

The Public's Health and the Law in the 21<sup>st</sup> Century  
5<sup>th</sup> Annual Partnership Conference

Concurrent Session

**Seizure of Private Property: Powers and Protections**

Tuesday, June 13, 2006  
4:00-5:30 pm

Moderator: Edward P. Richards III, JD, MPH, Harvey A. Peltier Professor of Law, and Director, Program in Law, Science and Public Health, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA

Panel: Ernest B. Abbott, JD, MPP, Disaster Relief Law Specialist, FEMA Law Associates, PLLC, former general counsel, FEMA, Washington, DC

Peter Baldrige, JD, General Counsel, California Department of Health Services, Sacramento, CA

Howard K. Koh, MD, MPH, Harvey V. Fineberg Professor of the Practice of Public Health and Associate Dean for Public Health Practice, Harvard University School of Public Health, Cambridge, MA

Session Purpose:

The session will cover the reasons why a government could come to the point of deciding it needs to control a private health care facility, to any degree - whether an entire facility, part of a facility, or other supplies and resources.

The types of legal issues posed may include both federal and state emergency powers. Several types of players involved, including health care providers, their legal counsel, and the courts. There could also be implications for patients at these facilities. The session will also delve into some of the legal issues raised during a public health emergency situation concerning the "taking" of a private hospital or its resources. Panelists will work through these issues as they discuss a hypothetical hospital seizure scenario.

The goal is to provide attendees with an understanding of the relevant legal issues, supplemented with personal experience from the panel as they work through a hypothetical seizure scenario to illustrate the legal issues raised. Through the hypothetical, the session will offer an interesting way for the audience to learn about the relevant issues in a non-lecture format and will offer opportunities for the audience to participate as the situation unfolds.

Learning Objectives:

By the close of this session, participants will be able to:

- Articulate a general understanding of the legal issues raised regarding takings of private property in emergency situations, particularly related to hospitals and hospital resources; and
- Explain how the legal issues might play out in a real-world scenario, identifying the relevant issues, questions and concerns that might play out in their home jurisdictions.

Session Convener:

Public Health Law Program, CDC

Resource Materials:

WWW page for more information and full-text cases: <http://biotech.law.lsu.edu/cdc/cdc-2006.htm>

A hypothetical seizure scenario will be distributed as a handout.

Lessons Learned:

1. Ernest B. Abbott  
 In catastrophic events chaos reigns – and sometimes government officials must act so quickly that they seize property in order to save lives, protect property, and protect the public health and safety. Government police power authority to do so is clear. As was demonstrated during Hurricane Katrina, state governors and even local police officials have authority to (for example) commandeer busses to evacuate of an afflicted area, or commandeer or reallocate fuel to assure that rescue vehicles can continue to operate. This authority extends to the ability to commandeer hospitals and hospital equipment and pharmaceuticals, and exists at both the state and federal level – using either the state's police power authority (usually expressly set forth in emergency statutes) or specialized federal laws or the Defense Production Act. But 'voluntary' procurements – whether standard competitions, or pre-event contingent contracts, or even emergency procurements – are almost always preferable to the 'commandeering' kind, particularly where what is sought is not just a facility (such as a hospital's physical plant) but a *system* of supplies and facilities and employees and contractors and management that can effectively provide hospital/medical services only when working together. Authority to 'commandeer' people to work in emergency situations is extremely limited; commandeering people has substantial civil rights connotations and tends to generate hostility to government rather than foster the public service and volunteerism that characterizes residents' and business' responses to catastrophic events.
2. Howard K. Koh  
 During a mass casualty event such as pandemic influenza, conflicting risks and benefits complicate any consideration of government control of private assets. On one hand, an effective community response to a pandemic would likely require full utilization of all healthcare facilities. Smaller community hospitals may especially require extra support in order to continue operations in the face of increased demand. Some would argue that government seizure and reallocation of scarce assets could be a viable means to balance discrepancies in capital and resources among institutions. However, government seizure and redistribution of assets may also lead to a disincentive for preparedness. As an example, in the case of ventilators, larger hospitals may be discouraged from investing in

units that would be deployed elsewhere, while smaller hospitals may be deterred from fully purchasing them knowing that the state would ultimately assure availability. Furthermore, ventilators require specific critical care personnel for operations, and the redistribution of appropriate staff would introduce yet another set of legal and logistical challenges.

2. Edward P. Richards III

Seizure of Private Property

There are clear constitutional guidelines for seizing private property. If the property is seized and destroyed to protect the public health and safety, then the constitution does not require the government to pay compensation for the property. The owner of the property is entitled to a hearing to determine if the seizure was lawful, but this hearing may be provided after the property has been seized and destroyed. If the seizure was unlawful, the government must pay compensation.

Example References:

North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) ; Juragua Iron Company v. United States., 29 S. Ct. 385, 212 U.S. 297 (1909); and Surocco v. Geary, 3 Cal. 69, 1853 WL 639, 58 Am.Dec. 385 (Cal. Jan Term 1853)

Seizing Persons/Forced Work

Traditional seizure cases were simple, such as seizing a boarding house to use as a pest house. Modern health care is much more complex. While the government might seize a hospital, it could not operate it without its staff. This raises the question of whether the government, and especially the states, can force people to work at their jobs. Since surveys show that significant numbers of health care workers will not show up for work during an emergency such as an influenza pandemic, it can be expected that absenteeism will be even higher if there is a government seizure. If the workers do not trust the government to run the facility safely, which is likely in the light of government actions taking place in the wake of Hurricane Katrina, few workers may be willing to stay in their jobs. There is very little precedent for forced work, outside the military and jury duty, and a real question about its constitutional limits. This leads many public health law experts to advise negotiated agreements with facilities, based on regulatory powers, rather than seizures under the police power.

Example References:

Selective Draft Law Cases, 245 U.S. 366 (1918); Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004); and Korematsu v. United States, 323 U.S. 214, (1944).