4 The Domestic Use of Military Troops

What You Will Learn

- Which federal laws establish restrictions on the use of the military
- The public policy concerns behind such restrictions
- The history of how military troops have been used to quell unrest within the United States
- The difference between the Army, the Army Reserve, and the National Guard
- The distinctive conditions associated with martial law

Introduction

Since the founding of the Republic, the use of active duty military forces against Americans on American soil has been a contentious issue. There is a strong tradition in the United States of civilian control of the military and of concern about the presence of a large standing army. One can see the framers' response to these concerns in the architecture of the Constitution. The Constitution provides that the President and Congress share control over the uniformed armed services by virtue of the different responsibilities assigned to each. In addition, the federal government shares with the states control over the militia (now the National Guard).

Article I, Section 8 assigns to Congress the power to raise, support, organize, and regulate the armed forces; to provide for the "calling forth" of the militia to execute federal law and suppress insurrections; and to provide for organizing, arming, and disciplining the militia while they are deployed in federal service. Article II, Section 2 specifies that the President shall be commander in chief of the armed forces while Article II. Section 3 provides the President with the general power to "take Care that the Laws be faithfully executed." The Third Amendment specifically bars any branch of government from ordering that civilians allow soldiers to be quartered in their homes during peacetime.

What began as state militias are now state National Guard units. The National Guard is a uniformed service that governors can use to keep and restore order and protect lives and property. Although governors have the authority to call out the National Guard when needed, the Constitution forbids states from maintaining standing armies (Article I, Section 10). In turn, however, it makes the federal government responsible for protecting states against invasion and insurrection (Article IV, Section 4). Certainly, in the event of a foreign attack on American soil or a domestic rebellion, the President can deploy military units to respond. The President has the power to "call forth" National Guard units for assignment either in the United States or elsewhere, if needed.

History

During the nation's first century, the federal government's use of military forces within the United States was episodic. In 1794, President Washington mobilized the militia (there were too few regular army troops available) to suppress the Whiskey Rebellion in Pennsylvania. Washington's authority to send troops was the Calling Forth Act, which was written to expire after three years. In 1807, Congress passed the Insurrection Act, which delineated the situations in which the President could send federal troops to quell domestic disorders.

In the years just before and after the Civil War, troops were sometimes deployed as part of civilian posses – to enforce the Fugitive Slave Law before the war and to enforce Reconstruction laws afterward. The source of this power was the Judiciary Act of 1789, under which U.S. marshals could call up members of the state militia to serve in a posse. The U.S. Marshals Service is a unit within the Justice Department that is responsible for providing security in the federal courts and for serving papers and enforcing court orders, including making arrests. The word "posse" is a shortened version of the Latin phrase "posse comitātūs," (pronounced com-ee-tay'-tus), which Black's Law Dictionary defines as

> *n.* [Latin "power of the county"] A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.
>
> Black's Law Dictionary (2004)

One example of the use of the militia for law enforcement purposes was to assist marshals at the polls in the 1876 presidential election. After the election, disputes arose over votes in South Carolina, Louisiana, and Florida, where it was alleged that the military presence intimidated voters into supporting Republican candidates, including Rutherford B. Hayes. When the

final count showed that Democrat Samuel Tilden had won the popular vote, a deal was struck in which Southern Democrats agreed to deliver enough electoral votes to give the Presidency to Hayes in return for a promise that federal troops would leave the southern states. Reconstruction ended, and less than two years later, Congress enacted the Posse Comitātūs Act.

The Posse Comitātūs Act

The Posse Comitātūs Act (PCA) has been amended slightly since its original enactment, and now provides as follows:

The Posse Comitātūs Act
U.S. Code, Title 18 Section 1385

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitātūs or otherwise to execute the laws shall be fined under this title or imprisoned not more than 2 years, or both.

Acting pursuant to the "expressly authorized" language, Congress has passed several laws that create exceptions to the PCA. The two most significant are the Insurrection Act, discussed below, and the Stafford Act, which deals with responses to natural disasters and is the subject of Chapter 9. Congress has also enacted authorization for the armed forces to share equipment with civilian law enforcement agencies. In addition to these specific exceptions, government officials and legal scholars have debated the extent to which the President may have "inherent authority" to use troops to enforce the law within the United States when emergency conditions seem to require an immediate response. (Recall President Truman's unsuccessful invocation of "inherent powers" to seize the steel mills in the *Youngstown* case in 1952. We discuss this case in Chapter 1.)

Congress reaffirmed the PCA, although in hedged language, when it enacted the Homeland Security Act in 2002. A section of that law is titled "Sense of Congress reaffirming the continued importance and applicability of the [PCA]." It provides as follows:

Homeland Security Act
U.S. Code, Title 6 Section 466

> (a) FINDINGS – Congress finds the following: …
>
> (3) The Posse Comitātūs Act has served the Nation well in limiting the use of the Armed Forces to enforce the law.

> (4) Nevertheless, by its express terms, the Posse Comitātūs Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency. …
>
> (b) SENSE OF CONGRESS – Congress reaffirms the continued importance of [the PCA], and it is the sense of Congress that nothing in this Act should be construed to alter the applicability of such section to any use of the Armed Forces as a posse comitātūs to execute the laws.

■ ■ Critical Thinking ■

Consider the language in Section (a)(4) above, beginning "or the President determines." Is this a proper codification of the concept that the President has indeterminate "inherent powers"? What are the checks and balances on this kind of authority?

The Scope of the PCA

What does the PCA mean when it prohibits "us[ing] any part of the Army or Air Force"? For starters, why only those two services? As a practical matter, the Navy may be less likely to be engaged in domestic law enforcement. For the sake of consistency, though, Defense Department regulations extend the prohibitions of the PCA to the Navy (of which the Marine Corps is a part). The Coast Guard is different, however. From its inception, the Coast Guard has been a uniformed service dedicated to domestic use; it has never been part of the Defense Department. It was originally part of the Treasury Department and is now part of the Department of Homeland Security (see Chapter 3). Thus, there is no barrier to using the Coast Guard for law enforcement purposes. Whether the PCA applies to the National Guard depends on whether the Guard units in question have been federalized (see the box at the end of this chapter titled "The Dual Role of the National Guard").

The Wounded Knee Standoff

One of the most controversial modern uses of military troops for law enforcement purposes occurred in 1973, when President Nixon ordered Army and National Guard troops to end the occupation by Lakota Sioux Indians of a building on their reservation. In the three-month confrontation that followed, two people were killed and one paralyzed by gunfire. The bitterness aroused by this action was deepened by the fact that it occurred at Wounded Knee, S.D., where Army troops in 1890 massacred more than 200 Sioux, including dozens of women, children, and elders.

The litigation that followed the 1973 Wounded Knee standoff included criminal prosecutions of those thought to have led the group seizing federal property. The defendants countered that government officials themselves had violated the law by violating the PCA. A series of court decisions distilled the following three tests for whether the PCA had been violated:

- Whether civil law enforcement agents made direct active use of military personnel to execute the laws;
- Whether the use of military personnel pervaded the activities of civilian law enforcement actions; and
- Whether military personnel subjected civilians to exercises of military power that were regulatory, prescriptive, or compulsory in nature.

A second category of cases arising from the 1973 Wounded Knee incident were civil suits brought by Native Americans for violation of their constitutional rights. The following case was one in which residents of the reservation sued federal officials. The appeals court reversed the trial court's dismissal of their complaint.

Bissonette v. Haig
U.S. Court of Appeals, 1985

> *This is an action for damages caused by defendants' alleged violations of the Constitution of the United States. The complaint alleges, among other things, that the defendants seized and confined plaintiffs within an "armed perimeter" by the unlawful use of military force, and that this conduct violated not only a federal statute but also the Fourth Amendment. The use of federal military force, plaintiffs argue, without lawful authority and in violation of the Posse Comitātūs*

Act, was an "unreasonable" seizure of their persons within the meaning of the Fourth Amendment. [The Fourth Amendment prohibits unreasonable searches and seizures.] We hold that the complaint states a claim upon which relief may be granted. The judgment of the District Court, dismissing the complaint with prejudice for failure to state a claim, will therefore be reversed, and the cause remanded for further proceedings consistent with this opinion.

I. This case arises out of the occupation of the village of Wounded Knee, South Dakota, on the Pine Ridge Reservation by an armed group of Indians on February 27, 1973. On the evening when the occupation began, members of the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Indian Affairs Police sealed off the village by establishing roadblocks at all major entry and exit roads. The standoff between the Indians and the law-enforcement authorities ended about ten weeks later with the surrender of the Indians occupying the village.

In February 1975, the plaintiffs, most of whom at the time of the occupation were residents of the Pine Ridge Indian Reservation, brought this action in the District Court for the District of Columbia alleging that the defendants, who were military personnel or federal officials, conspired to seize and assault them and destroy their property in violation of several constitutional and statutory provisions. …

II. In their amended complaint, plaintiffs … claim that they were unreasonably seized and confined in the village of Wounded Knee contrary to the Fourth Amendment and their rights to free movement and travel. … This case comes to us on appeal from a dismissal for failure to state a claim, and we therefore accept for present purposes the factual allegations of the complaint. …

… We believe that the Constitution, certain acts of Congress, and the decisions of the Supreme Court embody certain limitations on the use of military personnel in enforcing the civil law, and that searches and seizures in circumstances which exceed those limits are unreasonable under the Fourth Amendment.

… Reasonableness is determined by balancing the interests for and against the seizure. Usually, the interests arrayed against a seizure are those of the individual in privacy, freedom of movement, or, in the case of a seizure by deadly force, life. Here, however, the opposing interests are more societal and governmental than strictly individual in character. They concern the special threats to constitutional government inherent in military enforcement of civilian law. …

Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

The interest in limiting military involvement in civilian affairs has a long tradition beginning with the Declaration of Independence and continued in the Constitution, certain acts of Congress, and decisions of the Supreme Court. The Declaration of Independence states among the grounds for severing ties with Great Britain that the King "has kept among us, in times of peace, Standing Armies without Consent of our Legislature … [and] has affected to render the Military independent of and superior to the Civil power." These concerns were later raised at the Constitutional Convention. Luther Martin of Maryland said, "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army." …

… [I]n Laird v. Tatum, *statements the [Supreme] Court made … reaffirm … limitations [found in the Constitution and in statutes]:*

"The concerns of the Executive and Legislative Branches … reflect a traditional and strong resistance of Americans to any

military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."

The governmental interests favoring military assistance to civilian law enforcement are primarily twofold: first, to maintain order in times of domestic violence or rebellion; and second, to improve the efficiency of civilian law enforcement by giving it the benefit of military technologies, equipment, information, and training personnel. These interests can and have been accommodated by acts of Congress to the overriding interest of preserving civilian government and law enforcement. … [Under the Insurrection Act] the President may call upon the military only after having determined that domestic unrest makes it "impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings," and he may do so only after having issued a proclamation ordering the insurgents to disperse. Those steps were not taken here.

We believe that the limits established by Congress on the use of the military for civilian law enforcement provide a reliable guidepost by which to evaluate the reasonableness for Fourth Amendment purposes of the seizures and searches in question here. Congress has acted to establish reasonable limits on the President's use of military forces in emergency situations, and in doing so has circumscribed whatever, if any, inherent power the President may have had absent such legislation. This is the teaching of Youngstown Sheet & Tube Co. v. Sawyer. *There the President attempted to justify his*

seizure of the steel mills on grounds of inherent executive power to protect national security. Justice Black, writing for the Court, rejected this assertion of executive authority, and in addition four of the five judges concurring in the Court's opinion or judgment wrote separate opinions expressing the view that Congress had precluded the exercise of inherent executive authority by specifically refusing to give the President the power of seizure.

… The legal traditions which we have briefly summarized establish that the use of military force for domestic law-enforcement purposes is in a special category, and that both the courts and Congress have been alert to keep it there. In short, if the use of military personnel is both unauthorized by any statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case, we have no hesitation in declaring that such searches and seizures are constitutionally "unreasonable." We do not mean to say that every search or seizure that violates a statute of any kind is necessarily a violation of the Fourth Amendment. But the statute prohibiting (if the allegations in the complaint can be proved) the conduct engaged in by defendants here is, as we have attempted to explain, not just any act of Congress. It is the embodiment of a long tradition of suspicion and hostility towards the use of military force for domestic purposes.

Plaintiffs' Fourth Amendment case, therefore, must stand or fall on the proposition that military activity in connection with the occupation of Wounded Knee violated the Posse Comitātūs Act. …

… [M]ilitary involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitātūs Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief. A mere threat of some future injury would be insufficient. In addition, … the mere furnishing of materials and supplies cannot violate the statute. … [T]he use of military personnel, planes, and cameras to fly surveillance and the advice of military officers in dealing with the disorder – advice, that is, as distinguished from active participation or direction – [these are also permitted].

> *The question becomes, then, whether the present complaint alleges more than these kinds of activities. … We of course have no way of knowing what plaintiffs would be able to prove if this case goes to trial, but the complaint, considered simply as a pleading, goes well beyond an allegation that defendants simply furnished supplies, aerial surveillance, and advice. It specifically charges that "the several Defendants maintained or caused to be maintained roadblocks and armed patrols constituting an armed perimeter around the village of Wounded Knee. …" Defendants' actions, it is charged, "seized, confined, and made prisoners [of plaintiffs] against their will… ." These allegations amount to a claim that defendants' activities, allegedly in violation of the Posse Comitātūs Act, were "regulatory, proscriptive, or compulsory," in the sense that these activities directly restrained plaintiffs' freedom of movement. No more is required to survive a motion to dismiss. We hold, therefore, that plaintiffs' first set of claims, alleging an unreasonable seizure in violation of the Fourth Amendment because of defendants' confinement of plaintiffs within an armed perimeter, does state a cause of action. …*

■ ■ Critical Thinking ■

What are the principles behind the longstanding American aversion to sending federal troops to maintain order? Are they still important?

Weapons of Mass Destruction

More recently, public fear about an attack using chemical, biological or nuclear weapons has increased. In response, Congress enacted the following statute, geared to a scenario involving military assistance to federal law enforcement authorities, especially the Federal Bureau of Investigation:

Emergency situations involving chemical or biological weapons of mass destruction
U.S. Code, Title 10 Section 382

> (a) In general – The Secretary of Defense, upon the request of the Attorney General, may provide assistance in support of Department of Justice activities relating to the enforcement of [criminal laws] during an emergency situation involving a

biological or chemical weapon of mass destruction. Department of Defense resources, including personnel of the Department of Defense, may be used to provide such assistance if –

(1) the Secretary of Defense and the Attorney General jointly determine that an emergency situation exists; and

(2) the Secretary of Defense determines that the provision of such assistance will not adversely affect the military preparedness of the United States.

(b) Emergency situations covered – In this section, the term "emergency situation involving a biological or chemical weapon of mass destruction" means a circumstance involving a biological or chemical weapon of mass destruction –

(1) that poses a serious threat to the interests of the United States; and

(2) in which –

(A) civilian expertise and capabilities are not readily available to provide the required assistance to counter the threat immediately posed by the weapon involved;

(B) special capabilities and expertise of the Department of Defense are necessary and critical to counter the threat posed by the weapon involved; and

(C) enforcement of [criminal laws] would be seriously impaired if the Department of Defense assistance were not provided. …

(d)(2)(A) Except as provided in subparagraph (B), the regulations may not authorize the following actions:

(i) Arrest.

(ii) Any direct participation in conducting a search for or seizure of evidence related to a violation of [criminal law].

(iii) Any direct participation in the collection of intelligence for law enforcement purposes.

(B) The regulations may authorize an action described in subparagraph (A) to be taken under the following conditions:

(i) The action is considered necessary for the immediate protection of human life, and civilian law enforcement officials are not capable of taking the action. …

■ ■ Critical Thinking ■

Compare the language of the act you have just read to the language of the Insurrection Act below. How does this law arguably alter the Insurrection Act's requirements?

The Insurrection Act

As noted above, the Insurrection Act predates the PCA, and thus was at least part of what Congress intended by its reference in the PCA to statutes that explicitly authorize deployment of federal troops for law enforcement purposes within the United States. The Insurrection Act has been invoked a number of times, including to enforce court orders desegregating schools and in response to widespread looting and violence.

The most recent controversy over the Insurrection Act grew out of the failure of relief efforts immediately after Hurricane Katrina in 2005. Congressional hearings and agency reports sought to identify where and when the mistakes had been made, and some suggested that the President hesitated to send federal troops because he lacked clear authority under the PCA. During the same time period, in fall 2005, there was also widespread concern about and planning for a possible influenza pandemic reaching the United States. The *Washington Post* reported that Bush administration officials wanted to insure that military units would be available for enforcement of quarantine orders, should that become necessary.

In that context, Congress adopted an amendment to the Insurrection Act that diminished the control of governors over National Guard units and expanded the number of situations in which the President could deploy military forces to include natural disasters and health emergencies. The amendment was a small part of a much larger authorization bill and passed without debate. When they realized what had occurred, all 50 governors urged Congress to repeal the new language. A year later, Congress did precisely that. The Insurrection Act now provides as follows:

The Insurrection Act
U.S. Code, Title 10

§ 331. Aid to State governments

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature

or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

§ 332. Use of militia and armed forces to enforce Federal authority

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

§ 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it –

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

§ 334. Proclamation to disperse

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by

proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

■ ■ Critical Thinking ■

Diagram the different preconditions for troop deployment and the different functions that troops are authorized to serve. Under the current language of the Insurrection Act, could federal troops be sent to enforce a quarantine order?

Martial Law

In the midst of the post-Katrina rescue efforts, White House Press Secretary Scott McClellan announced that "martial law has been declared." He was incorrect, but not alone in his confusion. Many people conflate martial law with any deployment of troops to quell disturbances. As the Supreme Court noted, "the term 'martial law' carries no precise meaning. The Constitution does not refer to 'martial law' at all, and no Act of Congress has defined the term." *Duncan v. Kahanamoku* (1946). Martial law has a particular meaning, though – it signifies that military authority has *replaced* civilian authority and that civilian courts have been supplanted by military tribunals. When Hawaii was placed under martial law for almost three years after the attack on Pearl Harbor, for example, local police forces were under the command of the military, as were the local courts.

Although there is a consensus that a President could declare martial law in the event of an extreme emergency, it has happened only rarely in American history. Given their powers under the Insurrection Act (above) and the National Emergencies Act (see Chapter 3), presidents have not sought the extraordinary powers associated with martial law except during the Civil War and World War II. In every national emergency since World War II, including September 11, civil authority has continued to function and there has been no serious suggestion that the President should impose martial law.

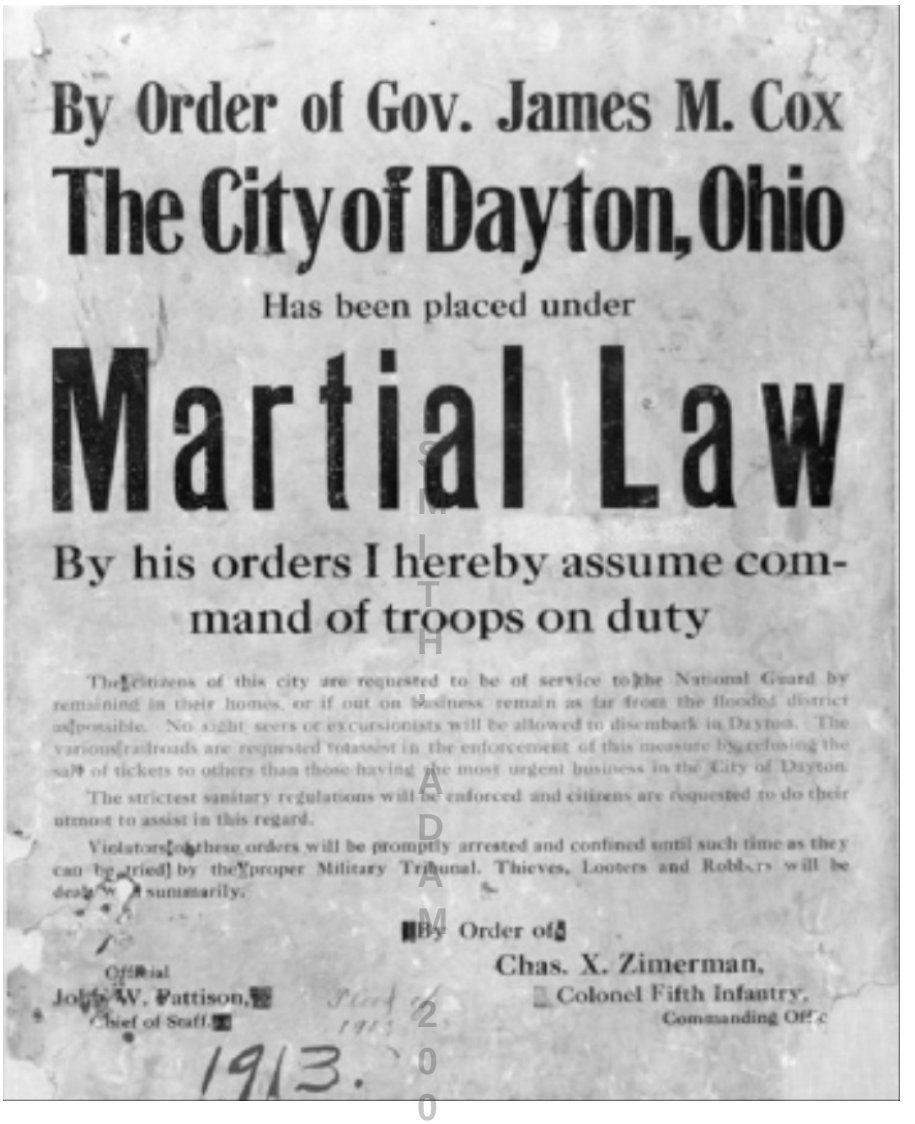
At the state level, the issue of martial law has received more attention. Governors have imposed martial law – which can then be enforced by the National Guard – with much greater frequency than have presidents. The following provides a summary description:

> Martial law authority in the states is delegated by statute to the state executive. In total, eighteen states statutorily provide for the governor to declare martial law. While the statutes contain much boilerplate, there are enough differences among them to provide a spectrum of martial law authority in the states.
>
> At one end of the spectrum, Washington empowers its governor to proclaim "complete martial law," defined as the "subordination of all civil authority to the military." The governor must be of the opinion that the "re-establishment or maintenance of law and order may be promoted." The only condition is the presence of troops in the specific localities under martial law. The statute even permits "military tribunals" to try persons apprehended in such a locality, and for the limited suspension of habeas corpus.
>
> At the other end of the spectrum, Iowa allows its governor to "establish a military district under martial law" only when the general assembly is convened, which provides a certain oversight function. When the general assembly is not in session, the governor can establish martial law "only after the governor has issued a proclamation convening an extraordinary session of the general assembly." Iowa also provides by statute that any justice of the Iowa Supreme Court may transfer a pending civil or criminal case from the district under martial law to any other jurisdiction for adjudication.
>
> The majority of states fall somewhere in between these two extremes.
>
> Weida (2004)

Figure 4.1 is an example of a proclamation of martial law. In this example, martial law was declared in 1913 in the aftermath of a flood.

■ ■ Critical Thinking ■

Watch a film that depicts the imposition of martial law, such as "The Seige." How realistic do you think it is? How are the burdens and advantages of martial law depicted?



By Order of Gov. James M. Cox

The City of Dayton, Ohio

Has been placed under

Martial Law

By his orders I hereby assume command of troops on duty

The citizens of this city are requested to be of service to the National Guard by remaining in their homes, or if out on business remain as far from the flooded district as possible. No sight seers or excursionists will be allowed to disembark in Dayton. The various railroads are requested to assist in the enforcement of this measure by refusing the sale of tickets to others than those having the most urgent business in the City of Dayton.

The strictest sanitary regulations will be enforced and citizens are requested to do their utmost to assist in this regard.

Violators of these orders will be promptly arrested and confined until such time as they can be [tried] by the proper Military Tribunal. Thieves, Looters and Robbers will be dealt with summarily.

By Order of

Chas. X. Zimerman,
Colonel Fifth Infantry,
Commanding Officer

Official
John W. Pattison,
Chief of Staff.

1913.

FIGURE 4.1 Ohio Governor James M. Cox's Proclamation of Martial Law in 1913.

Important Terms

- Federalizing the National Guard
- Martial law
- Militia
- Posse comitātūs
- Regulatory, prescriptive, or compulsory
- U.S. marshals

THE DUAL ROLE OF THE NATIONAL GUARD

The National Guard has a unique dual mission that consists of both federal and state roles. The President can activate the National Guard for participation in federal missions, either domestically or abroad. When federalized, the Guard units are commanded by the commander of the theater in which they are operating and, ultimately, by the President as commander in chief. When not federalized, the only federal mission of the National Guard is to maintain properly trained and equipped units that are available for prompt mobilization.

For state missions, the governor, through the state adjutant general, commands Guard forces. Each state and territory has its own National Guard. The governor can call the National Guard into action during local or statewide emergencies, such as storms, fires, earthquakes, civil disturbances, or to support law enforcement. When National Guard units are under state command, they are not subject to the PCA and therefore can be used in law enforcement activities.

The Militia Act of 1903 reorganized and renamed the various state militias into what is today the National Guard. The Army National Guard is part of the U.S. Army and comprises almost half of the Army's available combat forces and approximately one-third of its support organization. The Air National Guard is part of the U.S. Air Force. The Army and Air Force National Guards are trained and equipped as part of their respective services and use the same ranks and insignia.

The Army and Air National Guards are very similar to the Army Reserve and Air Force Reserve, respectively. The primary difference lies in the level of government to which they are subordinated. The Army Reserve and Air Force Reserve are subordinated to the federal government while the National Guards are subordinated to the various state governments, except when called into federal service.

Review Questions

1. What is the relationship between the Posse Comitātūs Act and the Insurrection Act? Between the Insurrection Act and martial law?
2. How is the National Guard different from other services? How is the Coast Guard different from other services?
3. When can National Guard troops lawfully be used for law enforcement?
4. What kinds of activities must military commanders avoid to insure that they do not violate the Posse Comitātūs Act?

12 Searches, Seizures, and Evacuations

What You Will Learn

- How the Fourth Amendment constrains the ability of public officials to conduct searches
- When and for what purposes an emergency provides an exception to the normal Fourth Amendment rules
- When the Takings Clause of the Fifth Amendment might require the government to compensate for property seized or destroyed during an emergency
- The ways in which *state* emergency laws address these issues

Introduction

In this chapter, we will be examining how two amendments in the Bill of Rights limit the actions of public officials and how those limitations might alter the range of permissible responses to a public emergency. The Fourth Amendment imposes restrictions on searches of both individuals and property. Although these restrictions are most commonly applicable in the context of criminal prosecutions, they can also affect how emergency officials respond to an emergency. The Fifth Amendment provides a general rule, known as the Takings Clause, that the government must pay just compensation whenever it "takes" private property for a public use. During an emergency, the Takings Clause could be triggered by such things as forced closures or evacuations and the commandeering of health institutions for purposes such as quarantine. An emergency official must be aware of the normal scope of, and the exceptions to, these rules when planning responses to an emergency.

THE FOURTH AND FIFTH AMENDMENTS

"The Fourth and Fifth Amendments to the U.S. Constitution apply only to government-sponsored actions; therefore public health officials, like all government agents, must conform their investigations to constitutional standards." (Goodman et al., 2003) As a general rule, these amendments will apply to any government official as well as any individual acting as an agent of the government. Any actions by private sector entities or ordinary citizens are not covered by the Fourth and Fifth Amendments.

The Fourth Amendment

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The protection afforded by this Amendment historically emanates from the home. The idea that the privacy of one's own home is somehow special is centuries old. It was in 1604 that an English court famously observed, "the house of every one is to him as his castle and fortress" (quoted in *Wilson v. Layne*, 1999). While the range of Fourth Amendment protections has increased over time, the home is still seen to a large extent as inviolable. As we will see, knowing when and why a private home can be entered can be very important during an emergency. Meanwhile, the "seizure" strand of the Fourth Amendment refers mainly to the detention and interrogation of individuals.

Reasonable Searches

Because the Fourth Amendment prohibits only those searches that are "unreasonable," the touchstone for analysis is reasonableness. Although testing for reasonableness may seem difficult, the Supreme Court has held that reasonableness is synonymous with the presence of a warrant. As a result, warrantless searches are presumed to be

"unreasonable" and therefore in violation of the Fourth Amendment unless they conform to certain narrowly defined exceptions. We will soon be turning to some of these exceptions and how they might be relevant in emergency situations.

Before we do, note that the Amendment also demands that warrants can only be issued "upon probable cause." Probable cause has come to require that the official(s) have some individualized suspicion as to the person or place to be searched. One way of understanding probable cause is that officials must show a "likelihood to believe that evidence of a crime will be found in the area to be searched." (Goodman et al., 2003) Generally, with or without a warrant, searches are only valid when based on probable cause.

Seizures are subject to slightly different rules. Arrests usually require a warrant issued on probable cause, unless the circumstances make this both impractical and dangerous. Interrogations, on the other hand, normally only require probable cause.

HOW IS THE FOURTH AMENDMENT ENFORCED?

The most powerful mechanism for enforcing the Fourth Amendment is the principle that if the police violate an individual's rights by engaging in an unlawful search, they are prohibited from using whatever they find against the person in a criminal prosecution. This so-called exclusionary rule will not usually be relevant in emergencies that typically involve no wrongdoing and therefore no need for criminal prosecution – for example, a naturally occurring epidemic or a flood. Of course, in the case of bioterrorism, this rule could prove very important, as the desire to hold someone responsible might strongly conflict with the need to prevent the spread of the disease or future attacks.

Community Caretaking

The Fourth Amendment is primarily concerned with public officials operating pursuant to criminal law enforcement needs for example, chasing a suspect or investigating a crime. There are a number of different exceptions to both the warrant and probable cause requirements, and most of these exceptions arise when officials are acting for purposes other than law enforcement. Because the nature of an emergency is frequently outside the criminal law context, these exceptions might often be of great use to emergency officials.

Perhaps the most important of the exceptions arises when the police are acting in their "community caretaker" function. When acting in that role, the police are generally not bound by the normal warrant and probable cause requirements (Decker, 1999). The difference between the community caretaking and normal law enforcement functions is one of motivation:

> The law enforcement function includes conduct that is designed to detect or solve a specific crime, such as making arrests, interrogating suspects, and searching for evidence. Community caretaking on the other hand, is based on a service notion that police serve to ensure the safety and welfare of the citizenry at large. For example, this may involve approaching a seemingly stranded motorist or lost child to inquire whether he or she needs assistance, assisting persons involved in a natural disaster, or warning members of a community about a hazardous materials leak in the area.
>
> Decker (1999)

One court colorfully summed up the exception as follows:

> *Police are required to serve the community in innumerable ways, from pursuing criminals to rescuing treed cats. While the Fourth Amendment's warrant requirement is the cornerstone of our protections against unreasonable searches and seizures, it is not a barrier to a police officer seeking to help someone in immediate danger.*
>
> *People v. Molnar* (2002)

How does the community caretaking exception alter the normal rules of the Fourth Amendment? "When an officer is pursuing a community caretaking function that in no way involves a 'seizure' of a person, no 'particularized and objective justification' for his actions is required" (Decker, 1999). In other words, so long as no one is detained or interrogated, neither a warrant nor probable cause are necessary in this context.

While the Supreme Court has never explicitly defined this as an "emergency" exception, the caretaking functions listed above suggest that it is commonly triggered by emergencies, both large (a hazardous materials leak) and small (a cat in a tree). The Supreme Court has connected this exception with public health emergencies. In fact, in a case mentioning "inspections, even without a warrant, that the law has traditionally upheld in emergency situations," the Court offered this list: exposure to unwholesome food, smallpox

and other contagious diseases, and tubercular cattle (*Camara v. Municipal Court of City and County of San Francisco,* 1989).

Although there are few cases that specifically address public health or other emergencies as such, the decisions that do exist clarify how acting out of public health and welfare concerns can at least partially trump the warrant and probable cause requirements.

Firefighting, for example, is a caretaking function. Firemen entering a house to fight a fire are generally not subject to Fourth Amendment strictures. So long as they are not specifically looking for evidence of a crime, any evidence they might find while fighting the fire would be admissible in court. Meanwhile, police officers would similarly be operating outside the Fourth Amendment to the extent that they were helping put out or investigate the cause of the fire, subject again to the limitation that they cannot be looking for evidence of a crime.

Case Study 1 – The Furniture Store Fire

> [F]irefighters were dispatched around midnight to a furniture store to extinguish a fire. While fighting the fire, firefighters came across two containers of flammable liquid and summoned the police, who seized the containers as possible evidence of arson. Police and firefighters then briefly scanned the rest of the building in an attempt to determine the exact cause of the fire. Due to darkness and smoke, the officials were not able to establish the fire's origin and, consequently, evacuated the premises around 4:00 a.m. after verifying that the fire was completely extinguished.
>
> Later that morning, police and firefighters re-entered the premises without a warrant several times to further investigate the cause of the fire. During those entries, police seized pieces of a rug and bits of the stairway as evidence suggestive of a fuse trail. More than three weeks later, police again made repeated visits to the scene to investigate and to obtain evidence against the defendants, the owners of the store, who were charged with conspiracy to commit arson.

When does the community caretaking function end and evidence collection begin?

> The police had neither a warrant nor consent for any of these various entries. At trial, the defendants moved to suppress all evidence obtained after the initial entry as the fruits of illegal warrantless searches.
>
> The Supreme Court noted that a fire in progress, of course, was an obvious emergency permitting immediate governmental action. However, the Court pointed out that owners of fire-damaged premises, whether commercial or residential, which are not completely destroyed, continue to have a reasonable expectation of privacy in their premises even after the exigency of the fire has passed. Thus, the Fourth Amendment is applicable in this context, and government officials must obtain a warrant to conduct a search of the premises for origin of the fire or evidence of arson in the absence of either consent or an applicable exception to the warrant requirement.
>
> Decker (1999) (describing *Michigan v. Tyler*)

Imagine that instead of a fire, the house had been partially damaged by a flood or wholly contaminated by the release of a biological agent. What limitations would there be on entries by public health officials and other emergency workers? In the latter scenario, what happens if or when it becomes clear that the release of the agent was intentional and probably criminal?

Two other cases might provide some answers. In one, a 911 call alerted the police about a "strange odor" coming from an apartment, so strong and putrid that some neighbors had to vacate their apartments. Police officers arrived and knocked on the door, but no one answered. After concluding there was no alternative, they forced their way into the apartment. The apartment was covered with vermin and a dead body was protruding from a closet. The evidence seen and collected by the officers was admitted into court because "[t]he police were not functioning in a criminal arena, but acting as public servants in the name of protecting health and safety" (*People v. Molnar,* 2002). In the other, a police officer, who had received tips that the defendant kept the manufacturing ingredients for narcotics in his car, approached the defendant's car only to smell an odor of ether "so strong that it made his eyes water" (*People v. Clements,* 1983). Concerned the ether might explode, the officer opened the trunk and found the ether in a glass whiskey bottle. The court held that the search was permissible because the smell of ether presented an emergency.

Although there are few clear lines in this area, there appears to be a space in which an emergency official can be acting primarily out of his caretaking obligation while at the same time clearly engaged in more traditional law enforcement efforts.

FACTORS THAT TRIGGER COMMUNITY CARETAKING OR EMERGENCY EXCEPTIONS

What is required to trigger the community caretaking or emergency exception?

Law professor John F. Decker has identified three factors.

- *First*, there must be some identifiable emergency. In other words, the circumstances must suggest that the "officer could have reasonably believed that there was an immediate need for his or her community caretaking assistance." Recognized examples include the following: a burning building, a person in need of medical treatment, missing persons, kidnapping, a child in danger, report of an assault in progress, the odor of a dead body, and the presence of volatile chemicals.
- *Second*, the officer must be motivated by some caretaking instead of law enforcement concern.
- *Third*, the action must fall within the scope of the emergency, both in terms of time and place.

Decker (1999)

Administrative Searches

Another exception to the normal warrant requirement has been established for administrative authorities charged with ensuring public health and safety compliance. Such "[a]dministrative searches have been described generally as a means of ensuring compliance with such matters as occupancy permits and proper wiring standards" and have generally been permitted because they "normally involve only a minimal invasion of privacy" (Gould and Stern, 2004). Administrative searches are not excused from the warrant requirement altogether, but rather are subjected to a lower standard of probable cause than law enforcement searches. As opposed to the traditional "likelihood that evidence will be found," in the administrative context "probable cause is satisfied by 'reasonable legislative or administrative standards for conducting an area inspection … with respect to a particular dwelling'"

(Goodman et al., 2003). In other words, ensuring compliance can be done in a more systematic way than criminal searches, which require individualized suspicion.

Generally, routine (what we might call nonemergency) searches conducted by public health officials will qualify as administrative searches:

> [C]ommon purposes of public health investigations include, for example, detecting and remediating biological, chemical, or other threats to community health; developing information regarding risk factors for the occurrence of diseases, injuries and disabilities; and providing a scientifically rational basis for implementing prevention and control measures. These purposes may require public health officials to make entries to obtain samples of substances that pose a threat to public health, conduct inspections, or to alleviate hazardous conditions. Entry may also be sought in response to a complaint, in furtherance of a regulatory scheme, or pursuant to an enforcement provision in a statute or ordinance.
>
> Goodman et al. (2003)

■ ■ Critical Thinking ■

What types of administrative searches might be necessary during or after a pandemic? A flood or earthquake? To what extent do you think administrative searches might be inapplicable in the event of a bioterrorist attack?

Case Study 1 *Continued* – The Furniture Store Fire Revisited

We can locate a primary example of how the administrative search doctrine functions by revisiting the scene of a fire:

> *If the primary object [of a search] is to determine the cause and origin of a recent fire, an administrative warrant will suffice. To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.*
>
> *Michigan v. Clifford* (1984)

Recall the furniture store fire in *Michigan v. Tyler* described above. In that case, the firefighters and police officers entered the building at three different times and for three different purposes: *first*, while the fire was burning, to put it out; *second*, later that morning, to further investigate the cause of the fire; and *third*, more than three weeks later, to look for evidence of arson.

The first entry was permissible without a warrant on the grounds of the emergency or community caretaking exception. For obvious reasons, we do not want to make firefighters wait for a warrant before putting out a fire. Accordingly, there was no Fourth Amendment violation, and although the firefighters could not actively look for evidence of a crime, any evidence they came across in the course of putting out the fire would be admissible.

The second entry presents a harder case, coming so soon after the fire was put out. Remember that the scope of the emergency exception is limited to the timeframe of the emergency. In *Michigan v. Tyler*, the fire had already been extinguished, so the Supreme Court would have required a warrant. Because they were only looking for the cause of the fire – then unknown – the firefighters probably would have needed only an administrative warrant. Under slightly different circumstances, however, we might imagine a court ruling that the emergency was still ongoing and therefore not requiring a warrant; or alternatively taking a stricter view of the Fourth Amendment and requiring a traditional warrant supported by individualized probable cause.

The third entry, however, was conducted for the purpose of finding evidence of arson. This search would not fit the administrative search or community caretaking exception, and an ordinary warrant accompanied by probable cause would have been necessary.

THE SCOPE OF AN ADMINISTRATIVE SEARCH

It is important to realize that administrative warrants provide "no wholesale right to do a thorough search of the house, such as opening drawers or cabinets" (Goodman et al., 2003). Rather, the search is limited to its purpose: a public health official testing for chemical agents, for example, might only need access to a main room and the water supply, but would have little reason to rifle through a desk. Searches that exceed their purpose are often found to violate the Fourth Amendment. Items in "plain view," however, are fair game. So if the health inspector, while testing the tap water, sees contraband in the sink, the contraband can be admitted into evidence in court.

Now, consider *Florida Department of Agriculture v. Haire*. In that case, citrus tree growers challenged search warrants permitting area-wide searches to find trees infected with citrus canker. Any infected trees and any trees within 1,900 feet of an infected tree were to be removed and destroyed. Although the court would have allowed warrants that included multiple properties, it found the area-wide warrants invalid. The probable cause requirement, whether in a criminal or administrative warrant, requires "particularity in the description of the property to be searched" (*Florida Department of Agriculture v. Haire*, 2003).

Special Needs

There is one other relevant exception to the general rules of the Fourth Amendment. The special needs exception applies "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" (*New Jersey v. T.L.O.,* 1985). Generally, the common thread tying such searches together is the presence of a "safety concern of sufficient magnitude to outweigh the particular privacy interests involved" (*American Federation of Teachers v. Kanawha County Board of Education,* 2009). Although such special needs searches may sound similar to the emergency or caretaking exception, they usually do not involve actual emergency situations. Instead, the special needs doctrine has been used to uphold systematic, suspicionless searches, such as routine drug tests of students, government employees, and railway employees (Gould and Stern, 2004). In other words, the special needs exception applies when warrants would present an undue administrative burden given the safety concerns involved, not because those safety concerns are time-sensitive. This doctrine has also been used to permit the search of probationers' homes on individualized suspicion less than the normal probable cause.

One law review article considered this doctrine in a hypothetical involving a small atomic bomb – for which we might substitute a dirty bomb – smuggled into a city and tracked to an area comprising 100 private homes (Gould and Stern, 2004). In a normal criminal search, the one-in-100 chance afforded by the tracking would not amount to probable cause as to any house. And as we discussed above, warrants

generally cannot be used to conduct area-wide sweeps. Could the special needs doctrine work here?

> Because the special-needs rationale has been used to permit a search of the home [of a probationer], and given that protecting the public is one of the concerns allowing such searches, it might appear that our hypothetical search, aimed at protecting homes in an entire urban area, fits neatly within this exception … [But unlike probationers], all citizens have a broad and cherished expectation of privacy in their homes and have no relation to the police that would give the latter any right to intrude on the home.
>
> Gould and Stern (2004)

The special needs doctrine would probably not work under this scenario. The needs here are too closely aligned with normal law enforcement. Could you argue, however, that these searches ought to be permitted under the emergency exception?

■ ■ Critical Thinking ■

Jacobson Revisited (Again)

Briefly read over the facts of *Jacobson* in Chapter 1. *Jacobson* involved forced vaccinations. Consider for a moment the fact that the Supreme Court has allowed numerous systematic drug-testing programs under the special needs theory.

Now, imagine the sudden outbreak of a highly contagious and deadly disease in a major U.S. city. Public health officials want to conduct mandatory blood testing on all of the city's residents. What problems would the Fourth Amendment potentially present for this plan? How great do you consider the privacy invasion – the needle in the arm and the blood examined – for the individuals involved? Are there any hurdles the officials will have to clear before beginning the testing? Or will certain exceptions and limitations on the Fourth Amendment render the Amendment inapplicable in these circumstances?

The Fifth Amendment and the Takings Clause

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The last clause of the Amendment is commonly referred to as the Takings Clause. As demonstrated above by the special status given to the home, the law is very protective of private property: "It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen" (*House v. Los Angeles County Flood Control District*, 153 P.2d 950 [Cal. 1944]). The Takings Clause is one specific protection of private property.

Eminent Domain v. the Police Power

The general rule of the Takings Clause is that the government must pay just compensation for any property it has taken for public use. The government's power to take property for public use is called eminent domain.

Takings come in two forms. The first are physical occupations – or "real" takings – in which the government either physically damages or appropriates or occupies property. Such real takings are usually remedied by granting the property owner money damages for the market value of the property taken. An example might be the appropriation of a house or other private building to build some public structure in its place.

The other form is the regulatory taking, where some government action diminishes the owner's ability to use his property. For example, if a city rezones a parcel of land to prohibit almost all buildings or uses on that land, we might call this a regulatory taking. The government has not actually "taken" the land, but it has severely restricted its use. Regulatory takings are a confusing area of the law, but the rule of thumb is that they do not require compensation unless they deprive the property owner of all economically beneficial use of the land – a very high standard to meet (Salzberg, 2006).

Beyond the question of form, takings are defined by the motivation underlying them. Courts have strongly delineated between those

takings that are effected for "public use" and those that occur for other purposes. One of the most important "other purposes" is the police power, which allows states to act in defense of the public health and safety. The line between public use and the police power is often a fine one, but it is very important because it separates those takings that require compensation from those that do not:

> *The distinction between an exercise of the eminent domain power that is compensable under the fifth amendment and an exercise of the police power [which is not compensable] is that in a compensable exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public; and in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare.*
>
> *Franco-Italian Packing Co. v. United States* (1955)

Put another way, the eminent domain power relates to public improvements and public works but does not cover emergency situations that threaten the public health (*Customer Company v. City of Sacramento,* 1995). One classic example of police power at work consists of those cases "in which buildings have been set on fire to prevent a larger fire from spreading" (Salzberg, 2006). In such a situation, the owners of the buildings set on fire are owed no compensation from the government.

Of course, this is not to say that in any situation the government can claim there was an emergency and be excused from paying compensation. The government must demonstrate that an emergency actually existed; in addition, the damage inflicted "cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights" (*House v. Los Angeles County Flood Control District,* 1944). The government must also exercise the police power with reasonable care. When the government was the cause of the emergency compensation may be required (*Odello Brothers v. County of Monterey,* 1998).

■ ■ Critical Thinking ■

Do you think the distinction between taking property for public use and destroying property to protect the public health is a viable one? In the examples that follow, can you make the argument that the

government should have been required to pay the property owner? Why might we consider this distinction a good one?

Public Health and Takings

What types of actions have been excused from the normal rule of compensation as exercises of the police power? Historically, the police power exception has been at its strongest during wartime. Compensation was denied for a tuna boat impounded off the coast of Costa Rica in the days after Pearl Harbor, an oil facility in Manila destroyed by the U.S. Army immediately prior to the Japanese invasion of the Philippines, and a bridge destroyed by Union forces to prevent a Confederate advance during the Civil War (*Franco-Italian Packing Company v. United States,* 1955; *United States v. Caltex, Inc.,* 1952; *United States v. Pacific Railroad,* 1887).

The historical record also provides a number of cases that deal directly with the public health. So, for example, the destruction of a herd of elk infected with contagious bovine tuberculosis did not require compensation (*South Dakota Department of Health v. Heim,* 1984).

Case Study 2 – The Smallpox Hospital

In 1896, Chicago built and began operating a smallpox hospital on the east side of Lawndale Avenue near West 33rd Street on a parcel of land the city owned. The owners of property on the west side of that same stretch of Lawndale Avenue sued the city, claiming that the smallpox hospital had rendered their property unsuitable for many investment purposes. The private property owners sought money damages under the Takings Clause. The court denied the property owners' claim, however, stating that it was within the city's police power to erect the hospital on its own land (*Frazer v. City of Chicago,* 1900).

What type of taking was involved in this case? How might the principles of the case be important during a public health emergency? Think specifically of quarantine and isolation. Note that 20 years later, a court granted compensation to a property owner who complained about "hospitals for the confinement and treatment of malignant, contagious, and infectious diseases" built adjacent to her land. One possible difference between these outcomes is that the property owner in the later case alleged that the city negligently maintained the "pest house" (*Oklahoma City v. Vetter,* 1919). What additional factors might that ruling require a public health official to consider in dealing with an epidemic?

Case Study 3 – The Nursing Home

In September 1976, the Woodland Nursing Home in Methuen, Massachusetts was facing serious budgetary issues. It told its staff that it could not longer pay them and informed the families and relatives of certain patients that they were advised to remove those patients immediately. The Massachusetts Commissioner of Public Health decided that the transfer of the patients would put them at serious risk, such that the situation constituted a public health emergency. As a result, the Governor of Massachusetts declared an emergency and ordered that the Department of Public Health take over the nursing home. The emergency declaration was revoked two days later, and the nursing home was turned back over to its owners.

The owners then sued Massachusetts for compensation under the Takings Clause. The court, however, held that no compensation was required:

> *We believe that the Commonwealth's action in these circumstances constituted an exercise of the State's police power and a regulation of or a restriction upon the plaintiff's use of its property "to prevent the use thereof in a manner that is detrimental to the pubic interest."*
>
> *Davidson v. Commonwealth* (1979)

Davidson deals with a somewhat limited emergency. How are the stakes changed when the situation is graver and potentially affects many more people? Think again about our example of a dirty bomb being detonated or other chemical agent being released in an urban area. Presumably, public health officials would need to use the existing health infrastructure – and hospitals in particular – to respond to the situation. This might well involve various degrees of appropriating hospitals, from using isolated wards for quarantine to taking over the entire operations of the facility. What types of claims might the hospital make once the emergency passed? Law professor Vickie J. Williams has suggested some possibilities:

> … Physical occupation of [a] hospital by the government would clearly involve interference with "property," since even a de minimus physical occupation of real property constitutes a compensable taking. An order establishing an isolation or quarantine center at a hospital could involve a physical occupation of the hospital by the government.

> Nevertheless, it is far more likely to constitute a regulatory action directing the hospital to use its premises in a certain manner, thus disrupting the facility's day-to-day business. It is far from clear whether the hospital's contracts with insurers and other business associates, and day-to-day revenue-producing operations, are "property" within the meaning of the Takings Clause. Protecting these intangible interests would be of paramount importance to a hospital when considering whether to comply with an order designating it an isolation or quarantine center. The Supreme Court has found compensable takings when government action adversely affects intangible interests such as loss of repose, intellectual property, and monetary interest on pooled funds. Yet, hospital managers could not be certain whether the Takings Clause would protect the hospital's intangible business interests. Intangible business-related interests have been characterized as compensable "property" in some types of takings, but have been characterized as non-compensable losses in others.
>
> Williams (2007)

Can you think of any other ways in which public health officials might "take" private property during such an emergency?

Takings and Emergencies – Statutory Response

In addition to the general concerns and issues involved with the application of the Takings Clause, many states have enacted legislation specifically expanding takings-type powers in times of emergency. New Jersey's law on takings and public health emergencies, based largely on the Model State Emergency Health Powers Act (MSEHPA; see Chapter 6), follows:

> During a state of public health emergency, the commissioner may exercise, for such period as the state of public health emergency exists, the following powers concerning health care and other facilities, property, roads, or public areas:
>
> a. Use of property and facilities. To procure, by condemnation or otherwise, subject to the payment of reasonable costs …, construct, lease, transport, store, maintain, renovate or distribute property and facilities as may be reasonable and necessary to respond to the public health emergency, with the right to take immediate possession thereof. Such property

and facilities include, but are not limited to, communication devices, carriers, real estate, food and clothing.

Do you think reasonable costs are the same as just compensation?

This authority shall also include the ability to accept and manage those goods and services donated for the purpose of responding to a public health emergency. The authority provided to the commissioner pursuant to this section shall not affect the existing authority or emergency response of other State agencies.

b. Use of health care facilities.

(1) To require, subject to the payment of reasonable costs …, a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary to respond to the public health emergency, as a condition of licensure, authorization or the ability to continue doing business in the State as a health care facility. After consultation with the management of the health care facility, the commissioner may determine that the use of the facility may include transferring the management and supervision of the facility to the commissioner for a limited or unlimited period of time, but shall not exceed the duration of the public health emergency. In the event of such a transfer, the commissioner shall use the existing management of the health care facility.

How long might a health emergency last? Can a hospital challenge the state's determination of the duration of the emergency?

(2) Concurrent with or within 24 hours of the transfer of the management and supervision of a health care facility, the

commissioner shall provide the facility with a written order notifying the facility of:

(a) the premises designated for transfer;

(b) the date and time at which the transfer will commence;

(c) a statement of the terms and condition of the transfer;

(d) a statement of the basis upon which the transfer is justified; and

(e) the availability of a hearing to contest the order, as provided in paragraph (3) of this subsection.

(3) A health care facility subject to an order to transfer management and supervision to the commissioner pursuant to this section may request a hearing in the Superior Court to contest the order.

(a) Upon receiving a request for a hearing, the court shall fix a date for a hearing. The hearing shall be held within 72 hours of receipt of the request by the court, excluding Saturdays, Sundays and legal holidays. The court may proceed in a summary manner. At the hearing, the burden of proof shall be on the commissioner to prove by a preponderance of the evidence that transfer of the management and supervision of the health care facility is reasonable and necessary to respond to the public health emergency and the order issued by the commissioner is warranted to address the need.

(b) If, upon a hearing, the court finds that the transfer of the management and supervision of the health care facility is not warranted, the facility shall be released immediately from the transfer order.

(c) The manner in which the request for a hearing pursuant to this subsection is filed and acted upon shall be in accordance with the Rules of Court.

Why might the following section be very important to hospitals?

(4) A health care facility which provides services or the use of its facility or whose management or supervision is transferred to the commissioner pursuant to this subsection shall not be liable for any civil damages as a result of the commissioner's acts or omissions in providing medical care or treatment or any other services related to the public health emergency.

(5) For the duration of a state of public health emergency, the commissioner shall confer with the Commissioner of Banking and Insurance to request that the Department of Banking and Insurance waive regulations requiring compliance by a health care provider or health care facility with a managed care plan's administrative protocols, including but not limited to, prior authorization and pre-certification.

c. Control of property. To inspect, control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation or other means, the use, sale, dispensing, distribution or transportation of food, clothing and other commodities, as may be reasonable and necessary to respond to the public health emergency.

This section grants a great deal of leeway over most property. Is the "reasonable and necessary" requirement a serious limitation on this power?

d. To identify areas that are or may be dangerous to the public health and to recommend to the Governor and the Attorney General that movement of persons within that area be restricted, if such action is reasonable and necessary to respond to the public health emergency.

N.J. Stat. 26:13-9

Reasonable reimbursement, meanwhile, is determined and awarded by a State Public Health Emergency Claim Reimbursement Board (N.J. Stat. 26:13-24). How well does the New Jersey statute fit with what we already know about the Takings Clause and the limitations on it provided by the police power?

THE MAYOR OF DES MOINES DECLARES AN EMERGENCY

The massive floods of 1993 caused disruption throughout Des Moines, including the incapacitation of the city's water treatment facility. In response, the Mayor issued a proclamation of emergency that ordered businesses to provide their own sanitation facilities for employees. Most businesses complied, but some simply ignored the proclamation. The city began to receive complaints from employees that they were being forced to work in unsanitary conditions. The city's lawyers had to face the question of whether and how the proclamation could be enforced. The city's chief lawyer described the result:

> … Iowa's state code provides for no specific penalty in this situation. Iowa statutes simply provide that in times of emergency the mayor may "govern the city by proclamation." The Legal Department reasoned that if the mayor can govern by proclamation, then the mayor can do by proclamation whatever the city council exercising the city's home rule powers can do by motion, resolution, amendment, or ordinance. We reasoned further that since the initial proclamation stated that all future proclamations were to have the force and effect of law, the proclamation requiring businesses to cease occupying their business premises had the same effect as an ordinance. Consequently, since the original proclamation provided that the violation of a proclamation would be considered a violation of law punishable as such, then a violation of a proclamation could be prosecuted as a simple misdemeanor under the Iowa Code and would be punishable as such.
>
> In the face of open defiance of the second proclamation by a small handful of businesses, the Legal Department advised the mayor and city staff to advise the public that violators would be prosecuted for misdemeanor violations. Fortunately for all concerned, the need to resort to such eventualities was avoided by the restoration of water service …
>
> Nowadzky (1995)

Takings, Emergencies, and Public Policy

The Takings Clause is not merely an after-the-fact issue. From a policy standpoint, compensation for perceived takings could be a crucial issue both for the government and hospitals in preparing to react to emergencies:

> Because the availability, type, or amount of compensation under the Takings Clause is uncertain, the Clause is not an incentive for hospitals to comply with the orders of public health authorities during a pandemic. In the case of a wide-scale public health emergency requiring multiple isolation and quarantine centers capable of using sophisticated medical technology, the threat of massive amounts of litigation regarding the compensation due to hospitals is likely to cool the eagerness of hospitals to comply with the orders of public health authorities. It could also make the government think twice about designating hospitals as isolation and quarantine centers. This fear may dilute the response to the emergency, cause delay, and adversely affect the public's health. The undeveloped state of our Takings Clause jurisprudence in the context of public health emergencies encourages hospitals to protect themselves by resisting such orders in the first place. Resistance becomes far more attractive than taking the chance of complying and engaging in protracted litigation about the amount of compensation due afterward.

Do these concerns help explain or justify the distinction between eminent domain and "public use" on the one hand and the police power and protecting the public welfare on the other?

Are hospitals better off preparing to be unprepared?

> "Demoralization costs" are a less apparent danger to the viability and quality of our health care system from the uncertainty surrounding compensation for takings in public health emergencies. A "demoralization cost" is the loss in utility

> that can be attributed to the likelihood that a property owner, knowing that the compensation she receives will be inadequate if her property is taken, will fail to maintain the property or use it properly. A hospital that knows that it is unlikely to receive adequate compensation for its losses if it is designated as an isolation or quarantine facility has little economic incentive to build additional capacity or invest in additional equipment in anticipation of a pandemic. In this context, demoralization costs may take the form of hospitals choosing to make themselves less attractive isolation or quarantine centers by channeling funds away from pandemic preparedness. Hence, hospitals that might have been well-prepared for a pandemic may consciously choose to under-prepare so that they can reap the financial benefits related to treating the more lucrative patients that isolation and quarantine centers will have to turn away. A perverse incentive to under-prepare such as this works to the severe detriment of the public's health by decreasing overall pandemic preparedness.
>
> Williams (2007)

■ ■ Critical Thinking ■

How well do you think the New Jersey statute addresses the concerns identified by Professor Williams?

Important Terms

- Administrative search
- Community caretaking function
- Eminent domain
- Exclusionary rule
- Just compensation
- Plain view
- Probable cause
- Regulatory taking
- Special needs exception
- Taking for police power purposes
- Taking for public use
- Warrant

Review Questions

1. What are the usual requirements for conducting a search of a private home under the Fourth Amendment?
2. What exceptions to the normal Fourth Amendment rules might be triggered in the event of a public health emergency?
3. What is the difference between eminent domain and a taking effected under the police power? Which requires compensation to be paid to the property owner?
4. What policy reasons suggest that public health officials should be granted a good deal of leeway in both searching and taking private property during emergencies?

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and other contagious diseases, and tubercular cattle (*Camara v. Municipal Court of City and County of San Francisco,* 1989).

Although there are few cases that specifically address public health or other emergencies as such, the decisions that do exist clarify how acting out of public health and welfare concerns can at least partially trump the warrant and probable cause requirements.

Firefighting, for example, is a caretaking function. Firemen entering a house to fight a fire are generally not subject to Fourth Amendment strictures. So long as they are not specifically looking for evidence of a crime, any evidence they might find while fighting the fire would be admissible in court. Meanwhile, police officers would similarly be operating outside the Fourth Amendment to the extent that they were helping put out or investigate the cause of the fire, subject again to the limitation that they cannot be looking for evidence of a crime.

Case Study 1 – The Furniture Store Fire

> [F]irefighters were dispatched around midnight to a furniture store to extinguish a fire. While fighting the fire, firefighters came across two containers of flammable liquid and summoned the police, who seized the containers as possible evidence of arson. Police and firefighters then briefly scanned the rest of the building in an attempt to determine the exact cause of the fire. Due to darkness and smoke, the officials were not able to establish the fire's origin and, consequently, evacuated the premises around 4:00 a.m. after verifying that the fire was completely extinguished.
>
> Later that morning, police and firefighters re-entered the premises without a warrant several times to further investigate the cause of the fire. During those entries, police seized pieces of a rug and bits of the stairway as evidence suggestive of a fuse trail. More than three weeks later, police again made repeated visits to the scene to investigate and to obtain evidence against the defendants, the owners of the store, who were charged with conspiracy to commit arson.

When does the community caretaking function end and evidence collection begin?

> The police had neither a warrant nor consent for any of these various entries. At trial, the defendants moved to suppress all evidence obtained after the initial entry as the fruits of illegal warrantless searches.
>
> The Supreme Court noted that a fire in progress, of course, was an obvious emergency permitting immediate governmental action. However, the Court pointed out that owners of fire-damaged premises, whether commercial or residential, which are not completely destroyed, continue to have a reasonable expectation of privacy in their premises even after the exigency of the fire has passed. Thus, the Fourth Amendment is applicable in this context, and government officials must obtain a warrant to conduct a search of the premises for origin of the fire or evidence of arson in the absence of either consent or an applicable exception to the warrant requirement.
>
> Decker (1999) (describing *Michigan v. Tyler*)

Imagine that instead of a fire, the house had been partially damaged by a flood or wholly contaminated by the release of a biological agent. What limitations would there be on entries by public health officials and other emergency workers? In the latter scenario, what happens if or when it becomes clear that the release of the agent was intentional and probably criminal?

Two other cases might provide some answers. In one, a 911 call alerted the police about a "strange odor" coming from an apartment, so strong and putrid that some neighbors had to vacate their apartments. Police officers arrived and knocked on the door, but no one answered. After concluding there was no alternative, they forced their way into the apartment. The apartment was covered with vermin and a dead body was protruding from a closet. The evidence seen and collected by the officers was admitted into court because "[t]he police were not functioning in a criminal arena, but acting as public servants in the name of protecting health and safety" (*People v. Molnar,* 2002). In the other, a police officer, who had received tips that the defendant kept the manufacturing ingredients for narcotics in his car, approached the defendant's car only to smell an odor of ether "so strong that it made his eyes water" (*People v. Clements,* 1983). Concerned the ether might explode, the officer opened the trunk and found the ether in a glass whiskey bottle. The court held that the search was permissible because the smell of ether presented an emergency.

Although there are few clear lines in this area, there appears to be a space in which an emergency official can be acting primarily out of his caretaking obligation while at the same time clearly engaged in more traditional law enforcement efforts.

FACTORS THAT TRIGGER COMMUNITY CARETAKING OR EMERGENCY EXCEPTIONS

What is required to trigger the community caretaking or emergency exception?

Law professor John F. Decker has identified three factors.

- *First*, there must be some identifiable emergency. In other words, the circumstances must suggest that the "officer could have reasonably believed that there was an immediate need for his or her community caretaking assistance." Recognized examples include the following: a burning building, a person in need of medical treatment, missing persons, kidnapping, a child in danger, report of an assault in progress, the odor of a dead body, and the presence of volatile chemicals.
- *Second*, the officer must be motivated by some caretaking instead of law enforcement concern.
- *Third*, the action must fall within the scope of the emergency, both in terms of time and place.

Decker (1999)

Administrative Searches

Another exception to the normal warrant requirement has been established for administrative authorities charged with ensuring public health and safety compliance. Such "[a]dministrative searches have been described generally as a means of ensuring compliance with such matters as occupancy permits and proper wiring standards" and have generally been permitted because they "normally involve only a minimal invasion of privacy" (Gould and Stern, 2004). Administrative searches are not excused from the warrant requirement altogether, but rather are subjected to a lower standard of probable cause than law enforcement searches. As opposed to the traditional "likelihood that evidence will be found," in the administrative context "probable cause is satisfied by 'reasonable legislative or administrative standards for conducting an area inspection … with respect to a particular dwelling'"

(Goodman et al., 2003). In other words, ensuring compliance can be done in a more systematic way than criminal searches, which require individualized suspicion.

Generally, routine (what we might call nonemergency) searches conducted by public health officials will qualify as administrative searches:

> [C]ommon purposes of public health investigations include, for example, detecting and remediating biological, chemical, or other threats to community health; developing information regarding risk factors for the occurrence of diseases, injuries and disabilities; and providing a scientifically rational basis for implementing prevention and control measures. These purposes may require public health officials to make entries to obtain samples of substances that pose a threat to public health, conduct inspections, or to alleviate hazardous conditions. Entry may also be sought in response to a complaint, in furtherance of a regulatory scheme, or pursuant to an enforcement provision in a statute or ordinance.
>
> Goodman et al. (2003)

■ ■ Critical Thinking ■

What types of administrative searches might be necessary during or after a pandemic? A flood or earthquake? To what extent do you think administrative searches might be inapplicable in the event of a bioterrorist attack?

Case Study 1 *Continued* – The Furniture Store Fire Revisited

We can locate a primary example of how the administrative search doctrine functions by revisiting the scene of a fire:

> *If the primary object [of a search] is to determine the cause and origin of a recent fire, an administrative warrant will suffice. To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.*
>
> *Michigan v. Clifford* (1984)

Recall the furniture store fire in *Michigan v. Tyler* described above. In that case, the firefighters and police officers entered the building at three different times and for three different purposes: *first*, while the fire was burning, to put it out; *second*, later that morning, to further investigate the cause of the fire; and *third*, more than three weeks later, to look for evidence of arson.

The first entry was permissible without a warrant on the grounds of the emergency or community caretaking exception. For obvious reasons, we do not want to make firefighters wait for a warrant before putting out a fire. Accordingly, there was no Fourth Amendment violation, and although the firefighters could not actively look for evidence of a crime, any evidence they came across in the course of putting out the fire would be admissible.

The second entry presents a harder case, coming so soon after the fire was put out. Remember that the scope of the emergency exception is limited to the timeframe of the emergency. In *Michigan v. Tyler*, the fire had already been extinguished, so the Supreme Court would have required a warrant. Because they were only looking for the cause of the fire – then unknown – the firefighters probably would have needed only an administrative warrant. Under slightly different circumstances, however, we might imagine a court ruling that the emergency was still ongoing and therefore not requiring a warrant; or alternatively taking a stricter view of the Fourth Amendment and requiring a traditional warrant supported by individualized probable cause.

The third entry, however, was conducted for the purpose of finding evidence of arson. This search would not fit the administrative search or community caretaking exception, and an ordinary warrant accompanied by probable cause would have been necessary.

THE SCOPE OF AN ADMINISTRATIVE SEARCH

It is important to realize that administrative warrants provide "no wholesale right to do a thorough search of the house, such as opening drawers or cabinets" (Goodman et al., 2003). Rather, the search is limited to its purpose: a public health official testing for chemical agents, for example, might only need access to a main room and the water supply, but would have little reason to rifle through a desk. Searches that exceed their purpose are often found to violate the Fourth Amendment. Items in "plain view," however, are fair game. So if the health inspector, while testing the tap water, sees contraband in the sink, the contraband can be admitted into evidence in court.

Now, consider *Florida Department of Agriculture v. Haire*. In that case, citrus tree growers challenged search warrants permitting area-wide searches to find trees infected with citrus canker. Any infected trees and any trees within 1,900 feet of an infected tree were to be removed and destroyed. Although the court would have allowed warrants that included multiple properties, it found the area-wide warrants invalid. The probable cause requirement, whether in a criminal or administrative warrant, requires "particularity in the description of the property to be searched" (*Florida Department of Agriculture v. Haire*, 2003).

Special Needs

There is one other relevant exception to the general rules of the Fourth Amendment. The special needs exception applies "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable" (*New Jersey v. T.L.O.,* 1985). Generally, the common thread tying such searches together is the presence of a "safety concern of sufficient magnitude to outweigh the particular privacy interests involved" (*American Federation of Teachers v. Kanawha County Board of Education,* 2009). Although such special needs searches may sound similar to the emergency or caretaking exception, they usually do not involve actual emergency situations. Instead, the special needs doctrine has been used to uphold systematic, suspicionless searches, such as routine drug tests of students, government employees, and railway employees (Gould and Stern, 2004). In other words, the special needs exception applies when warrants would present an undue administrative burden given the safety concerns involved, not because those safety concerns are time-sensitive. This doctrine has also been used to permit the search of probationers' homes on individualized suspicion less than the normal probable cause.

One law review article considered this doctrine in a hypothetical involving a small atomic bomb – for which we might substitute a dirty bomb – smuggled into a city and tracked to an area comprising 100 private homes (Gould and Stern, 2004). In a normal criminal search, the one-in-100 chance afforded by the tracking would not amount to probable cause as to any house. And as we discussed above, warrants

generally cannot be used to conduct area-wide sweeps. Could the special needs doctrine work here?

> Because the special-needs rationale has been used to permit a search of the home [of a probationer], and given that protecting the public is one of the concerns allowing such searches, it might appear that our hypothetical search, aimed at protecting homes in an entire urban area, fits neatly within this exception … [But unlike probationers], all citizens have a broad and cherished expectation of privacy in their homes and have no relation to the police that would give the latter any right to intrude on the home.
>
> Gould and Stern (2004)

The special needs doctrine would probably not work under this scenario. The needs here are too closely aligned with normal law enforcement. Could you argue, however, that these searches ought to be permitted under the emergency exception?

■ ■ Critical Thinking ■

Jacobson Revisited (Again)

Briefly read over the facts of *Jacobson* in Chapter 1. *Jacobson* involved forced vaccinations. Consider for a moment the fact that the Supreme Court has allowed numerous systematic drug-testing programs under the special needs theory.

Now, imagine the sudden outbreak of a highly contagious and deadly disease in a major U.S. city. Public health officials want to conduct mandatory blood testing on all of the city's residents. What problems would the Fourth Amendment potentially present for this plan? How great do you consider the privacy invasion – the needle in the arm and the blood examined – for the individuals involved? Are there any hurdles the officials will have to clear before beginning the testing? Or will certain exceptions and limitations on the Fourth Amendment render the Amendment inapplicable in these circumstances?

The Fifth Amendment and the Takings Clause

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The last clause of the Amendment is commonly referred to as the Takings Clause. As demonstrated above by the special status given to the home, the law is very protective of private property: "It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen" (*House v. Los Angeles County Flood Control District*, 153 P.2d 950 [Cal. 1944]). The Takings Clause is one specific protection of private property.

Eminent Domain v. the Police Power

The general rule of the Takings Clause is that the government must pay just compensation for any property it has taken for public use. The government's power to take property for public use is called eminent domain.

Takings come in two forms. The first are physical occupations – or "real" takings – in which the government either physically damages or appropriates or occupies property. Such real takings are usually remedied by granting the property owner money damages for the market value of the property taken. An example might be the appropriation of a house or other private building to build some public structure in its place.

The other form is the regulatory taking, where some government action diminishes the owner's ability to use his property. For example, if a city rezones a parcel of land to prohibit almost all buildings or uses on that land, we might call this a regulatory taking. The government has not actually "taken" the land, but it has severely restricted its use. Regulatory takings are a confusing area of the law, but the rule of thumb is that they do not require compensation unless they deprive the property owner of all economically beneficial use of the land – a very high standard to meet (Salzberg, 2006).

Beyond the question of form, takings are defined by the motivation underlying them. Courts have strongly delineated between those

takings that are effected for "public use" and those that occur for other purposes. One of the most important "other purposes" is the police power, which allows states to act in defense of the public health and safety. The line between public use and the police power is often a fine one, but it is very important because it separates those takings that require compensation from those that do not:

> *The distinction between an exercise of the eminent domain power that is compensable under the fifth amendment and an exercise of the police power [which is not compensable] is that in a compensable exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public; and in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare.*
>
> *Franco-Italian Packing Co. v. United States* (1955)

Put another way, the eminent domain power relates to public improvements and public works but does not cover emergency situations that threaten the public health (*Customer Company v. City of Sacramento,* 1995). One classic example of police power at work consists of those cases "in which buildings have been set on fire to prevent a larger fire from spreading" (Salzberg, 2006). In such a situation, the owners of the buildings set on fire are owed no compensation from the government.

Of course, this is not to say that in any situation the government can claim there was an emergency and be excused from paying compensation. The government must demonstrate that an emergency actually existed; in addition, the damage inflicted "cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights" (*House v. Los Angeles County Flood Control District,* 1944). The government must also exercise the police power with reasonable care. When the government was the cause of the emergency compensation may be required (*Odello Brothers v. County of Monterey,* 1998).

■ ■ Critical Thinking ■

Do you think the distinction between taking property for public use and destroying property to protect the public health is a viable one? In the examples that follow, can you make the argument that the

government should have been required to pay the property owner? Why might we consider this distinction a good one?

Public Health and Takings

What types of actions have been excused from the normal rule of compensation as exercises of the police power? Historically, the police power exception has been at its strongest during wartime. Compensation was denied for a tuna boat impounded off the coast of Costa Rica in the days after Pearl Harbor, an oil facility in Manila destroyed by the U.S. Army immediately prior to the Japanese invasion of the Philippines, and a bridge destroyed by Union forces to prevent a Confederate advance during the Civil War (*Franco-Italian Packing Company v. United States,* 1955; *United States v. Caltex, Inc.,* 1952; *United States v. Pacific Railroad,* 1887).

The historical record also provides a number of cases that deal directly with the public health. So, for example, the destruction of a herd of elk infected with contagious bovine tuberculosis did not require compensation (*South Dakota Department of Health v. Heim,* 1984).

Case Study 2 – The Smallpox Hospital

In 1896, Chicago built and began operating a smallpox hospital on the east side of Lawndale Avenue near West 33rd Street on a parcel of land the city owned. The owners of property on the west side of that same stretch of Lawndale Avenue sued the city, claiming that the smallpox hospital had rendered their property unsuitable for many investment purposes. The private property owners sought money damages under the Takings Clause. The court denied the property owners' claim, however, stating that it was within the city's police power to erect the hospital on its own land (*Frazer v. City of Chicago,* 1900).

What type of taking was involved in this case? How might the principles of the case be important during a public health emergency? Think specifically of quarantine and isolation. Note that 20 years later, a court granted compensation to a property owner who complained about "hospitals for the confinement and treatment of malignant, contagious, and infectious diseases" built adjacent to her land. One possible difference between these outcomes is that the property owner in the later case alleged that the city negligently maintained the "pest house" (*Oklahoma City v. Vetter,* 1919). What additional factors might that ruling require a public health official to consider in dealing with an epidemic?

Case Study 3 – The Nursing Home

In September 1976, the Woodland Nursing Home in Methuen, Massachusetts was facing serious budgetary issues. It told its staff that it could not longer pay them and informed the families and relatives of certain patients that they were advised to remove those patients immediately. The Massachusetts Commissioner of Public Health decided that the transfer of the patients would put them at serious risk, such that the situation constituted a public health emergency. As a result, the Governor of Massachusetts declared an emergency and ordered that the Department of Public Health take over the nursing home. The emergency declaration was revoked two days later, and the nursing home was turned back over to its owners.

The owners then sued Massachusetts for compensation under the Takings Clause. The court, however, held that no compensation was required:

> *We believe that the Commonwealth's action in these circumstances constituted an exercise of the State's police power and a regulation of or a restriction upon the plaintiff's use of its property "to prevent the use thereof in a manner that is detrimental to the pubic interest."*
>
> *Davidson v. Commonwealth* (1979)

Davidson deals with a somewhat limited emergency. How are the stakes changed when the situation is graver and potentially affects many more people? Think again about our example of a dirty bomb being detonated or other chemical agent being released in an urban area. Presumably, public health officials would need to use the existing health infrastructure – and hospitals in particular – to respond to the situation. This might well involve various degrees of appropriating hospitals, from using isolated wards for quarantine to taking over the entire operations of the facility. What types of claims might the hospital make once the emergency passed? Law professor Vickie J. Williams has suggested some possibilities:

> … Physical occupation of [a] hospital by the government would clearly involve interference with "property," since even a de minimus physical occupation of real property constitutes a compensable taking. An order establishing an isolation or quarantine center at a hospital could involve a physical occupation of the hospital by the government.

> Nevertheless, it is far more likely to constitute a regulatory action directing the hospital to use its premises in a certain manner, thus disrupting the facility's day-to-day business. It is far from clear whether the hospital's contracts with insurers and other business associates, and day-to-day revenue-producing operations, are "property" within the meaning of the Takings Clause. Protecting these intangible interests would be of paramount importance to a hospital when considering whether to comply with an order designating it an isolation or quarantine center. The Supreme Court has found compensable takings when government action adversely affects intangible interests such as loss of repose, intellectual property, and monetary interest on pooled funds. Yet, hospital managers could not be certain whether the Takings Clause would protect the hospital's intangible business interests. Intangible business-related interests have been characterized as compensable "property" in some types of takings, but have been characterized as non-compensable losses in others.
>
> Williams (2007)

Can you think of any other ways in which public health officials might "take" private property during such an emergency?

Takings and Emergencies – Statutory Response

In addition to the general concerns and issues involved with the application of the Takings Clause, many states have enacted legislation specifically expanding takings-type powers in times of emergency. New Jersey's law on takings and public health emergencies, based largely on the Model State Emergency Health Powers Act (MSEHPA; see Chapter 6), follows:

> During a state of public health emergency, the commissioner may exercise, for such period as the state of public health emergency exists, the following powers concerning health care and other facilities, property, roads, or public areas:
>
> a. Use of property and facilities. To procure, by condemnation or otherwise, subject to the payment of reasonable costs …, construct, lease, transport, store, maintain, renovate or distribute property and facilities as may be reasonable and necessary to respond to the public health emergency, with the right to take immediate possession thereof. Such property

and facilities include, but are not limited to, communication devices, carriers, real estate, food and clothing.

Do you think reasonable costs are the same as just compensation?

This authority shall also include the ability to accept and manage those goods and services donated for the purpose of responding to a public health emergency. The authority provided to the commissioner pursuant to this section shall not affect the existing authority or emergency response of other State agencies.

b. Use of health care facilities.

(1) To require, subject to the payment of reasonable costs …, a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary to respond to the public health emergency, as a condition of licensure, authorization or the ability to continue doing business in the State as a health care facility. After consultation with the management of the health care facility, the commissioner may determine that the use of the facility may include transferring the management and supervision of the facility to the commissioner for a limited or unlimited period of time, but shall not exceed the duration of the public health emergency. In the event of such a transfer, the commissioner shall use the existing management of the health care facility.

How long might a health emergency last? Can a hospital challenge the state's determination of the duration of the emergency?

(2) Concurrent with or within 24 hours of the transfer of the management and supervision of a health care facility, the

commissioner shall provide the facility with a written order notifying the facility of:

(a) the premises designated for transfer;

(b) the date and time at which the transfer will commence;

(c) a statement of the terms and condition of the transfer;

(d) a statement of the basis upon which the transfer is justified; and

(e) the availability of a hearing to contest the order, as provided in paragraph (3) of this subsection.

(3) A health care facility subject to an order to transfer management and supervision to the commissioner pursuant to this section may request a hearing in the Superior Court to contest the order.

(a) Upon receiving a request for a hearing, the court shall fix a date for a hearing. The hearing shall be held within 72 hours of receipt of the request by the court, excluding Saturdays, Sundays and legal holidays. The court may proceed in a summary manner. At the hearing, the burden of proof shall be on the commissioner to prove by a preponderance of the evidence that transfer of the management and supervision of the health care facility is reasonable and necessary to respond to the public health emergency and the order issued by the commissioner is warranted to address the need.

(b) If, upon a hearing, the court finds that the transfer of the management and supervision of the health care facility is not warranted, the facility shall be released immediately from the transfer order.

(c) The manner in which the request for a hearing pursuant to this subsection is filed and acted upon shall be in accordance with the Rules of Court.

Why might the following section be very important to hospitals?

(4) A health care facility which provides services or the use of its facility or whose management or supervision is transferred to the commissioner pursuant to this subsection shall not be liable for any civil damages as a result of the commissioner's acts or omissions in providing medical care or treatment or any other services related to the public health emergency.

(5) For the duration of a state of public health emergency, the commissioner shall confer with the Commissioner of Banking and Insurance to request that the Department of Banking and Insurance waive regulations requiring compliance by a health care provider or health care facility with a managed care plan's administrative protocols, including but not limited to, prior authorization and pre-certification.

c. Control of property. To inspect, control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation or other means, the use, sale, dispensing, distribution or transportation of food, clothing and other commodities, as may be reasonable and necessary to respond to the public health emergency.

This section grants a great deal of leeway over most property. Is the "reasonable and necessary" requirement a serious limitation on this power?

d. To identify areas that are or may be dangerous to the public health and to recommend to the Governor and the Attorney General that movement of persons within that area be restricted, if such action is reasonable and necessary to respond to the public health emergency.

N.J. Stat. 26:13-9

Reasonable reimbursement, meanwhile, is determined and awarded by a State Public Health Emergency Claim Reimbursement Board (N.J. Stat. 26:13-24). How well does the New Jersey statute fit with what we already know about the Takings Clause and the limitations on it provided by the police power?

THE MAYOR OF DES MOINES DECLARES AN EMERGENCY

The massive floods of 1993 caused disruption throughout Des Moines, including the incapacitation of the city's water treatment facility. In response, the Mayor issued a proclamation of emergency that ordered businesses to provide their own sanitation facilities for employees. Most businesses complied, but some simply ignored the proclamation. The city began to receive complaints from employees that they were being forced to work in unsanitary conditions. The city's lawyers had to face the question of whether and how the proclamation could be enforced. The city's chief lawyer described the result:

> … Iowa's state code provides for no specific penalty in this situation. Iowa statutes simply provide that in times of emergency the mayor may "govern the city by proclamation." The Legal Department reasoned that if the mayor can govern by proclamation, then the mayor can do by proclamation whatever the city council exercising the city's home rule powers can do by motion, resolution, amendment, or ordinance. We reasoned further that since the initial proclamation stated that all future proclamations were to have the force and effect of law, the proclamation requiring businesses to cease occupying their business premises had the same effect as an ordinance. Consequently, since the original proclamation provided that the violation of a proclamation would be considered a violation of law punishable as such, then a violation of a proclamation could be prosecuted as a simple misdemeanor under the Iowa Code and would be punishable as such.
>
> In the face of open defiance of the second proclamation by a small handful of businesses, the Legal Department advised the mayor and city staff to advise the public that violators would be prosecuted for misdemeanor violations. Fortunately for all concerned, the need to resort to such eventualities was avoided by the restoration of water service …
>
> Nowadzky (1995)

Takings, Emergencies, and Public Policy

The Takings Clause is not merely an after-the-fact issue. From a policy standpoint, compensation for perceived takings could be a crucial issue both for the government and hospitals in preparing to react to emergencies:

> Because the availability, type, or amount of compensation under the Takings Clause is uncertain, the Clause is not an incentive for hospitals to comply with the orders of public health authorities during a pandemic. In the case of a wide-scale public health emergency requiring multiple isolation and quarantine centers capable of using sophisticated medical technology, the threat of massive amounts of litigation regarding the compensation due to hospitals is likely to cool the eagerness of hospitals to comply with the orders of public health authorities. It could also make the government think twice about designating hospitals as isolation and quarantine centers. This fear may dilute the response to the emergency, cause delay, and adversely affect the public's health. The undeveloped state of our Takings Clause jurisprudence in the context of public health emergencies encourages hospitals to protect themselves by resisting such orders in the first place. Resistance becomes far more attractive than taking the chance of complying and engaging in protracted litigation about the amount of compensation due afterward.

Do these concerns help explain or justify the distinction between eminent domain and "public use" on the one hand and the police power and protecting the public welfare on the other?

Are hospitals better off preparing to be unprepared?

> "Demoralization costs" are a less apparent danger to the viability and quality of our health care system from the uncertainty surrounding compensation for takings in public health emergencies. A "demoralization cost" is the loss in utility

> that can be attributed to the likelihood that a property owner, knowing that the compensation she receives will be inadequate if her property is taken, will fail to maintain the property or use it properly. A hospital that knows that it is unlikely to receive adequate compensation for its losses if it is designated as an isolation or quarantine facility has little economic incentive to build additional capacity or invest in additional equipment in anticipation of a pandemic. In this context, demoralization costs may take the form of hospitals choosing to make themselves less attractive isolation or quarantine centers by channeling funds away from pandemic preparedness. Hence, hospitals that might have been well-prepared for a pandemic may consciously choose to under-prepare so that they can reap the financial benefits related to treating the more lucrative patients that isolation and quarantine centers will have to turn away. A perverse incentive to under-prepare such as this works to the severe detriment of the public's health by decreasing overall pandemic preparedness.
>
> Williams (2007)

■ ■ Critical Thinking ■

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