

MEMORANDUM

To: Governors' Offices
From: National Governors Association
Re: Overview of State Actions to Commandeer and Inventory Private Property
Date: April 20, 2020

Background

As governmental entities at all levels continue to implement COVID-19 response efforts, states are determining what private property (e.g., medical supplies, personal protective equipment, hotel rooms) is currently needed and may be needed in the future to help respond to the crisis.¹ Over the last six weeks, several governors have issued orders authorizing state agencies to commandeer property for public health purposes. In addition to these actions, governors are issuing orders requiring hospitals, as well as non-essential healthcare facilities and businesses, to report their inventory of certain medical equipment and supplies. As governors continue to take action around commandeering and/or the inventorying of private property, states should consider potential issues related to the implementation of these orders during an emergency period.

This memorandum provides an overview of state action and potential issues for states to consider when contemplating commandeering or inventorying actions. Specifically, it: (1) provides an overview of state legal authority; (2) highlights state actions to date and identifies key elements within commandeering and inventory orders; and (3) underscores potential issues for governors to consider when taking these actions.

This memorandum is for the sole and exclusive use of the members of the National Governors Association and gubernatorial staff. It is intended to provide references to state and federal statutes, regulations, executive orders, and other resources that are currently in the public domain. NGA conducted independent research and consulted with leading legal experts on the issues raised in this memorandum.² This research memorandum is not legal advice. Definitions of legal terms and terminology vary from state to state. States should consult their legal counsel and Attorney General's office and reference relevant statutes and case law for state-specific procedures and guidance.

Legal Authority to Commandeer & Inventory Private Property

Governors have the authority to commandeer and inventory private property in an emergency for the purpose of protecting the health and safety of their citizens.³ Governors derive this authority from their police powers and/or state statutes.⁴ However, this authority is not unlimited, and

¹ For more information on state responses to COVID-19, please see [NGA's Coronavirus Website](#). Supply issues remain a focus of NGA. For more information, please see NGA's memoranda on [The Defense Production Act & Executive Action Taken in Response to COVID-19](#) and [Gubernatorial Actions to Support Medical Surge Capacity](#). Please also see NGA's State Coronavirus Action Network call on [Supply Chain Challenges and the Defense Production Act](#) (Password: e9?s\$84=).

² NGA thanks Professor Bernadette Meyler for her support developing this memorandum. Professor Meyler is the Carl and Sheila Spaeth Professor of Law at Stanford University School of Law.

³ Nan D. Hunter, *The Law of Emergencies* (2009).

⁴ U.S. Const. amend. X. See Also, *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) ("The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that

governors' powers are subject to restrictions under the U.S. Constitution, state constitutions, and federal and state law.⁵ These constraints are designed to ensure that the property taken has a sufficient connection to the public health emergency and that just compensation is provided to the owner.⁶ While the president also retains this power, local officials do not have this authority unless specified in state statute.^{7,8}

As applied to COVID-19 now and in the future, legal counsel should review the restrictions to this emergency power in their own state statutes as well as relevant legal precedent. When determining whether commandeering property constitutes a taking that requires just compensation, courts are likely to consider the specific fact-based circumstances, including the nature of the confiscation, the emergent situation, and the purpose of the taking.⁹

State Action in Response to COVID-19

Over the last two months, states have sought to stop the spread of COVID-19 and have strived to avoid imposing undue economic burdens on businesses. As states approach their respective projected peak number of cases, governors are actively engaging the business community and negotiating agreements to use private property, where needed, to support COVID-19 responses efforts. Anticipating the potential necessity for commandeering private property as the COVID-19 crisis grows, some governors are taking action to inventory supplies and explicitly lay out procedures for potential commandeering.

State COVID-19 Commandeering Orders

As of April 16, at least three governors ([California](#), [New Jersey](#), and [Pennsylvania](#)) have issued executive orders explicitly invoking the state's authority to commandeer property during an emergency.¹⁰ While governors may not need to issue an executive order to exercise their commandeering authority, they may do so nonetheless in order to lay out the relevant statutory provision, identify specific categories of businesses, and articulate the purpose of the authority to protect the public health and welfare of the state. In addition to formal commandeering orders,

relate to matters completely within its territory and which do not by their necessary operation affect the people of other States.”).

⁵ The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. The Clause applies to the States via the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). Courts have long recognized a “public necessity” exception to the Takings Clause in the U.S. Constitution, leaving no recourse for owners whose property is damaged or destroyed for the public use in a time of urgent necessity. Supreme Court precedent requires “an actual emergency with immediate and impending danger” to support a necessity defense. See *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1379 (Fed. Cir. 2013).

⁶ Many states have passed statutes or constitutional provisions to require governments to pay for taking private property during an emergency, but such laws do not guarantee compensation in emergency cases. Some courts have interpreted state laws to apply only to “takings” outside the exercise of the state’s police powers.

⁷ Nan D. Hunter, *The Law of Emergencies* (2009).

⁸ The federal government has already taken the formal steps to allow the appropriation of private property. President Trump authorized the administrator of the Federal Emergency Management Agency (FEMA) to exercise the right of eminent domain to acquire both physical facilities and supplies when he declared a national emergency under the Stafford Act on March 13, 2020. Even though FEMA is required to compensate owners, the Stafford Act also allows for an immediate right of possession.

⁹ *National Board of YMCA v. United States*, 396 F.2d 467, 473, 1968 (“Mindful of the Supreme Court’s caveat in *Caltex* that each case in this category must be judged on its own facts”).

¹⁰ [California](#) issued an executive order on March 12, 2020. [New Jersey](#) issued an executive order on April 2, 2020. [Pennsylvania](#) issued an executive order on April 8, 2020.

state-issued public health emergency orders may also include provisions around state regulation or taking of private property—especially if shortages arise.

All states have been entering into voluntary contracts with the private sector to meet the needs of the state in response to the COVID-19 crisis. In states where governors have invoked their commandeering authority, they are doing so “as necessary” or as a measure of last resort. For states with commandeering orders, specific industries have been put on notice that state action to commandeer property might be taken if voluntary compliance is no longer possible. Examples of property might include buildings, hotels, land, food, medicine, testing supplies, medical equipment, personal protective equipment, parts, and fuel.

Key elements of COVID-19 commandeering orders include:

- **Empowered agency.** Orders specify which agency within the state is authorized and empowered to commandeer.
 - California: California Health and Human Services and the Office of Emergency Services.
 - New Jersey: The State Director of Emergency Management, who is also the Superintendent of State Police.
 - Pennsylvania: The Pennsylvania Emergency Management Agency.
- **Authorizing statute.** Orders specify which state statute is invoked to authorize commandeering during an emergency.
- **Property identified.** Orders identify specific property that could be commandeered. While specificity may not be required to ensure compliance with the state constitution and statutory restrictions, states are able to provide notice to businesses and property owners of potential commandeering.
- **Purpose.** Orders specify that the reason for authorizing this action is to protect the health and safety of citizens of the state. Some orders include additional justifications for the need to acquire property.
- **Compensation.** Orders include statements regarding compensation and the applicable state statute for providing compensation.¹¹

State COVID-19 Inventorying Orders

In at least six states ([Colorado](#), [New Jersey](#), [Minnesota](#), [Ohio](#), [Pennsylvania](#)), governors have issued orders requiring businesses to report their inventories of certain medical equipment and supplies.¹² Although governors have clear authority to conduct inventorying during emergencies absent executive action, formal inventorying orders may help provide additional clarity of supply levels and help coordinate statewide response efforts. In some orders, the purpose of inventory reporting requirements is to help the state identify where all supplies are located. This data may be used to inform a statewide dashboard of supplies and equipment. Inventorying may also help determine the necessity of potential commandeering actions in the future.

¹¹ Pennsylvania’s order is specific regarding compensation stating that, “[t]he compensation price of PPE, pharmaceuticals, and other medical resources shall be the average price at which the same or similar consumer goods or services were obtainable in the affected areas during the last seven days immediately prior to March 6, 2020.”

¹² [Colorado](#) issued an executive order on March 19, 2020. [New Jersey](#) issued an executive order on March 23, 2020. [Minnesota](#) issued an executive order on March 23, 2020. [Ohio](#) Department of Health issued an order on March 30, 2020. [New York](#) issued an executive order on April 7, 2020. [Pennsylvania](#) issued an executive order on April 8, 2020, which included inventory requirements and authorized commandeering.

Key elements of COVID-19 Inventory Orders include:

- **Entities subject to the order.** Under many of these orders, non-hospital entities are required to report. Some orders are very broad and require any entity within a product's supply chain to provide a report.
- **Property to be reported.** Most orders specify certain medical equipment and supplies that must be reported.
- **Process for reporting.** Some orders include specific processes for reporting inventories to the state, such as online forms and portals.
- **Exceptions.** Some orders provide exceptions for medical equipment in transit within the state or for personal use only.

Potential Commandeering Issues to Consider

When deciding whether to commandeer property during the COVID-19 public health crisis, governors should consult state constitutional and statutory requirements. Potential issues to consider include:

- **Ensuring that the property taken has a sufficient connection to the public health emergency.** While courts are likely to interpret a governor's authority broadly, the state would need to demonstrate that the commandeered property had a sufficient connection to the COVID-19 crisis. Current orders list specific property to be taken and articulate that the property listed is for the purpose of addressing the needs of the public during the public health emergency. States should be aware that overly broad orders may make it difficult for property owners to be aware that their property could be commandeered and could lead to legal challenges.
- **Determining just compensation.** Following the taking of private property in response to the COVID-19 emergency, states may be required to provide the owner just compensation. In determining the appropriate level of compensation, courts are likely to take a more expansive approach due to the emergent nature of this crisis. While recognizing that in a time of emergency some products or property might have a higher value in the marketplace, the court's determination would not allow for unlawful price gouging.

Conclusion

When considering state action to commandeer private property during a public health emergency, governors should be aware of potential constitutional or statutory restrictions. While states have broad authority during an emergency to protect the health and safety of their citizens, use of the commandeering authority could trigger legal challenges, specifically around the determination of just compensation. NGA will continue to track this issue and compile lessons learned from state officials and legal experts.