Sisolak, in his Executive Order #35, claims that:

“NRS 414.060 outlines powers and duties delegated to the Governor during the existence of a state of emergency, including without limitation, directing and controlling the conduct of the general public.”⁵

But that’s not what NRS 414.060 actually says.

No authority to direct or control “the conduct of the general public” is granted to the Governor by NRS 414.060.

Instead, the law merely says that the Governor “**may cooperate** with the President of the United States and the heads of the Armed Forces, [and other federal or state agencies] **in matters pertaining to emergency management**,” such as the direction or control of the conduct of the general public.⁶ (emphasis added).

Thus, the Governor’s rules limiting the number of people you could invite over for Christmas was in no way authorized by statute, which instead merely allows the Governor to **cooperate** with federal or other state agencies on matters related to emergency management.

By unilateral decree, Governor Sisolak has transformed an authority to cooperate with other agencies into the authority to dictate the private conduct of Nevadans, even within their own homes. (It is worth mentioning that even if the Legislature actually authorized such power, it would be an unconstitutional violation of Nevadans’ liberty rights.)

To prevent future administrations from misrepresenting the text of NRS 414.060 in this way, the Legislature should adopt the following recommendation.

RECOMMENDATION

Delete the subsections within NRS 414.060(3)(g) and maintain the existing language that permits the Governor to cooperate with the President and other agencies on matters related to emergency management as outlined on the following page.

NRS 414.060 Powers and duties of Governor.

...

3. In performing his or her duties under this chapter and to effect its policy and purpose, the Governor may:

...

(g) Cooperate with the President of the United States and the heads of the Armed Forces, the agency of the United States for emergency management and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to emergency management in the State and nation, ~~including the direction or control of:~~

- ~~(1) Mobilizing forces for emergency management and other tests and exercises.~~
- ~~(2) Mechanical devices to be used in connection with warnings and signals for emergencies or disasters.~~
- ~~(3) The effective screening or extinguishing of all lights and lighting devices and appliances.~~
- ~~(4) Coordinating the efforts of all public utilities in terminating and restoring service to the general public during an emergency or disaster.~~
- ~~(5) The conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster.~~
- ~~(6) Public meetings or gatherings.~~
- ~~(7) The evacuation and reception of the general public during an attack or an emergency or disaster.~~

“*Governor Sisolak has transformed an authority to cooperate with other agencies into the authority to dictate the private conduct of Nevadans*”

STEP 2: EMERGENCIES MUST POSE AN IMMEDIATE THREAT

The EPGA received its last substantive amendment in 1999, which was described by its proponent Senator William R. O'Donnell as being needed to expand the types of disasters that would permit its enactment:

Senator O'Donnell pointed out the amendment would also add the types of disasters to which can be responded. Mr. Siracusa said they have made the attempt to bring the terminology in chapter 414 of NRS up to date regarding natural and man-made technological emergencies. He indicated the amendment clarified, modernized, and simplified the bill. Prompted by Senator O'Donnell, Mr. Siracusa indicated the amendment referenced man-made disasters such as hazardous material spills and dam failures.⁷

As the previous iteration of the EPGA could only be invoked in response to military attacks from a foreign entity, Frank Siracusa, the Chief of the Division of Emergency Management at the Department of Motor Vehicles and Public Safety, explained that the 1999 amendment was needed to “add the types of disasters” that the EPGA would authorize a government response to. The Governor’s claim that he need only declare an emergency in order to have an unlimited state of emergency and the attendant powers ascribed under the EPGA is thus incompatible with the text and legislative history, which reveals the EPGA is only operative in response to certain *kind* of emergencies, such as military attack, dam failures, and other unforeseen catastrophes for which immediate government action is required in order to save lives from imminent and certain death or bodily harm. A statute that empowers the Governor to act in a unilateral fashion on his say-so would not need to be amended to include additional types of disasters that authorize its invocation. Thus, the Legislature clearly intended the EPGA to only be potentially operative during an emergency of the kind outlined in NRS 414.035. In other words, the delineation of the certain kinds of emergencies that justify

invoking the EPGA in NRS 414.035 is a *de facto* refutation of the Governor’s claim that he need only declare an emergency in order to access the full range of powers put forth in the EPGA.

Based on wildly inaccurate infection fatality rate estimates that we now know were 1,000 times too high, there *might* have been a justification for the original executive order on March 12, 2020 based on the fear that the virus would arrive and overwhelm Nevada’s hospital system, which would then be an emergency which required immediate government intervention. But as better information became available and the threatened hospital shortages never came close to materializing, that justification similarly evaporated. Whereas a person trapped in their home during an earthquake, wildfire, missile attack, etc. is almost certain to die without immediate action, imposing mask mandates or closing businesses to possibly reduce the spread of an infectious disease is simply not the type of “emergency” that justifies the invocation of the EPGA.

RECOMMENDATION

To restrain future Governors from defining emergency in an expansive manner, as it pertains to the invocation of the EPGA, the Legislature should adopt the following recommendation.

- (1) Amend NRS 414.0345 to define “emergency” as only those events that are likely to lead to widespread death or severe bodily harm without immediate government action. Simply reincorporating the language already used within the Act to define “Emergency management” would likely be sufficient:

NRS 414.0345 “Emergency” defined.

“Emergency” means an enemy attack, sabotage or other hostile action, fire, flood, earthquake, storm or other natural, technological or man-made catastrophes that is expected to cause widespread death or bodily harm without immediate government intervention.

STEP 3: AN EMERGENCY CANNOT LAST FOREVER

As the Michigan Supreme Court recently explained when considering this issue, “As the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the Governor’s discretion by the Legislature must correspondingly become more detailed and precise.”⁸

Yet, as Governor Sisolak proclaims in each of his orders, there exists no limitation in either degree or scope upon his powers, which allow him to regulate a seemingly infinite number of elements fundamental to Nevadans’ constitutional right to the enjoyment of their life and liberty.

Governor Sisolak believes the EPGA grants him free rein to exercise a substantial part of our state and local legislative authority — including police powers — for an indefinite period. Such expansive powers “devoid of all temporal limits...constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional under”⁹ Nevada’s Separation of Powers Doctrine. To prevent unduly expansive interpretations of the EPGA that would lead to unconstitutional actions like those exhibited by Governor Sisolak, the Legislature should adopt the following recommendation.

RECOMMENDATION

Amend NRS 414.060 and 414.070 to declare that the powers granted under the EPGA expire 28 days after the state of emergency was first invoked. Require the affirmative vote of at least two-thirds of the Legislature for an extension, which cannot exceed 28 days.

OTHER ACTIONS

NRS 414.070(7) is facially unconstitutional, as it is a vague and seemingly unlimited delegation of legislative powers to the Executive Branch, in direct violation of Nevada’s Separation of Powers doctrine.

Even after the above recommendations are implemented, there is one aspect of the Act that must be repealed — NRS 414.070(7). This facially unconstitutional statute permits the Governor “To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.”

As discussed above, when the Legislature delegates legislative authority to the executive branch, the standards concribing that power must correspondingly become more precise in proportion to the size and scope of the power being granted. Because NRS 414.070(7) grants the Governor unlimited license to exercise any other “functions, powers and duties” as he deems necessary to promote the safety of the population, it can too readily be interpreted, as Governor Sisolak has, as a grant of infinite power with absolutely no limitation whatsoever. Naturally, this is an unlawful delegation of legislative power to the executive branch and is thus null and void as a matter of law. As the Nevada Supreme Court previously explained:

“Every constitutional officer derives his power and authority from the Constitution, the same as the Legislature does, and the Legislature, in the absence of express constitutional authority, is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong in it.”¹⁰

RECOMMENDATION

Repeal NRS 414.070(7).

APPENDIX: THE GOVERNING STATUTES

CONCLUSION

The principle of divided and limited government enshrined in the Nevada Constitution is essential for creating a free and prosperous society.

The initial justification for Governor Sisolak’s unilateral ability to both make and execute the law was represented by the phrase “15 days to slow the spread.”

It has now been over 300 days, and the Governor has shown no indication that he intends to relinquish these tyrannical powers, which are fundamentally incompatible with a free society.

The Legislature must never again allow a Governor to engage in such unconstitutional behavior, which fundamentally erodes trust in both the rule of law and Nevada’s political institutions.

Adopting these recommendations will make it much harder for future administrations to abuse the EPGA and, in so doing, help reaffirm the Legislature’s commitment to constitutional government.

NRS 414.020 POLICY AND PURPOSE:

1. Because of the existing and increasing possibility of the occurrence of emergencies or disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, from a fire, flood, earthquake, storm or other natural causes, or from technological or man-made catastrophes, and in order to ensure that the preparations of this state will be adequate to deal with such emergencies or disasters, and generally to provide for the common defense and to protect the public welfare, and to preserve the lives and property of the people of the State, it is hereby found and declared to be necessary:
 - (a) To create a state agency for emergency management and to authorize the creation of local organizations for emergency management in the political subdivisions of the State.
 - (b) To confer upon the Governor and upon the executive heads or governing bodies of the political subdivisions of the State the emergency powers provided in this chapter.
 - (c) To assist with the rendering of mutual aid among the political subdivisions of the State and with other states and to cooperate with the Federal Government with respect to carrying out the functions of emergency management.
2. It is further declared to be the purpose of this chapter and the policy of the State that all functions of emergency management in this state be coordinated to the maximum extent with the comparable functions of the Federal Government, including its various departments and agencies, of other states and localities and of private agencies of every type, providing for the most effective preparation and use of the nation’s workforce, resources and facilities for dealing with any emergency or disaster that may occur.

[2:293:1953] — (NRS A [1965, 340](#); [1983, 167](#); [1999, 1242](#))

NRS 414.0345 “EMERGENCY” DEFINED:

“Emergency” means an occurrence or threatened occurrence for which, in the determination of the Governor, the assistance of state agencies is needed to supplement the efforts and capabilities of political subdivisions to save lives, protect property and protect the health and safety of persons in this state, or to avert the threat of damage to property or injury to or the death of persons in this state.

(Added to NRS by [1999, 1242](#))

NRS 414.035 “EMERGENCY MANAGEMENT” DEFINED:

“Emergency management” means the preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible, to minimize injury and repair damage resulting from emergencies or disasters caused by enemy attack, sabotage or other hostile action, by fire, flood, earthquake, storm or other natural causes, or by technological or man-made catastrophes, including, without limitation, a crisis involving violence on school property, at a school activity or on a school bus. These functions include, without limitation:

1. The provision of support for search and rescue operations for persons and property in distress.
2. Organized analysis, planning and coordination of available resources for the mitigation of, preparation for, response to or recovery from emergencies or disasters.

(Added to NRS by [1983, 1351](#); A [1999, 1242](#); [2001, 1337](#))

NRS 414.060 POWERS AND DUTIES OF GOVERNOR

1. The Governor is responsible for carrying out the provisions of this chapter, and in the event of an emergency or disaster beyond local control, may assume direct operational control over all or any part of the functions of emergency management within this State.
2. In performing his or her duties under this chapter, the Governor may cooperate with the Federal Government, with other states and with private agencies in all matters pertaining to emergency management in this State and the nation.
3. In performing his or her duties under this chapter and to effect its policy and purpose, the Governor may:
 - (a) Make, amend and rescind the necessary orders and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon the Governor in this chapter, with due consideration of the plans provided by the Federal Government.
 - (b) Prepare a comprehensive state emergency management plan and develop a program for emergency management in this State to be integrated into and coordinated with the plans of the Federal Government and of other states for emergency management to the fullest possible extent, and coordinate the preparation of plans and programs for emergency management by the political subdivisions of this State to be integrated into and coordinated with the plan and program of this State to the fullest possible extent.

- (c) In accordance with the plan and program for the emergency management in this State, procure supplies and equipment, institute planning, training and exercise programs, carry out public information programs, and take all other preparatory steps, including the partial or full mobilization of organizations for emergency management in advance of an actual emergency or disaster, to ensure the availability of adequately trained and equipped forces in time of need.
- (d) Make such studies and surveys of industries, resources and facilities in this State as may be necessary to ascertain the capabilities of the State for emergency management and plan for the most efficient use thereof.
- (e) On behalf of this State, enter into mutual aid agreements with other states and coordinate mutual aid plans between political subdivisions of this State.
- (f) Delegate any administrative authority vested in him or her under this chapter, and provide for the subdelegation of any such authority.
- (g) **Cooperate with** the President of the United States and the heads of the Armed Forces, the agency of the United States for emergency management and other appropriate federal officers and agencies, and with the **officers and agencies of other states in matters pertaining** to emergency management in the State and nation, including the direction or control of:
 - (1) Mobilizing forces for emergency management and other tests and exercises.
 - (2) Mechanical devices to be used in connection with warnings and signals for emergencies or disasters.
 - (3) The effective screening or extinguishing of all lights and lighting devices and appliances.
 - (4) Coordinating the efforts of all public utilities in terminating and restoring service to the general public during an emergency or disaster.
 - (5) The conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster.
 - (6) Public meetings or gatherings.
 - (7) The evacuation and reception of the general public during an attack or an emergency or disaster.

[6:293:1953] — (NRS A [1965, 342](#); [1981, 674](#); [1983, 169](#); [1999, 1244](#))

NRS 414.070 ADDITIONAL POWERS OF GOVERNOR DURING EXISTENCE OF STATE OF EMERGENCY OR DECLARATION OF DISASTER

The provisions of this section are operative only during the existence of a state of emergency or declaration of disaster. The existence of such an emergency or disaster may be proclaimed by the Governor or by resolution of the Legislature if the Governor in his or her proclamation, or the Legislature in its resolution, finds that an attack upon the United States has occurred or is anticipated in the immediate future, or that a natural, technological or man-made emergency or disaster of major proportions has actually occurred within this State, and that the safety and welfare of the inhabitants of this State require an invocation of the provisions of this section. Any such emergency or disaster, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a resolution terminating the emergency or disaster. During the period when a state of emergency or declaration of disaster exists or continues, the Governor may exercise the following additional powers:

1. To enforce all laws and regulations relating to emergency management and to assume direct operational control of any or all forces, including, without limitation, volunteers and auxiliary staff for emergency management in the State.
2. To sell, lend, lease, give, transfer or deliver materials or perform services for the purpose of emergency management on such terms and conditions as the Governor prescribes and without regard to the limitations of any existing law, and to account to the State Treasurer for any money received for such property.
3. Except as otherwise provided in [NRS 414.155](#) and [414.340](#), to procure, by purchase, condemnation, seizure or other means, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency management without regard to the limitations of any existing law. The Governor shall make compensation for the property so seized, taken or condemned on the following basis:
 - (a) If property is taken for temporary use, the Governor, within 90 days after the taking, shall fix the amount of compensation to be paid therefor. If the property is returned to the owner in a damaged condition, or is not returned to the owner, the Governor shall fix within 90 days the amount of compensation to be paid for the damage or failure to return the property. If the Governor deems it advisable for the State to take title to property taken under this section, the Governor shall forthwith cause the owner of the property to be notified thereof in writing by registered or certified mail, postage prepaid, or by the best means available, and forthwith cause to be filed a copy of the notice with the Secretary of State.

- (b) Within the 90-day period prescribed in paragraph (a), the Governor shall make an offer in writing to the person or persons entitled to receive it of the amount of money proposed to be paid as full compensation. If the offer is accepted, the money must be paid out of such fund, funds or other sources as are available and no further action in law or in equity may ever be maintained in connection therewith. If the offer of payment is refused, the person or persons entitled thereto have the same rights as plaintiffs in actions of eminent domain insofar as the fixing of damages and compensation is concerned, [NRS 37.060](#), [37.070](#), [37.080](#) and [37.090](#), so far as applicable, apply, and proceedings must be had in conformity therewith so far as possible. The action must be commenced within 1 year after the receipt of the offer of settlement from the Governor.
4. To provide for and compel the evacuation of all or part of the population from any stricken or threatened area or areas within the State and to take such steps as are necessary for the receipt and care of those persons.
5. Subject to the provisions of the State Constitution, to remove from office any public officer having administrative responsibilities under this chapter for willful failure to obey an order or regulation adopted pursuant to this chapter. The removal must be upon charges after service upon the officer of a copy of the charges and after giving him or her an opportunity to be heard in his or her defense. Pending the preparation and disposition of charges, the Governor may suspend the officer for a period not exceeding 30 days. A vacancy resulting from removal or suspension pursuant to this section must be filled as provided by law.
6. To authorize providers of emergency medical services and providers of mental health services who are not licensed, certified or registered, as applicable, in this State but hold a license, certificate, registration or similar credential in good standing in another state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States to practice their profession within their scope of practice as if they were licensed, certified or registered, as applicable, in this State for the amount of time necessary to assist in responding to the emergency or disaster.
7. To perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.

[7:293:1953] — (NRS A [1983, 170](#); [1999, 1245](#); [2007, 358](#); [2009, 499](#); [2019, 4155](#))

ENDNOTES:

- 1 “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” wrote James Madison in Federalist 47, quoting Montesquieu. Retrieved from <https://www.npri.org/commentary/a-repellant-for-tyrants-part-i/>
- 2 *State v. Douglass*, 33 Nev. 82, 110 P. 177 (1910).
- 3 While COVID-19 has an alarming high fatality rate of approximately 5.4% for those 70 and older, the infection fatality rate plummets for the rest of the population: 0.5% for those 50-69, 0.02% for those aged 20-49, and functionally zero for those aged 0-19 years, who have an infection fatality rate of 0.003%. Source: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html#table-1>. As these numbers are backwards looking, it is likely they will continue to fall as improved therapeutics, vaccines and other treatments are developed.
- 4 As will be shown, the single sentence comprising NRS 414.070(7) is facially unconstitutional.
- 5 Executive Order 35, retrieved from: https://gov.nv.gov/News/Emergency_Orders/2020/2020-11-24_-_COVID19_Emergency_Declaration_Directive_035/
- 6 See Appendix for the full statute.
- 7 Minutes of the Senate Committee on Government Affairs, 70th Legislative Session, April 29, 1999. Retrieved from: <https://www.leg.state.nv.us/Session/70th1999/Minutes/SM-GA-990429-Hearing%20Upon%20the%20Adjournment%20of%20Senate%20Transportation.html>
- 8 *Midwest Inst of Health, PLLC v Governor of Michigan* (In re Certified Questions from the United States Dist Court) No 161492, ___ Mich ___, ___ NW2d ___ (Oct 2, 2020)
- 9 *Ibid.*
- 10 *State v. Douglass*, 33 Nev. 82, 110 P. 177 (1910).

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DIRECTOR OF POLICY AND VICE PRESIDENT
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