

CHAPTER III -- STATE AND LOCAL EMERGENCY RESTRICTIONS

INTRODUCTION

The Tenth Amendment vests responsibility for coping with emergencies, including terrorist events, in the states which have primary jurisdiction to undertake consequence management. Preservation of public health is the most important duty incumbent upon the State.¹ This police power is not explicitly limited but is co-extensive with the threat to the public interest. “Thus on the state level, the power to provide for and protect the public health is a basic, inherent power of the government.”² “Inspection laws, quarantine laws, and health laws of every description are component parts of this mass.”³ Justice Holmes noted that:

[P]ublic danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment. When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.⁴

In the event of a terrorist attack and the ensuing mass chaos, state or local officials might need to restrict fundamental liberties, especially freedom of movement, for at least three reasons. First and perhaps of narrowest impact, movement of rescuers, equipment, and supplies could demand precedence over personal travel; officials might seek to disencumber highways or airports or to prevent crowding at a site. Second and perhaps of widest impact, in the event of a biological attack, officials might have to prevent personal movement to reduce the potential for spreading contagion. Third, a catastrophic terrorist attack could incite riots or vigilante attacks against ethnic groups perceived to be associated with the attackers; restrictions on liberty might be necessary to restore law and order.

Emergency restrictions bring into sharp contrast each American’s right to freedom of movement with the authority of state and local officials to protect the public. The “constitutional right to travel from one state to another” is firmly embedded in our jurisprudence.⁵ Yet even traffic

¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

² FRANK GRAD, *PUBLIC HEALTH LAW MANUAL* 10 (2nd ed., American Public Health Association 1990). “[T]here are circumstances in which a public emergency, for instance, a fire, the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government’s police power.” *Davis v. City of South Bay*, 433 So. 2d 1364, 1366 (Fla. Dist. Ct. App. 1983).

³ *Gibbons v. Ogden*, 22 U.S. 1, 87 (1824); *see also*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475-7 (1996).

⁴ *Moyer v. Peabody*, 212 U.S. 78, 85 (1909). “By virtue of his duty to ‘cause the laws to be faithfully executed,’ the executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive.” *Sterling v. Constantin*, 287 U.S. 378, 399 (1936).

⁵ *Saenz v. Rue*, 526 U.S. 489, 498 (1999); *see also* *United States v. Guest*, 383 U.S. 745, 758 (1966) (the right to interstate travel originated in the Articles of Confederation and is a “necessary concomitant of the stronger Union the Constitution created); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969). The Supreme Court has suggested that some more generalized right to movement may exist. *See, e.g.*, *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (“Freedom of movement is basic in our scheme of values.”); Justice Douglas noted that “wandering or strolling” from place to

restrictions (although they have been easily sustained) implicate a substantive right of free movement.⁶ The right to travel must be balanced against the state's police power to protect the compelling needs of the public health, safety, morals, and general welfare.⁷ To protect society, the police power may justify severe restraint of personal liberty such as preventing passage into or out of an infected district in order to limit contagion.⁸ More accurately, a citizen may not be deprived of the right to travel *without* due process of law; thus, this right may be restricted *with* due process of law.

The constitutional protection of freedom of travel “does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area.”⁹ Yet, even in emergencies, restrictions on personal movement must be imposed in good faith and with actual basis that the restrictions are necessary.¹⁰ Neither personal liberty nor official authority is absolute. The legality of a restriction depends on case-specific factors: who imposes it; how serious is the need for the restriction; how unbiased is it; and do restricted persons have means to sustain their health and well-being. Restrictions that violate legal standards may be struck down or even give rise to liability claims.

Thus, the issue here is not whether Americans have a right to travel (we do), nor is it whether the Governor has authority to restrict travel when necessary to protect the public (s/he does); the issue here is what travel restrictions cross the boundary of reasonableness and necessity such that a court will deny their enforcement. Part I of this chapter discusses statutory authorization for state or local emergency response efforts, including restrictions on movement. Part II of this chapter discusses judicial review of restrictive measures. [*Relevant liability issues are discussed in Chapter IV.*]

place was historically part of the “amenities of life.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

⁶ A The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the 14th Amendment to the United States Constitution. “[T]he familiar traffic light is, however, an every present reminder that this segment of liberty is not absolute. It may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.” *State v. Dobbins*, 277 N.C. 484, 497 (N.C. Sup. Ct. 1971).

⁷ *See Lutz v. City of New York*, 899 F.2d 255, 268 (3d Cir. 1990) (ordinance outlawing “cruising,” *i.e.* driving repeatedly around loop of public roads, implicated substantive due process right to “move freely about one's neighborhood or town,” but was upheld under intermediate scrutiny test derived from First Amendment time, place, and manner doctrine); *see also Townes v. City of St. Louis*, 949 F. Supp. 731 (E.D. Mo. 1996) (heightened scrutiny applied when resident claimed that city's placement of large flower pots across the entrance to her block infringed her fundamental right to localized travel but holding the ordinance would survive intermediate scrutiny), *aff'd*, 112 F.3d 514 (8th Cir. 1997).

⁸ *Compagnie Francaise etc. v. Louisiana State Board of Health*, 186 U. S. 380, 385 (1902).

⁹ *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

¹⁰ *Smith v. Avino*, 91 F.3d. 105, 109 (11th Cir. 1996).

1. STATE EMERGENCY AUTHORITIES

A catastrophic terrorist attack will create an immediate emergency in every locality where it strikes. Before any disaster draws a national response, states and localities will have to use established emergency preparedness frameworks to address the occurrences. During the attack itself, responsible officials must be certain of who is legally authorized to perform which functions. This section looks at existing emergency planning requirements, authorities, funding and training, and at quarantines and travel restrictions, as the basis for local responses to terrorist acts.

1.1. Federal Support for State Emergency Planning

A primary purpose of the Stafford Disaster Relief and Emergency Assistance Act (Act) (discussed in Chapter I), is to promote federal and state programs for responding to emergencies and disasters. The Act establishes and maintains coordinated federal, state and regional actions to prepare for, respond to and resolve anticipated hazards.¹¹ The Act grants the FEMA Director authority to:

- prepare response plans and programs along with other federal departments and agencies;
- develop preparedness measures and develop and conduct training programs;
- encourage states to enter into interstate preparedness agreements and review them for uniformity with federal plans;
- obtain necessary materials and facilities and give matching contributions to states for obtaining materials and facilities and for constructing emergency preparedness centers; and
- obtain, for loan or grant to states, “radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices.”¹²

The federal government provides a one-time grant not to exceed an aggregate \$250,000 for each State to assist in developing comprehensive emergency plans and programs. To receive this grant, the State must submit a comprehensive disaster preparedness program to the FEMA Director, setting forth provisions for both emergency preparedness and permanent assistance. The plan must:

- be mandatory and apply to all political subdivisions of the State;
- be administered by a single state agency, under a full-time director or deputy director;
- require development of state and local preparedness plans that meet FEMA standards;
- provide for reporting, as required, to FEMA;
- allow for audits; and
- be submitted to FEMA within sixty days after receiving notice of the State’s allocation.¹³

¹¹ 42 U.S.C. §§ 5195, 5195a (2000); Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (Nov. 23, 1988) “Assignment of Emergency Preparedness Activities” extends the FEMA Director’s responsibilities to preparing for responses to national emergencies. A “national security emergency” is “any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States.” *Id.* at Part I, § 101(a).

¹² 42 U.S.C. § 5196 (2000).

¹³ *Id.* § 5196b(a)-(f).

It must also provide for the appointment and training of appropriate staff and for the formulation of necessary regulations and procedures. Matching grants of 50% to the states (not in excess of \$50,000) are available for revision and updating of disaster assistance plans.¹⁴

In addition to the Stafford Act, the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) requires state and local planners to identify potential risks and notify the public of any releases of hazardous substances.¹⁵ EPCRA requires that each state establish an emergency response commission which in turn must appoint and supervise local emergency planning committees for addressing releases of hazardous substances.¹⁶ The State Emergency Response Commission must also establish procedures to receive and process public requests for information.¹⁷

Within nine months of the law's enactment, each commission must designate emergency planning districts to facilitate preparation and implementation of emergency plans. The State Commission appoints members of a local emergency planning committee for each district that must prepare an emergency response plan. Local planning committees must submit their plans to their State Emergency Response Commission which "shall review the plan and make recommendations to the committee on revisions of the plan that may be necessary to ensure coordination" with those of other planning districts.¹⁸

The response plans must designate responsible officials as well as identify relevant facilities, methods the facilities must follow, and "[p]rocedures providing reliable, effective, and timely notification by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, and to the public, that a release has occurred..."¹⁹ In addition, plans must describe available emergency resources including equipment nearby and at facilities, measures to minimize risks to human health and the environment, evacuation plans, and training programs. There is no provision, however, allowing the federal government, state government or private citizen to challenge a nonexistent or incomplete state or local plan. Nor may citizens prevent locally elected government officials from implementing an emergency response plan.²⁰

1.2. The Governor's Authority

[The following sections are generalized, describing essential authorities common in all states. Particular examples are noted parenthetically.]

The Governor is the state's overall director of emergency management. The Governor's general powers include authority to appoint an Adjutant General and mobilize the national guard, transfer and direct state personnel for emergency management purposes, direct the evacuation of all or part of the population, commandeer or use private property, suspend state statutes as necessary (in Tennessee, for example, the Governor may authorize the emergency management agency to amend

¹⁴ *Id.* §5131.

¹⁵ Codified at 42 U.S.C. §§11001-11050 (1995).

¹⁶ *Id.* § 11001.

¹⁷ *Id.* § 11044

¹⁸ *Id.* § 11003.

¹⁹ *Id.* § 11003.

²⁰ *Vernet v. Town of Exeter*, 523 A.2d 48, 50 (1986).

or rescind laws as necessary during an emergency), authorize emergency funds, and enter into mutual aid agreements with other states. For states with an emergency management advisory commission, the Governor appoints its members and serves as chair.

Typically, the legislature creates a State Emergency Management Agency or Commission which is delegated the Governor's authority to allocate resources in an emergency. It may be located in the Governor's office, the Department of Military Affairs, the Department of Public Safety, the Department of Community Affairs, or under the State Police. Almost always, the Governor appoints that agency's Director (in Oregon, the State Police superintendent appoints the Director; in Arizona and Maryland, the Adjutant General does so).

The emergency agency has lead responsibility to appoint county and local directors of emergency planning organizations, establish local planning districts, and prepare a comprehensive emergency management plan for submission to the Governor. (In a few states, the Governor retains direct responsibility for these tasks: in Pennsylvania, Maryland to appoint local directors; in Alaska, Texas to establish local districts; in Alabama to prepare the plan.) It generally oversees implementation of state emergency management functions as required by federal law. In some states, the agency certifies state and local relief agencies, and registers and classifies relief workers for compensation, liability, and management purposes (California). A primary responsibility is to ensure a rapid and effective disaster communication systems to be used by disaster relief employees operating in different jurisdictions. The agency is also in charge of collecting and disseminating information regarding hazardous materials from facility owners and operators.

The State Adjutant General is responsible for organizing and training the National Guard which, at the Governor's discretion, provides staff and equipment for emergencies. The Adjutant General is also responsible for emergency management activities not expressly reserved to the Governor. S/he sits on the emergency management advisory commission in order to advise the Governor on military affairs (in Missouri, s/he heads the agency).

The Attorney General handles all state claims arising out of the implementation of emergency plans, including claims for reimbursement of state funds or for compensation by the State for use of private property. In some states, the Attorney General may restrict and control the flow of vehicular traffic (New Jersey), although this power is usually reserved for the Governor.

Local planning committees appointed by local officials prepare and maintain local plans, coordinate emergency management organizations, and arrange training exercises. They also execute mutual aid agreements with other planning districts and other states. Local districts that cannot establish their own planning committees (due to lack of resources and population) may combine to do so, or the locality may appoint a liaison officer to the State Emergency Management Agency. In some states, if the local committee cannot manage the disaster, the State Emergency Management Agency assumes direction of local disaster operations (New York).

In most states, firefighting response is handled by local fire officials. Search and rescue operations are the responsibility of sheriffs' departments although the State Emergency Management Agency usually appoints a coordinator for such operations. In some states, a local planning committee having jurisdiction within the zone of a commercial nuclear reactor is required to submit a radiological emergency response plan to the state director, providing for evacuation in the event of a dangerous release of radiation (Maryland).

Most states have adopted by legislation or executive order the Incident Command Structure

(ICS) that is designed to ensure effective procedures for the various agencies that must jointly plan and execute disaster response; it also facilitates integration of federal assistance into state and local response efforts. It consists of a modular organization, integrated communications, a unified command structure, consolidated action plans, pre-designed incident facilities, a manageable span of control, and comprehensive resource management.

1.2.1. Declarations and Orders

Most states authorize the Governor to issue executive orders in an emergency even without complying with procedural safeguards or defined process that other laws require. These orders, legally binding on all state political subdivisions, public agencies, officials and employees, typically have three parts. The first part establishes the purpose of the order, details the actions that the Governor plans to take, and cites the Governor's legal authority. The second part is a broad statement invoking the Governor's powers. The final section contains the substance of the order. In most states, however, a long-term solution to a problem cannot be addressed by executive orders unless the legislature declares a continuing emergency.

The Governor may declare a state of emergency by issuing an executive order. This declaration initiates the Governor's emergency powers for a statutory period (*i.e.* 30 days in Illinois) that can be lengthened at the Governor's request and legislative approval. If the Governor is inaccessible, authority to declare a state of emergency follows the statutory/constitutional line of succession. In some states, the emergency management agency has this authority if the Governor is inaccessible or absent (California, Arizona). Local jurisdictions may declare a local state of emergency. In general, the Governor by rescinding the initial order, or the legislature by joint resolution, has the power to terminate a state emergency. The Governor is responsible for notifying the public of rules and regulations issued during a state of emergency; local emergency management districts disseminate these orders to judicial and law enforcement authorities. Generally, the Governor's Chief of Staff is the principal contact in the Governor's office for emergency management.

1.2.2. Mitigation Measures

To support emergency management activities, states set requirements on individuals, companies and on state agencies to assure advance preparation that will mitigate the effects of a disaster. States require that facility owners/operators register hazardous materials; the state emergency management agency collects and maintains that information. Local fire fighting organizations are in charge of inspecting facilities reporting hazardous materials. Some states have hazmat response teams to be activated in a hazardous material emergency. When authorized to respond to a hazardous release, these teams may enter onto any private or public property where the release has occurred or where there is an imminent threat of such release; they may also enter an adjacent or surrounding property to monitor, control, or contain the release or perform any other mitigation activity.

Some states have set up committees that address specific types of disasters and propose mitigation measures. To cope with a disaster that may cause disease, some states authorize the State Board of Health to establish preventative programs. Most states require local planning districts to establish a voluntary register of persons needing assistance during an emergency (such as the handicapped, the infirm, and others with disability) and to file those registries with the State Emergency Management Agency. These registries are used to provide special services during an

evacuation. If the Governor orders evacuation of persons from an area, state and county departments of health, local police, militia, and/or National Guard would carry out those orders.

In most states, publicly funded schools would operate as mass care facilities. School buses and other forms of publicly funded transportation would be made available for an evacuation. In some states, the Governor may prescribe routes, modes of transportation, and destinations for an evacuation. Typically, the Department of Public Utilities is responsible for mapping underground infrastructures (gas lines, electrical lines, etc.) to plan for safe evacuation of areas and detonation of explosives. The emergency management agency must study structures to identify those that may be susceptible in a disaster and to recommend structural changes. Also, some Emergency Management Agencies establish standards for construction of fall-out shelters.

1.2.3. Training Programs

The Governor administers emergency management training programs. The emergency management agency is responsible for organizing statewide and multi-jurisdictional training exercises and programs. Most states require local districts to establish training programs and conduct exercises. Some states have created specialized training institutes and curriculum for disaster relief, and some states have designated special funds for such purposes.

1.2.4. Funding

The Emergency Management Agency is generally in charge of obtaining federal funding for planning programs and maintaining compliance with federal requirements. Statutorily designated persons manage and allocate those funds. A Board (usually a Disaster Emergency Funding Board) advises the Governor on allocation matters, but the Governor has decisional authority. Most states have a separate fund controlled by the Governor for use during an emergency. Usually, the Governor delegates his authority to allocate funds to an office of emergency management within his offices. Such funds are typically dispersed via grants to local districts to establish local planning committees or to assist in disaster relief and recovery efforts.

In general, disaster relief personnel are considered state employees and have immunity for activities undertaken in good faith. States can obtain insurance (not in excess of workers compensation) to cover injuries/deaths of emergency employees.

1.2.5. Quarantines and Travel Restrictions

The Governor has broad authority to restrict the movement of persons and may use this authority to issue orders of quarantine. Yet, most quarantines are issued at the local level or by the Department of Health which has authority to declare epidemics. The State Department of Health issues rules and regulations for quarantines and may obtain warrants to arrest persons violating an epidemic-based quarantine. Local counterparts to those departments enforce those rules or may issue their own if not more stringent than state rules. Most states direct counties and/or local boards of health to set up quarantine facilities within their jurisdiction.

Local physicians must notify the Department of Health of certain diseases. That information is used for general statistical purposes and to determine whether clusters or epidemics may be emerging. In most states, the initial step in issuing quarantines requires that an infected person stay home. Only if there is evidence that a person has a contagious disease may physical restraint be used. When necessary, quarantined persons may be relocated to hospitals. Quarantined persons may contest the necessity of quarantine or isolation, usually at a hearing within forty-eight hours of a

request, but those persons must remain in quarantine while awaiting that hearing. Persons that refuse medical treatment must comply with other quarantine measures.

Most state departments and localities are authorized to remove or destroy any property believed likely to communicate disease. Compensation may be provided to parties injured by such actions. But, following an historic volcanic eruption, the State of Washington successfully argued that continued restriction of access to a town near the volcano was a proper exercise of police power and as such did not require compensation.²¹

The State Department of Agriculture and local boards have authority to issue quarantine orders and to establish rules and regulations of plants and animals infected with communicable disease. This authority includes controlling the movement of animals into and out of state. When necessary, the State Wildlife Commission is in charge of measures to control the movement of wildlife in the event of a rapidly spreading infectious disease. In most states, the Department is authorized to destroy property that poses a threat of spreading the disease. Owners are not typically compensated for the quarantine or destruction of infected plants or animals. When owners fail to obey the Department's eradication orders, the Department may take necessary means to do so, with or without the owner's consent, and owners must pay costs associated with such actions.

2. JUDICIAL EVALUATION OF EMERGENCY RESTRICTIONS

That terrorism presents unforeseen challenges suggests that officials might not actually make the most appropriate responses in an emergency. This section discusses how courts examine whether a particular response is properly authorized under the circumstances. First are issues concerning the nature and extent of limitations placed upon personal liberties. Second is the matter of an official's skill, experience and judgment and how s/he applies those attributes in responding to a specific situation. When events are moving quickly amid uncertainty and fear, officials may take steps so extreme that the courts later question the legitimacy of the action. This section looks at the standards courts apply in evaluating official decisions, and considers circumstances requiring martial law, quarantines, curfews, restrictions on movement or seizures of goods and services.

In general, the courts defer to officials concerning the legality of emergency restrictions. There is a need to protect the public interest without fear that a judge might overrule decisions. If the emergency restrictions are legally wrong, there is typically a subsequent liability action that is a sufficient remedy.

[Issues as to whether that restriction was properly executed arise in connection with liability actions brought by adversely affected citizens and are discussed in Chapter IV.]

The rare situations where the courts strike down an emergency restriction for lack of authority typically are where those restrictions amount to punishment of the person. That is, when courts are faced with a challenge to a state-imposed restriction on the grounds that a citizen has been deprived of liberty without due process of law, the judicial inquiry is whether those conditions or restrictions are non-discriminatory and tailored to achieve a necessary non-punitive public purpose or, by contrast, show an express intent to punish.²² If a condition or restriction is arbitrary or purposeless, a court may permissibly infer that the governmental action may not constitutionally be

²¹ Cougar Business Owners Assn. v. State of Washington, 647 P.2d 481, 486 (Sup. Ct. Wash. 1982).

²² Bell v. Wolfish, 441 U.S. 520, 564 (1979).

inflicted.²³

2.1. Governors' Martial Law Authority

[For discussion of Presidential martial law authority, see Chapter II.]

If law and order within a state seriously break down, the Governor has authority to declare martial law and to use the National Guard to enforce the declaration. This authority, although distinct from the Presidential authority to declare martial law in a state of emergency [discussed in the previous chapter], is based on the same idea. The Supreme Court has held that a Governor has power to call out its military forces to suppress insurrection and disorder.²⁴

This principle was developed in *Duncan v. Kahanamoku*.²⁵ After the Japanese attacked Pearl Harbor, Hawaii Governor Poindexter declared martial law, suspended the writ of habeas corpus, and authorized the commanding general of the Military Department of Hawaii to use all powers normally exercised by judicial officers and employees of the territory. At issue in *Duncan* was whether Congress, under a declaration of martial law, had authorized the trial of civilians by military commission. Ultimately, the Court held that even though the Hawaii Organic Act authorized martial law, Congress had not intended to replace civilian courts with military jurisdiction. However, the Court explicitly explained that it was not addressing: the validity of suspending the writ of *habeas corpus* under martial rule; the military authority to arrest or detain persons or to enforce curfews; nor the military power to exercise court martial jurisdiction as well as to try civilians in foreign territory where civilian government cannot function.²⁶

Chief Justice Stone's concurrence in *Duncan* added that martial law “is a law of necessity to be prescribed and administered by the executive power. Its object, to preserve public safety and good order, defines its scope which will vary with the circumstances and necessities of the case.”²⁷ Additionally, the power of the “executive branch of the government to preserve order and insure the public safety in times of emergency [does] not extend beyond what is required by the exigency which calls it forth.”²⁸ Thus, the necessity to declare martial law limits the authority granted thereunder to the circumstances of the emergency. This notion renders military jurisdiction unnecessary if civilian courts are capable and accessible.

The Governor's authority to declare martial law arises from either the state constitution or from the legislature. Any such declaration, to be valid, must be within the terms of the power the legislature has granted the executive.²⁹ No specific process is required to validate the Governor's decision.³⁰ Martial law is a tool that may be wielded only by the Governor, not local or subordinate State officials. Local officials may proclaim an emergency, but only in “situations involving riots or

²³ *Egan v. Aurora*, 365 U.S. 514 (1961).

²⁴ *Moyer v. Peabody*, 212 U.S. 78, 81 (1909).

²⁵ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

²⁶ *Id.* at 312-314.

²⁷ *Id.* at 335.

²⁸ *Id.*

²⁹ *Gayle v. Governor of Guam*, 414 F. Supp. 636, 638 (D. Guam App. Div. 1976) (holding that the Governor did not have authority to bar the population from all public places after a super typhoon, or set a curfew).

³⁰ *Bright v. Nunn*, 448 F.2d 245, 248 (6th Cir. 1971).

unlawful assemblies characterized by violence or an imminent threat of violence; extraordinary disasters; and instances where deliberate acts of destruction or personal injury pose a threat to the public at large.”³¹

A Governor’s declaration is not afforded absolute immunity, but courts grant Governors wide latitude in the use of the power to declare martial law: “It is not a tort for government to govern.”³² Only rarely have such declarations and the exercise of military authority following the declaration been overturned.³³ Governors have declared martial law in circumstances such as student demonstrations in state university campuses,³⁴ and labor unrest.³⁵ Courts are somewhat stricter in scrutinizing how the Governor, having declared martial law, exercises the authority.³⁶ Only the most arbitrary and capricious acts, however, will be found illegal.

The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or to the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.³⁷

Under martial law, the National Guard has the power to imprison a person, deprive him of the right of a trial by jury, deny him the right of habeas corpus, or deprive him of other rights, in order to restore law and order. The arrests and detention are not considered punishment, but a means to halt the disorder that gave rise to the declaration of martial law. In this situation, then, the National Guard is not considered an adjunct to civil law enforcement personnel. The Guard is sent in when they can no longer maintain law and order, and military rules are substituted as necessary.³⁸

³¹ *ACLU v. Chandler*, 458 F. Supp. 456, 460 (W.D. Tenn. 1978).

³² *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1973) (noting that qualified immunity is based on “existence of reasonable grounds for the belief formed at the time ... coupled with good-faith belief ... in light of all the circumstances”). “[T]he range of discretion must be comparably broad” when considering broad and subtle options when evaluating civil disorder. *Id.* at 247.

³³ *Gayle v. Governor of Guam*, 414 F. Supp. 636 (D. Guam App. Div. 1976); *Hearon v. Calus*, 178 S.C. 381 (1936) (striking down the Governor’s use of militia to seize control of State Highway Commission and removing the head of the commission from his office, as political in nature and beyond his constitutional authority).

³⁴ *Bright v. Nunn*, 448 F.2d 245, 248 (6th Cir. 1971) (holding use of National Guard on state university campus was justified because student-caused disorders and violence constituted a clear and present danger); *Gilligan v. Morgan*, 413 U.S. 1, 6-7 (1973) (holding that even after death of students during National Guard’s presence on state campus, court will not evaluate or oversee how the Guard operates; that is a legislative and executive function).

³⁵ *Cox v. McNutt*, 12 F. Supp. 355, 356 (S.D. Ind. 1935) (upholding martial law declared after 15,000 workers in one county took a “labor holiday”); *ACLU v. Chandler*, 458 F. Supp. 456, 460 (W.D. Tenn. 1978) (upholding declaration of curfew after strike by Memphis police union).

³⁶ “We hold it to be the established rule that the discretion of the Governor to determine the existence of an insurrection may not be interfered with by judicial authority. We hold it to be the established rule that the acts of the Governor after the declaration of a state of insurrection, which are in excess of his constitutional and legislative authority, are subject to review by the Courts.” *Hearon v. Calus*, 178 S.C. 381, 406 (1936).

³⁷ *Cox v. McNutt*, 12 F. Supp. 355, 359 (S.D. Ind. 1935), quoting *Sterling v. Constantin*, 53 S. Ct. 190, 196 (1936).

³⁸ *State ex rel Roberts v. Swope*, 28 P.2d 4, 6 (N.M. Sup. Ct. 1933).

2.2. Quarantines and Evacuations

Not surprisingly, the courts have been extremely tolerant of quarantines and related orders when health conditions may reasonably be said to be in jeopardy. City and state officials often have the authority to enact such regulations in emergency situations. The right to travel may be legitimately curtailed when a community has been ravaged by flood, fire or disease, and its safety and welfare are threatened.³⁹ Yet, most of the case law on quarantines is pre-WWII or earlier, reflecting the fact that the past five decades in the United States have been relatively free of health threats that call for quarantines or similar restrictions.

In order to restrict the movement of persons due to suspected infection, a credible and factual basis must exist supporting the suspicion that the person has been exposed to contagion. The police may hold persons arrested of an unrelated offense who are also suspected of being infected with disease without bail until the prisoners submit to an examination where the state law enables municipalities to segregate or treat persons suffering from communicable disease. Such quarantine laws are not within the criminal code but are based on the state's police power. Therefore, persons can be held without bail.⁴⁰

2.2.1. Geographic Quarantines

Where a quarantine is established due to conditions within a particular area, the courts have uniformly upheld the order. A leading recent decision is *Miller v. Campbell City*,⁴¹ involving an order to evacuate an area due to leaking methane and hydrogen gases. After residents of a subdivision contracted maladies, the County Commissioners declared the subdivision uninhabitable. Plaintiff was arrested when he traveled through a roadblock in attempting to return to his home. The court upheld a finding that the evacuation order was substantially related to the public health and safety, and there was no evidence that the action was taken in bad faith or maliciously. Because the defendants obviously needed to act quickly because of the potential danger, no liability could be found.

Similarly, in *People ex Rel. Barmore v. Robertson*,⁴² the plaintiff was ordered to stay at home without access by visitors because she carried typhoid bacilli. Even despite evidence that she had never been sick with typhoid fever nor caused anyone else to become sick, the court upheld the quarantine as properly authorized by the State Department of Health.

2.2.2. Ethnic or Oppressive Quarantines

Despite the general principle of judicial deference to health authorities, a few cases suggest that the courts will step in if they view a quarantine restriction as unreasonable or oppressive. In *Kirk v. Board of Health*,⁴³ the Aiken, South Carolina, Board of Health ordered Miss Kirk, a refined, elderly, white victim of leprosy, to be taken to a city hospital used mainly for "incarcerating negroes

³⁹ *Zemal v. Rusk*, 381 U.S. 1, 15-16 (1965).

⁴⁰ *People ex rel Baker v. Strautz*, 54 N.E. 2d 441, 445 (Ill. 1944) (Prostitutes held without bail subject to examination for venereal disease).

⁴¹ *Miller v. Campbell Co.*, 945 F.2d 348 (10th Cir. 1991).

⁴² *People ex rel Barmore v. Robertson*, 134 N.E. 815 (Ill. 1922).

⁴³ *Kirk v. Board of Health*, 65 S.E. 387 (S.C. 1909).

having smallpox and other dangerous and infectious diseases.”⁴⁴ Miss Kirk disputed that her leprosy was contagious, and she charged that the place she was to go was “coarse and comfortless,” and located a hundred yards from the town dump. After reviewing the constitutional principles supporting the board of health’s power over citizens, the court defined the issue as whether the required isolation exceeded what was necessary to protect the public. While emphasizing that courts should exercise caution in deciding against boards of health, the court held that this was an exceptional case, given the plaintiff’s age, health and the effectiveness of quarantining her home.

In *Wong Wai v. Williamson*⁴⁵ the San Francisco Board of Health required inoculation of all Chinese residents against bubonic plague and restricted their right to leave the city, following nine deaths allegedly from plague. The inoculation was poisonous, producing severe reactions and could be fatal. The court assumed that the regulations were properly authorized but struck them down as “not based on any established distinction in the conditions that are supposed to attend the plague, or the persons exposed to its contagions.”⁴⁶ Shortly after, in *Jew Ho v. Williamson*, the same court found that the quarantine requirements applied only to Chinese and questioned whether bubonic plague actually caused the reported deaths. It struck down the quarantine as “unreasonable, unjust and oppressive.”⁴⁷

2.3. Municipally-Imposed Restrictions: Curfews

A curfew forbids people (or certain classes of people) from being outdoors between certain hours. A usual curfew is directed at minors out at night. Less common are curfews before or during an emergency, either natural (hurricanes) or because of civil unrest. In either case, the purpose of the curfew is to prevent people from interfering with civilian authorities who are protecting the community and from taking advantage of the situation by committing crime. Especially if law and order has broken down, persons who are out may represent a threat to the quietude of the public. It is easier to maintain order when people are off the streets and in their homes.

Legal challenges to curfews have typically failed. Courts have generally ruled that the temporary restrictions of individual rights are worth the sacrifice for the return of peace to the area. In the contrast of rights, the public’s right to be safe during dangerous situations almost always trumps the individual’s right to travel. Courts do not tend to second-guess the official because it is the executive in charge who has the best understanding of the dangers and the needs of the community and because that person is statutorily empowered to make that decision.⁴⁸ In such circumstances, preventive action is far more desirable than actions remedial.⁴⁹

In general, the legal test of a curfew is whether it is reasonable in relation to the specified

⁴⁴ *Id.* at 374.

⁴⁵ *Wong Wai v. Williamson*, 103 F. 1 (N.D. Cal. 1900).

⁴⁶ *Id.* at 15.

⁴⁷ *Jew Ho v. Williamson*, 103 F. Rep. 1047 (1900).

⁴⁸ “Whether the conditions warrant the curfew is a difficult question not easily answered with a simple ‘yes’ or ‘no.’ A court’s role in the aftermath of an emergency . . . is to review, with deference, the decision of the executive; at all times, however, under such conditions, the executive must be permitted to make the decision in the first instance.” *Moorhead v. Farrelly*, 727 F. Supp. 193, 201 (D.C.V.I. 1989).

⁴⁹ *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971)

ends.⁵⁰ The courts have often upheld a curfew because it is targeted at persons whose control is necessary to maintain order and who are clearly defined. “[A] municipality, under its inherent police power, may enact legislation which may interfere with the personal liberties of its citizens and impose penalties for the violation thereof where the general welfare, public health and safety demand such enactment; but this rule is always subject to the rule of reasonableness in relation to the objects to be attained.”⁵¹ The District of Columbia Court of Appeals recently upheld a curfew prohibiting juveniles 16 and under from being in a public place unaccompanied by an adult from 11:00 p.m. on Sunday through Thursday to 6:00 a.m. the next day, subject to enumerated exceptions.⁵²

Therefore, temporary restrictions on the right to travel are a reasonable means of reclaiming order from anarchy so that all may exercise their constitutional rights freely and safely. In the case of riots or looting, a threat to safety and the welfare of a community exists, providing a compelling reason to impose a curfew. Courts are deferential even to a curfew that affects First Amendment rights so long as those effects are incidental and non-discriminatory.⁵³ Where the courts have struck down a curfew, it has been because either: (1) the official who ordered it was not authorized to do so; (2) the curfew was vague and thereby encouraged discriminatory enforcement; or (3) the curfew was unreasonable for failing to permit exceptions.

2.3.1. Questionable Authority

A curfew must be issued by someone with proper authority. The Governor’s unquestionable authority derives from the power to declare a state of emergency. Some courts have held that mayors, by contrast, must have clear statutory authority, usually from a municipal ordinance, to declare states of emergency and issue curfew orders.⁵⁴ The reasoning is that an absence of statutory authority suggests a preference for coordinated state-wide direction; although the mayor has implicit powers to respond immediately to an emergency, a curfew is of greater duration. These cases turn on legislative intent as to who has the authority to impose a curfew. The curfew is a protection of the community’s rights at the sacrifice of some individual rights, and the only source to whom the public has deemed authorized to strike that balance is the legislature.

That said, statutory authority to enable local officials to order a curfew need not be very specific. A broad grant to make and enforce reasonable police regulations during periods of emergency has been upheld as sufficient to protect a curfew order during riot conditions when speedy response was essential.⁵⁵ Nor need the emergency actually have materialized; a mayor’s authority to order curfews during a “civil emergency” was sufficient when, during a strike of police and firefighters, the mayor thought it necessary to maintain order.⁵⁶

⁵⁰ *Thistlewood v. Ocean City Magistrate*, 204 A.2d 688, 693 (Md. 1964).

⁵¹ *Alves v. Justice Court*, 306 P.2d 601, 603 (Cal. App. 3d Dist. 1957).

⁵² *Hutchins v. District of Columbia*, 188 F.3d 531 (1999).

⁵³ *In re Juan C.*, 28 Cal. App. 4th Supp. 1093 (1994) (curfew stated that persons cannot be out in public areas or unimproved private properties from 7pm-6am. Violators of curfew are subject to arrest. Curfew imposed in response to civil disorder. Arrest only applies to those who refuse to obey curfew even after oral or written notice).

⁵⁴ *Walsh v. City of River Rouge*, 189 N.W.2d 318, 635-36 (1971).

⁵⁵ *Glover v. District of Columbia*, 250 A.2d 556, 560 (D.C. Cir. 1969)

⁵⁶ *ACLU v. Chandler*, 458 F. Supp. 456, 459-60 (W.D. Tenn. 1978).

2.3.2. Vagueness

In some cases, curfews have been struck down where the persons to whom they apply are vaguely defined. The problem with vagueness is that police officers might indiscriminately or unfairly decide whether a person on the street is covered by the curfew. Carte blanche discretion without guidelines impermissibly transfers the judicial task of determining what conduct violates the law to the police. Especially during emergencies and periods of chaos, there should be as little guessing as possible.

To avoid unconstitutional vagueness, an ordinance must: (1) define the offense with sufficient precision that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. Thus, the Ninth Circuit struck down a curfew that prohibited juveniles to “loiter, idle, wander, stroll or play” on the grounds that the prohibition was vague.⁵⁷ Similarly, a court struck down a curfew that prohibited being on the street “without satisfactory explanation.”⁵⁸ And a statute that penalized “anyone who prevented, hindered or delayed the protection of the city” could not be used to justify a municipal order that anyone on the street after curfew hours was guilty of that crime because there was insufficient reason to believe that curfew-breakers were endangering any lives or property.⁵⁹

2.3.3. Impermissibility of Exceptions

A judicial concern throughout the cases involving emergency restrictions is that, without exceptions or sensitive application, their imposition will cause unnecessary harm to innocent persons. Thus, an ordinance that fails to provide for any exceptions may be unconstitutional. If there are not any delineated exceptions, the police must decide who will or will not be restricted, leading to the risk of arbitrary enforcement.⁶⁰ That said, some courts disagree, ruling that desperate measures may be necessary in desperate times,⁶¹ or that the lack of exceptions deprives police of discretion and is, therefore, less arbitrary than an ordinance with exceptions.⁶²

2.4. Restrictions on Interstate Movement

The opposite of a quarantine is establishment of a barrier to movement that keeps people or goods out. A unique situation arises when the barrier is a state border, *i.e.*, when a Governor closes a border with a neighboring state. Legal issues arise both as to right to travel and to the risk that the restriction might overstep congressional prerogatives under the commerce clause. The power of the federal government to regulate interstate commerce does not prevent states from adopting reasonable measures intended to secure the public health.⁶³ However, a state may neither impose a burden that

⁵⁷ Nunez v. San Diego, 114 F.3d 935, 943-44 (1997); *see also* Stoutenburgh v. Frazier, 16 App. D.C. 229, 239-41 (1900) (congressional legislation declaring that “suspicious persons” within the District of Columbia can be arrested and prosecuted as criminals was struck down unconstitutionally vague).

⁵⁸ City of Shreveport v. Brewer, 72 So. 2d 308, 98 (La. Ct. App. 1954); *see also* City of Portland v. Goodwin, 210 P.2d 577, 428-29 (1949) (ordinance struck down that prohibited any person to be out at night without having and disclosing a lawful purpose).

⁵⁹ People v. Continola, 15 Cal. App. 4th Supp. 20, 27 (1993).

⁶⁰ People v. Kearse, 295 N.Y.S.2d 1921 (1968).

⁶¹ Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996).

⁶² State v. Boles, 240 A.2d 920, 928-29 (Conn. Cir. Ct. 1967).

⁶³ Clason v. Indiana, 306 U.S. 439, 444 (1939) (where statute prohibited the transfer of dead animals not slaughtered

materially affects interstate commerce in an area where uniformity of regulation is necessary, nor impose laws that discriminatorily restrict interstate commerce in order that its citizens gain a competitive advantage.⁶⁴ When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, it will be declared unconstitutional as violative of implied substantive restrictions on permissible state regulation of interstate commerce, under the dormant commerce clause, unless it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.⁶⁵

2.4.1. Products and Goods

Courts have upheld that prohibiting import of livestock into a state unless the state of origin's chief sanitary official has certified such livestock as being disease-free; this does not unduly burden interstate transportation so as to contravene the commerce clause.⁶⁶ However, some states have attempted to prohibit transportation of livestock into the state completely during certain times of the year.⁶⁷ Such laws are not quarantine laws nor inspection laws (because the states are not concerned about the health of livestock). These statutes impose liabilities and criminal penalties on persons attempting to transport cattle without any other stated purpose. Such statutes go outside the scope of the police powers of the State and are not allowed under the commerce clause. States cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory.⁶⁸

2.4.2. Hazardous Materials

The 1990 the Hazardous Materials Transportation Uniform Safety Act (HMTUSA)⁶⁹ empowers the Secretary of the Department of Transportation (DoT) to protect the nation adequately against the risks to life and property that are inherent in the transportation of hazardous materials in commerce.⁷⁰ The Secretary is authorized to promulgate regulations governing any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate.⁷¹ The HMTUSA regulations preempt "inconsistent" state or local regulations, *i.e.* when it is not possible to

for food on state highways. This did not unduly burden interstate commerce); *see also* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445 (1960) (city's smoke abatement code not pre-empted by federal statutes under which steam vessels and their equipment, including their broilers, are inspected, approved, and licensed to operate in interstate commerce in accordance with a comprehensive scheme of federal regulation. Federal purpose is to ensure seagoing safety of vessels subject to inspection. State purpose is to eliminate air pollution for the health of the local community).

⁶⁴ *Louisiana v. Texas*, 176 U.S. 1, 21 (1900); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 347 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

⁶⁵ *Bainbridge v. Bush*, 148 F. Supp 2d. 1306, 1310-11 (M.D. Fla. 2001) (upheld state statute prohibiting shipments of alcohol, from out-of-state vendors to recipients within state not holding manufacturer's or wholesaler's license).

⁶⁶ *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

⁶⁷ *Railroad Co. v. Husen*, 95 U.S. 465, 468 (1877).

⁶⁸ *Id.*

⁶⁹ 49 U.S.C.S. app. §§ 1801-1819 (Law. Co-op. 1998)

⁷⁰ *Id.* § 1801.

⁷¹ *Id.* § 1804(a).

comply with both or where state requirements are an obstacle to federal law.⁷² The HMTUSA established that the DoT is the single federal authority with the responsibility to oversee transportation of hazardous materials, that there is not any requirement that safety in such transport be maximized, and that even state action that increases such safety, is precluded.⁷³

2.5. States' Authority To Commandeer Resources

[*The following discussion is related to, but distinct from, a state's liability for a taking of private property, discussed in Chapter IV, section I*]

Inherent in government's sovereignty and its police power is the right to commandeer or seize private property for public service, "in cases of extreme necessity in time of war or of immediate and impending public danger."⁷⁴ The Fifth Amendment of the Constitution provides the underpinning for such seizure over a property owner's objection by requiring "just compensation" for any such acquisition,⁷⁵ and the Fourteenth Amendment extends this to state government action. The rationale for this is that the State must use its power to control violence and disorder and protect public health and welfare,⁷⁶ even to the point of taking extraordinary action.⁷⁷

Courts have regularly upheld commandeering or requisitioning in emergencies without requiring the normal judicial exercise of eminent domain.⁷⁸ The test for the validity of the government action is whether it has "some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained."⁷⁹

The basic objective of government is to protect and promote the health, safety and general welfare of the people. When a condition of affairs appears in the state which presents a threat to the accomplishment of that objective, the government has the right, and obligation, to cope with such

⁷² *Jersey Central Power v. Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985).

⁷³ *New York v. United States Dep't of Transp.*, 715 F.2d 732, 741 (2d Cir. 1983); *New York State Energy Research and Development Authority vs. Nuclear Fuel Services*, 102 F.R.D. 18, 22 (W.D. N.Y. 1983).

⁷⁴ *U.S. v. Russell*, 80 U.S. 623, 627 (1871) (upholding compensation to the owner of three steamboats used by the U.S. government for military transport during the Civil War).

⁷⁵ "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

⁷⁶ See generally Richard A. Epstein, *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 3, 5 (1986); David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 839-40 (2001).

⁷⁷ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 850 (2001).

⁷⁸ "Such a [T]aking of private property by the government, when the emergency is too urgent to admit of delay, is everywhere regarded as justified..." *United States v. Russell*, 80 U.S. 623, 629 (1871). "In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential." *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 486 (Sup. Ct. Wash. 1982) (internal quotations and citation omitted). Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1242 (1993).

⁷⁹ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 843 (2001). (citing *Varholy v. Sweat*, 15 S.2d 267, 270 (Fla. 1943)).

threat by whatever measures, within constitutional limits, that are necessary and appropriate.⁸⁰

At the federal level, emergency expropriation has generally occurred in time of war, to offset shortages of means of production (such as steel⁸¹ or power generation⁸²), services (such as transportation⁸³), space,⁸⁴ or supplies (such as oil⁸⁵). At the state level, seizures more frequently involve the accidental destruction of private property in emergency circumstances (such as a police vehicle colliding with an automobile during a chase) or the intentional destruction of property that poses a hazard, during or after an emergency. That curfews, quarantines, destruction of diseased animals and mandatory confinement of persons with contagious diseases have survived state court scrutiny suggests that courts would also be deferential to commandeering at the state level in order to assure that citizens have basic necessities and ease their hardships.⁸⁶

In most states, the Governor as well as local governments may enter into purchase, lease, or other arrangements for temporary housing units to be occupied by disaster victims. The Governor has authority to commandeer private property with or without the owner's permission, but the owner must be compensated. If dissatisfied by the offered compensation, the owner may file a request for additional compensation, but denial of that request may result in a reduction of the original offer. Depending on the state's statutory requirements, the seizure of property may require a formal declaration of an emergency;⁸⁷ the declaration may have to specifically authorize authorities to seize or destroy property in dealing with the emergency.⁸⁸ Courts typically do not review seizures for necessity unless the actions are arbitrary and capricious, a difficult standard of review for a plaintiff to meet. Moreover, courts have found that state government is not liable for damages to seized or destroyed property,⁸⁹ on the basis that "police power controls the use of property by the owner, for the public good."⁹⁰

⁸⁰ *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 551-52 (Sup. Ct. Alaska, 1966).

⁸¹ *Omnia Commercial Co. v. United States*, 261 U.S. 502, 511 (1923).

⁸² *Southern Calif. Edison Co. v. United States*, 91 F. Supp 757, 520 (Cl. Ct. 1950).

⁸³ *United States v. Russell*, 80 U.S. 623, 627 (1871) (upholding compensation to the owner of three steamboats used by the U.S. government for military transport during the Civil War); *Northern Pac. R. Co. v. N. Dak. Ex rel. Langer*, 250 U.S. 135, 144-45 (1919) (upholding the power of the Congress and President to take possession and control of railroads for troop transport during World War I); *Louisville Flying Service v. United States*, 64 F. Supp. 938, 942 (W.D. Ky., 1945) (providing just compensation for government's seizure of two private airplanes required for the war effort).

⁸⁴ *United States v. General Motors Corp.*, 323 U.S. 373, 374 (1945) (government has power to take possession of leased space from the lessee).

⁸⁵ *Gulf Refining Co. v. United States*, 58 Cl. Ct. 559 (Cl. Ct. 1923).

⁸⁶ David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 843 (2001).

⁸⁷ *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 472-73 (Wash. 1982).

⁸⁸ *Marty v. State of Idaho*, 786 P.2d 524, 142 (Idaho 1989).

⁸⁹ *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 476 (Wash. 1982); *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 552 (Alaska 1966); *Balent v. City of Wilkes-Barre*, 492 A.2d 1196, 581 (Comm. Ct. of Penn. 1985).

⁹⁰ *Balent v. City of Wilkes-Barre*, 492 A.2d 1196, 1197 (Pa. Commw. Ct. 1985).

If an emergency both interferes with supply and increases demand for services or products, federal or state government may use its police powers to remedy an economic and supply system that is not working. For example, when a hurricane left 250,000 people homeless and in need of food, water and shelter, the State of Florida enacted price controls to limit price gouging for necessities. Legal experts have argued that the State could also have engaged in a “take and distribute” strategy, requisitioning supplies from manufacturers and distributing them directly to citizens in the affected area, to reduce their waiting time and assure that price gouging did not occur.⁹¹

⁹¹ Gregory R. Kirsch, *Hurricanes and Windfalls: Takings and Price Controls in Emergencies*, 79 VA. L. REV. 1235, 1239 and 1262 (1993).