The federal government’s potential power to coordinate or take state assets during emergencies

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ABSTRACT

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) allows the federal government to intervene in emergency response efforts without the consent of state governments when there is an emergency that involves a responsibility or authority that is exclusively or pre-eminently granted to the United States. This statute may allow the federal government to coordinate the use of state assets when a state is unable to protect its citizens. Furthermore, the federal government could be able to take state-owned assets and resources under the Takings Clause of the US Constitution to serve the public purpose of responding to a wide-scale emergency as long as there is just compensation for such use. The federal government has yet to employ the Stafford Act or the Takings Clause to coordinate or take state emergency response assets, and although it is unlikely that the federal government would do so in the future, such scenarios may occur under the current legal framework.

Key words: emergency management, state, federal, Stafford Act, eminent domain, Takings Clause

INTRODUCTION

There is confusion among some state emergency management officials regarding whether the Stafford Act and eminent domain laws prevent the federal government from commandeering or taking state resources during certain emergency situations. The Stafford Act indeed allows the federal government to coordinate state emergency response efforts (which may include the use of state assets) under certain dire circumstances. Furthermore, the federal government might be able to exercise eminent domain powers over state-owned property despite the reference to “private property” in the Takings Clause of the US Constitution. It must be stressed that such a federal coordination or taking of state resources has not occurred in past emergencies and is highly unlikely to occur in the future; however, emergency officials should be aware that such federal actions against state property are not outside the realm of possibility, especially if a disaster cripples a state’s response capabilities.

THE FEDERAL GOVERNMENT’S POTENTIAL POWER OVER STATE ASSETS UNDER THE STAFFORD ACT

Emergency response efforts in the United States begin at the local level and should be managed at the lowest jurisdictional level possible. There are indeed incidents on a daily basis across the country to which local governments respond capably without need of outside assistance. Based on this principle, the federal government generally cannot interfere with an individual state’s right to protect its citizens.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) recognizes this tenet of federalism that grants states the power to protect its citizens. The Act functions on the “pull approach” in that the federal government may provide emergency assistance to a state only when the state so requests. In particular, the Act provides that before the federal government can assist a state during an incident, the state must first request the president to declare an emergency or a major disaster. Both types of requests must be “based on a finding that the incident is of such severity and magnitude

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that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. The Act further recognizes the state power to protect its citizens by providing that during a declared emergency or major disaster, the federal government may “accept and utilize the services or facilities of any State or local government ... with the consent of such government” (emphasis added).?

However, the Stafford Act also provides certain exceptions to the rule that a state government must first request federal assistance before receiving it. One such exception is that the federal government may intervene during an incident response without any request from a state if “an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which ... the United States exercises exclusive or preeminent responsibility and authority.”

Some legal experts believe that this exception grants the federal government the power to coordinate the use of state assets when a state's emergency response capabilities are unable to protect its citizens (eg, ref. 9[p529]).

This provision has never been exercised, and the courts have not had an opportunity to interpret it.9(p530) However, it is not outside the realm of possibility that the federal government will use this provision to intervene in a catastrophe without a state's consent. In fact, many have argued that the Bush administration had the power under this provision to intervene in Louisiana after Hurricane Katrina without Governor Kathleen Blanco’s consent. The argument is that the federal government had the responsibility to respond to this very large scale of death and destruction that the states could not handle.9(p529) Should there be another large domestic catastrophe that overwhelms a state's resources, there may be a stronger push for the federal government to assume the lead in coordinating emergency response efforts.9,11,7,4

THE FEDERAL GOVERNMENT’S EMINENT DOMAIN POWER OVER STATE-OWNED ASSETS

The Takings Clause of the US Constitution provides in part: “nor shall private property be taken for public use, without just compensation.”12,13,§ Thus, this clause places a condition on the government’s inherent power of eminent domain so that any taking must be for a public use with just compensation.14,15,¶ The “public use” requirement is defined very broadly so that it is satisfied as long as the government does not act in bad faith or in a way that is arbitrary or capricious.16 The government needs only a rational intent for the property to serve a public purpose.17 Meanwhile, “just compensation” is generally measured as the property's fair market value.17,18

The Takings Clause also includes a reference to private property, which is usually understood to be real property (ie, land) that is privately owned. However, private property can be construed more broadly to include state-owned real property and private personal property (ie, moveable property). In other words, the federal government has the power to condemn state-owned lands and private personal property under eminent domain (as long as it is for public use with just compensation). Given these powers, it can be reasoned that the federal government could in turn take state-owned assets and resources, even if there is no direct precedence for such takings.

Private property includes state real property

Case law on this subject clearly states that the federal government is able to extend its eminent domain power over the states and their lands.19 In the 1940s, the US government attempted to take land in Missouri for use as a post office and customhouse. However, this land was already under public use as a park that included a county courthouse and a city hall. The Supreme Court ruled that even though this land was already used for public use as a park that included a county courthouse and a city hall, the Supreme Court ruled that even though this land was already used for a public purpose by a subdivision of the state of Missouri, the federal government had...

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1See ref. 9(p530-531), which describes public's disapproval of the Bush administration's reluctance to intervene after Katrina.
2See ref. 11, in which it is argued that the Insurrection Act, 10 U.S.C. §§331-334, allows the federal government to use the military to restore public order when a state is unable to do so.

9The Takings Clause applies to both the federal and state governments.
10[The Takings Clause] is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power (see ref. 14).
the power to acquire title to this land with just compensation for it.\textsuperscript{14}

Following this case, the courts have repeatedly affirmed the federal government’s eminent domain power over state real property.\textsuperscript{18,20,21} The federal government’s eminent domain power also extends over Indian tribes\textsuperscript{22,23} and territories.\textsuperscript{24}

**Private property includes personal property**

The government has the power to take not only real property but also personal property.\textsuperscript{25,26,\#} In fact, some scholars believe that the original intent of the Takings Clause was to prevent the government from arbitrarily seizing citizens’ supplies for the military.\textsuperscript{27}

In United States v. Buffalo Pitts Co.,\textsuperscript{25} the federal government hired a contractor for a certain project that the case does not describe. To complete the project, the contractor purchased a traction engine from a third party through a chattel mortgage. The contractor was unable to complete the project and also defaulted on its mortgage payments. The government then took possession of all of the contractor’s equipment, including the traction engine. The third party notified the government of its lawful ownership of the engine due to the defaulted mortgage payments; however, the government refused to deliver the engine to the third party. The Supreme Court ruled that the Takings Clause required the government to pay just compensation for the use of the engine. The courts have ruled repeatedly since then that if the government takes or uses personal property (including equipment) that belongs to another person or entity, just compensation must be provided to the owner.\textsuperscript{28-30}

**Private property likely includes state-owned assets**

There are four types of property over which the federal government could possibly exert its power of eminent domain: private real property; state real property; private personal property; and state personal property (or moveable assets). The earlier discussion shows that the federal government can take the first three of those four types of property; however, there have been no published cases that address the extension of this power to the fourth type of property: state-owned assets. However, if it is settled that the federal government has the power to take state real property and private personal property for public use with just compensation, it follows logically that the federal government can extend this power of eminent domain over state assets.

The courts have allowed the federal government to take state-owned real property (despite the reference to private property in the Takings Clause) because the federal government must be able to exercise its sovereign eminent domain power to the fullest extent. No individual, state, or any other entity can impede this sovereignty.\textsuperscript{31,\#} This same line of reasoning would most likely extend to a case involving the taking of state moveable assets.

There is a hint of this federal power over state assets from a dated but relevant Supreme Court case:

“It has not been seriously contended ... that the United States government is without power to appropriate lands or other property within the States for its own uses[.] Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed” (emphasis added).\textsuperscript{32}

In the context of an emergency, especially a kind that overwhelms the response capabilities of a state, one can imagine the forcefulness of this argument that no entity should stand in the way of the federal government’s responsibility to protect its citizens when a state is unable to do so.

**CONCLUSIONS**

It must be emphasized again that it is unlikely for the federal government to commandeer or take state

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\*\*The government may take personal or real property whenever its necessities or the exigencies of the occasion demand*” (see ref. 25).
emergency resources. Very large catastrophes that completely overwhelm state and local response capabilities are rare, and the federal government does not want to face the political ramifications of such an invasive exercise of power over the states. However, state emergency officials should be aware that if there is such a large-scale disaster under the current legal framework, the Stafford Act and the laws of eminent domain may empower the federal government to assume the lead in response efforts and use state resources without the state’s consent.

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REFERENCES


12. U.S. Constitution Amendment V.


