

Supreme Court and Appellate Alert

Akin Gump
STRAUSS HAUER & FELD LLP

COVID-19: Emergency Powers and Constitutional Limits

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Key Points

- Our country is in a national state of emergency over COVID-19. Almost every state has declared its own state of emergency, and many states have started invoking their emergency powers.
- An emergency does not allow either the federal government or state governments to grant themselves any new powers. The federal government is still one of enumerated powers, and states cannot act arbitrarily.
- For extreme government actions such as commandeering and confiscation, American businesses may be able to invoke constitutional rights to protect their property.

On March 13, 2020, President Trump declared a national state of emergency over the coronavirus disease (COVID-19) outbreak. Almost every state has declared a state of emergency as well (oftentimes with local governments following suit). Pursuant to such declarations, states have invoked emergency powers: schools have been closed; public gatherings of a certain size are banned; and many nonessential businesses have been shut down. This alert addresses two main questions stemming from such actions: (1) What authority do federal and state governments have in a national emergency? (2) What limits does the U.S. Constitution place on their authority and, relatedly, what federal constitutional rights could American businesses invoke to protect their property? Because of the variety of state and federal laws involved, both questions are addressed at a high level. Whether a specific governmental action is constitutional will largely depend on particular circumstances.

Governmental Authority in a National Emergency

As the Supreme Court has said, “an emergency may not call into life a power which has never lived,” but “emergency may afford a reason for the exertion of a living power already enjoyed.”¹ In other words, by declaring a national or state emergency, neither the federal government nor state governments can grant themselves any *new* power. Rather, the emergency declaration allows governments to unlock powers that normally lie dormant.

Contact Information

If you have any questions concerning this alert, please contact:

Pratik A. Shah

Partner
pshah@akingump.com
Washington, D.C.
+1 202.887.4210

James E. Tysse

Partner
jtysse@akingump.com
Washington, D.C.
+1 202.887.4571

Z.W. Julius Chen

Partner
chenj@akingump.com
Washington, D.C.
+1 202.887.4475

Nnedinma C. Ifudu Nweke

Partner
nifudu@akingump.com
Washington, D.C.
+1 202.887.4013

Thomas J. McCarthy

Partner
tmccarthy@akingump.com
Washington, D.C.
+1 202.887.4047

Margo Rusconi

Associate
mrusconi@akingump.com
Washington, D.C.
+1 202.887.4163

Federal Government

The federal government is one of “enumerated powers.” As a result, its options in the wake of COVID-19 are limited to what the Constitution authorizes and federal statutes permit. Much of its power to respond to national emergencies is based on statutory authority derived from the Commerce Clause, which gives Congress broad ability to regulate foreign and interstate commerce. It can also tax and spend for “the common Defense and general Welfare.” Thus, Congress can enact laws regulating persons entering the country or traveling across states. And it can offer financial assistance to both states and individuals.

Although these powers are granted to Congress—not the President—that does not stop the President from responding to a national emergency via executive action. As Justice Jackson explained in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the extent of the President’s authority in an emergency will depend on whether he acts in accordance with congressional will.² Accordingly, any presidential (or other executive agency) action is subject to review and curtailment by the federal courts if it is deemed at odds with Congress’s explicit or implicit directives, or otherwise clearly exceeds recognized authority.

State Governments

State governments (absent federal preemption) maintain even broader powers than the federal government. While the federal government is one of enumerated powers, state governments can exercise what is known as their “police power.” This power is inherent and limited only by the federal Constitution, along with a particular state’s own constitution. Most importantly, states generally retain the power to make laws for the purpose of protecting the health, safety and welfare of its people.

Constitutional Limits on Such Authority That Businesses Can Invoke

Even if either the federal or a state government is acting within its authority to respond to COVID-19, a state of emergency does not give it free rein to violate constitutional rights. That said, the existence of the emergency may justify limiting the scope of certain rights, at least on a temporary basis. When considering current and potential government action in the wake of COVID-19, two rights are top of mind for businesses in particular: due process and just compensation. Below, we provide a brief overview of the scope of those rights during the current national state of emergency.

Due Process Rights

The Fifth Amendment of the U.S. Constitution provides that no person may “be deprived of life, liberty, or property, without due process of law.” Procedural due process requires certain procedures before a law is applied, such as notice or the opportunity to be heard. Substantive due process looks at the validity of the law being applied.

The Supreme Court has viewed procedural due process as flexible, and courts will consider a variety of factors when determining what protections are required. Courts will consider the private interest affected but will consider the government’s interests as well. Thus, the Supreme Court has found that there are emergency situations in which postponing notice and hearing does *not* deny due process. Under present circumstances, a court may find that compelling public interests triggered by COVID-

19 justify summary action subject only to later judicial review. If temporarily excused, customary due process procedures—including notice and an opportunity to be heard—will be required when the exigency subsides.

Substantive due process is unlikely to offer any greater protections. Where the government action does not discriminate against minority groups or curtail fundamental rights, courts will employ what is known as “rational basis review.” To meet this level of scrutiny, the law in question need only be rationally related to a legitimate government interest. Even outside emergency situations, courts rarely strike down laws under this test. Given the current circumstances, a court will be even more likely to defer to the government.

Takings Clause

Although the Due Process Clause does not afford businesses much protection, the Takings Clause of the Fifth Amendment may offer more. Under the Takings Clause, the government may not take private property for public use “without just compensation.” But whether an action constitutes a “taking” often depends on the nature of the government’s action. Below, we outline the different takings arguments in three situations:

1. Forced business closures

If the government forces a business to close indefinitely due to the pandemic, it could be considered a “regulatory taking.” In *Lucas v. South Carolina Coastal Council*, the Supreme Court stated that government action depriving owners of “all economically beneficial or productive use of the[ir] land” is a taking requiring just compensation.³ But if the closure is only temporary, then a court will be much less likely to deem it a “taking”; the Supreme Court has said that property “cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.”⁴ Assuming that any closures are temporary, a takings argument is unlikely to prove successful. But longer-term closures, or specialized circumstances that are the equivalent of a permanent closure (such as a closure that imposes an extreme or peculiar hardship on a business), may bolster a takings claim.

2. Commandeering of a business or factory

Whether the commandeering of private property constitutes a “taking” depends on the degree and physical nature of the government’s involvement. Courts often compare *United States v. Pewee Coal Co.*⁵ with *United States v. Central Eureka Mining Co.*⁶ In *Pewee Coal Co.*, the government took over the mine and ran it. Mine officials were deemed agents of the U.S. government; the government required every mine to fly the American flag and for the mines to post placards that read “United States Property!”; and miners were told to dig coal as a “public duty.” That use was considered a taking. By contrast, the Court found no taking in *Central Eureka Mining Co.*, where the government did not take physical possession of the mine or its equipment. Rather, the government called for mining to stop to conserve the manpower and equipment for “more essential” uses, and the halt in use was only temporary. Determining which case is more like yours, and thus whether the government’s commandeering is a taking that requires just compensation, would be a fact-intensive inquiry that would depend on the nature of the government’s involvement and requirements.

3. Confiscation of a business's private property

When the government expropriates private property (e.g., medical supplies), courts regularly find a compensable taking. Courts will look to see whether the government action was in response to imminent peril—such as a spreading fire or a hostile confrontation—or if the property was taken similar to “a procurement of goods and services under contract—in the absence of immediate danger, after deliberation, and for a somewhat later and less temporary use.”⁷ Where the confiscation fits the latter category, it is a taking requiring just compensation under the Fifth Amendment. As for the former, some case law suggests that in times of imminent peril, the government could exercise its police power “with impunity.” But, that notion has only been applied in situations where the government destroyed the property to prevent an immediate danger, as opposed to just confiscating it. Either way, where a given case falls, and whether a business's losses are compensable or noncompensable, depends on its own unique facts.

¹ *Wilson v. New*, 243 U.S. 332, 348 (1917).

² 343 U.S. 579, 637-638 (1952).

³ 505 U.S. 1003, 1016 (1992).

⁴ 535 U.S. 302, 332 (2002).

⁵ 341 U.S. 114 (1951).

⁶ 357 U.S. 155 (1958).

⁷ *National Bd. of Young Men's Christian Ass'n v. United States*, 184 Ct. Cl. 427, 434 (1968), *aff'd*, 394 U.S. 85 (1969).

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