CHAPTER 2

State and Federal Emergency Powers

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As the federal and state response to Hurricane Katrina demonstrated, a failure to understand and utilize legal authorities properly during a disaster can slow response efforts, destroy trust in government, and exacerbate chaos and civil unrest. This chapter will provide an overview of the statutory and constitutional authority for state and federal response to emergencies, including a description of typical state emergency management statutes, a summary of the major federal statutes related to public health emergency response, and a discussion of the constitutional limits on federal actions during a public health emergency.

Public health emergencies have unpredictable and far-reaching impacts, which rarely confine themselves to local, state, or even national borders and require officials at all levels of government to respond quickly and flexibly. Almost a century ago, what at first appeared to be a localized cluster of a few particularly serious cases of a garden-variety influenza in March 1918\(^1\) had sickened 25 million and killed 675,000 Americans (out

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1. The report of 18 severe cases of influenza, three of them fatal, in Haskell, Kansas, was among the first reports of the Spanish influenza that would later be recognized as the cause of the pandemic that reached its peak in the fall of 1918 and winter of 1918–1919. **Alfred W. Crosby, America’s Forgotten Pandemic** 18 (Cambridge Univ. Press, 1989); U.S. Dep’t of Health & Human Servs., “The Great Pandemic: the United States in 1918–1919,” Web page, http://1918.pandemicflu.gov/the_pandemic/01.htm (last viewed Sept. 29, 2008).
of a population of 105 million) a year later.\textsuperscript{2} Doctors were in short supply; nurses were in even shorter supply.\textsuperscript{3} Phone service was hobbled by high absenteeism.\textsuperscript{4} Some local governments sought to remedy the dire shortage of coffins by making coffins themselves and seizing shipments meant for other cities.\textsuperscript{5} More recently, Hurricane Katrina battered the Gulf Coast, displacing 770,000,\textsuperscript{6} stranding tens of thousands in New Orleans\textsuperscript{7} after levee and flood-wall breaches flooded 80 percent of the city,\textsuperscript{1} and ultimately killing over 1,400 people in Louisiana alone.\textsuperscript{9} Total property damage was close to $100 billion, making it the costliest disaster in U.S. history.\textsuperscript{10} Almost four years later, the Gulf Coast is still rebuilding; New Orleans has recovered only 72 percent of the population it had, and 36 percent of its housing remains vacant.\textsuperscript{11}

The need for quick, decisive action in response to a rapidly evolving crisis can make legal concerns seem almost trivial. Health-care workers, engineers, police officers, sanitary workers, medicine, and sandbags are needed to deliver services and maintain critical infrastructure; lawyers and laws, some might say, just get in the way. However, while emergencies may require some legal niceties to be overlooked, a clear understanding of applicable legal authorities and safeguards is vital to an effective response effort. Failure to utilize legal authorities properly can slow re-

\begin{itemize}
\item[2.] Crosby, supra note 1, at 205–06; U.S. Dep’t of Health & Human Servs., supra note 1. The pandemic would eventually kill about 20 million people worldwide.
\item[3.] Crosby, supra note 1, at 51.
\item[4.] Id. at 75 (describing the problem in Philadelphia), 97–98 (describing the problem in San Francisco).
\item[5.] Id. at 1, 83.
\item[7.] Id. at 39.
\item[10.] Id.
\end{itemize}
response efforts, destroy trust in government during a time of crisis, and create further chaos and civil unrest. For instance, Hurricane Katrina response efforts were hampered by a dispute over the federal government's role in leading response efforts and by its belief that it did not have the authority to deploy troops to restore order in Louisiana without the governor's permission.\(^\text{12}\) The resulting delay in full deployment of federal resources contributed to the lawlessness that plagued New Orleans in the immediate aftermath of the hurricane and extended the period of time during which evacuees were forced to endure the "barbaric and subhuman conditions" at the New Orleans Superdome and Convention Center.\(^\text{13}\)

This chapter will provide an overview of the statutory and constitutional authority for state and federal response to emergencies, including a description of typical state emergency management statutes, a summary of the major federal statutes related to public health emergency response, and a discussion of the constitutional limits on federal actions during a public health emergency.

**STATE AUTHORITY DURING PUBLIC HEALTH EMERGENCIES**

The authority to respond to public health emergencies is primarily vested with the states and is derived from the police powers reserved to them by the Tenth Amendment. The police power is the "power inherent in the state to prescribe within the limits of the federal and state constitutions reasonable regulations necessary to preserve the public order, health, safety or morals."\(^\text{14}\) For both constitutional and practical reasons, the U.S. Department of Homeland Security’s National Response Framework (NRF) reiterates the importance of the states in emergency response, emphasize-


\(^{13}\) Greenberger, *supra* note 12, at 403–04.

\(^{14}\) Tighe v. Osborne, 149 Md. 349, 356 (1925).
ing that emergencies should be managed at the lowest jurisdictional level possible.¹³

In the exercise of their police powers, states generally grant governors, state health officers, boards of health, and other state and local officials and agencies broad powers to prepare for and respond to public health emergencies. Powers utilized during public health emergencies are most often granted by emergency management and civil defense statutes, and public health statutes relating to communicable disease control.¹⁶ While the exercise of these powers during an emergency is rarely challenged in court, it is usually upheld, both because of judicial reluctance to interfere with actions taken to respond to the exigencies of an emergency and because of the traditional latitude that states are given in the exercise of their police powers.¹⁷

**Emergency Management and Civil Defense Statutes**

Although emergencies are rare events in the popular imagination, they are actually declared quite often. In 2007, the Federal Emergency Management Agency (FEMA) declared 63 major disasters at the request of state governors for events ranging from floods to wildfires,¹⁸ a figure that does not include any local or state emergencies that did not reach the level of major disasters. State and local officials respond to those emergencies using the authorities and structures created by laws that are variously referred to as “emergency management,” “civil defense,” or “emergency


¹⁶.  State constitutions also generally designate their respective governors as commanders-in-chief of their state militias (see, e.g., Md. Const. art. 2, § 8; Cal. Const. art. 5, § 7). This power is not discussed in this chapter because the commander-in-chief power is virtually indistinguishable from the various statutory powers granted to the governor, which include the authority to use the state militia for public health emergency response activities.

¹⁷.  See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1795 (2007) (noting that “[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (internal citations omitted).

powers' statutes. These laws authorize various state and local officials, usually the governor and the chief executive officers of localities, to declare states of emergency, deploy resources, and expend funds for emergency response efforts, order evacuations, and take a variety of other extraordinary actions (including, in some states, suspending the effect of statutes) as necessary to effectively respond to and terminate the emergency. The details vary from state to state, but Maryland's laws are representative of national norms.

Similar to other states, the Maryland Emergency Management Agency (MEMA) Act\(^\text{19}\) defines emergencies broadly as the threat or occurrence of:

- (1) a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion, and any other disaster in any part of the State that requires State assistance to supplement local efforts in order to save lives and protect public health and safety; or
- (2) an enemy attack, act of terrorism, or public health catastrophe.\(^\text{20}\)

The scope of the governor's power after declaring a state of emergency is similarly broad. Under the MEMA Act, the governor may, "in order to protect the public health, welfare, or safety":

- Suspend any statute, rule, or regulation of a state agency or of a political subdivision;
- Compel and control the evacuation of an affected area;
- Control entry to and exit from an emergency area;
- Control movement of people and occupancy of buildings in an affected area;
- Authorize the use of private property for emergency response efforts;


\(^{20}\) Id. § 14-101(c) (West 2003 & Supp. 2006). For a similarly broad definition, see N.Y. McKinney's Exec. Law § 20(2)(a) (defining a disaster as the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident, water contamination, bridge failure or bridge collapse.").
• Provide for temporary housing; and
• Authorize the clearance and removal of debris and wreckage.\(^\text{21}\)

The Governor’s Emergency Powers subtitle, which predates the MEMA Act, grants the governor additional authority to “promulgate reasonable orders, rules, or regulations that the Governor considers necessary to protect life and property or calculated effectively to control and terminate the public emergency . . .” including, but not limited to, orders that:

• Control places of public assembly and amusement;
• Establish curfews;
• Control the sale, transportation and use of alcohol; and
• Control the possession, sale, carrying, and use of dangerous weapons and explosives.\(^\text{22}\)

The breadth of powers granted by such statutes is what makes them so useful for state officials facing unpredictable crises. For instance, the authority to control public gatherings and movement in an affected area is particularly useful to deter transmission of infectious disease during an epidemic or to control civil unrest and looting.

The power to suspend statutes or regulations is one of the most sweeping powers that states can grant. This power can be used to create temporary ad hoc emergency exceptions to statutes that, for instance, impose strict deadlines for court proceedings, limit the scope of practice of healthcare professionals, or bar out-of-state professionals from providing services. Although several states grant this power to their governors,\(^\text{23}\) it has rarely been challenged in court.\(^\text{24}\)


\(^{22}\) Id. § 14-303(b). The statute requires that the governor declare a state of emergency, but it is not clear whether the declaration must be made under the subtitle (which provides for declarations of “public emergencies” and “energy emergencies”) or can be made under any of the statutes authorizing declarations of emergency. A “public emergency” under the subtitle is defined with similar breadth as an “emergency” under the MEMA Act. See Md. Code Ann., Pub. Safety § 14-301(c) (defining public emergency as, among other things, “a crisis, disaster, riot, or catastrophe”).

\(^{23}\) See, e.g., N.Y. McKinney’s Exec. Law § 29-a.

\(^{24}\) Although a smattering of cases mention the power, there are very few that make a holding as to its validity. Those that exist tend to be trial court cases. See, e.g., People v. Haneiph, 191 Misc. 2d 738, 745 N.Y.S.2d 405 (N.Y.C. Crim. Ct., 2002) (upholding the validity of an order suspending the effect of the “speedy trial” statute, pursuant to the governor’s statutory authority to
Procedural requirements for issuing orders and declaration under emergency management statutes are typically minimal. Many statutes impose time limits on orders and declarations but permit renewal for successive periods for as long as the emergency continues. Some require presentation of orders and declarations to the state legislature, which can be given a legislative veto. For the most part, however, there are few checks on the executive’s power during a state of emergency, which, while it allows quick and decisive action, does pose a legitimate concern for civil liberties advocates.

Public Health Emergency Statutes

Emergency management and civil defense statutes are designed to be broad and flexible. However, they do not provide sufficient authority for the measures needed to prepare for and respond to public health emergencies caused by communicable diseases and conditions. Surveillance, compelled medical testing and treatment, quarantine and isolation, and testing and decontamination of contaminated property are traditional tools used to control infectious disease. Power to mandate these and other public health tactics derives both from long-standing public health laws and regulations and from more recently enacted legislation based on the Model State Emergency Health Powers Act.

State and local health officers and boards of health have long used the aforementioned techniques to control infectious disease. In addition to quarantine (the separation of healthy individuals suspected of expo-

“temporarily suspend the specific provisions of any statute” if compliance with the provision would “prevent, hinder, or delay action necessary to cope with the disaster.”).  

25. See, e.g., MD. CODE ANN., PUB. SAFETY § 14-107(a)(3) (describing the 30-day time limit for declarations of states of emergency, with successive 30-day extensions permitted); N.Y. McKinney’s EXC. LAW § 29a(2)(a) (limiting the duration of an order suspending a law to 30 days, with successive 30-day extensions permitted).

26. See, e.g., MD. CODE ANN., PUB. SAFETY § 14-107(a)(4) (permitting the General Assembly to cancel a declaration of state of emergency by joint resolution).

sure to infectious disease from unexposed individuals) and isolation (the separation of infected individuals from those unexposed), authorities sought to prevent and mitigate outbreaks of disease by, for example, requiring immunization for smallpox,\textsuperscript{28} the wearing of masks in public during the Spanish flu pandemic,\textsuperscript{35} and destruction of tubercular cattle.\textsuperscript{36} The laws authorizing these actions remain on the books in many states, but they often fail to take into account either the scientific advances of the last century or the contemporary legal norms for protection of individual rights.\textsuperscript{31}

To correct this deficiency and help states improve their preparedness to respond to emerging public health threats, the Model State Emergency Health Powers Act (MSEHPA) was developed in the wake of September 11 and the anthrax attacks.\textsuperscript{32} Since then, at least 38 states have adopted the MSEHPA in whole or in part.\textsuperscript{33} Because most have adopted only partial or modified versions of the act, it is most useful to use the Maryland law enacted based on the Model Act as an exemplar of a modernized statute for responding to public health emergencies.

The Maryland Catastrophic Health Emergencies (CHE) Act grants the governor, the secretary of health and mental hygiene (Maryland's state health officer), and their designees several powers to detect, prepare for, and respond to a catastrophic health emergency, defined as "a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent."\textsuperscript{34} The powers granted by the CHE Act can be exercised only with respect to conditions caused by "deadly agents," defined as any chemical agent, level of radiation, or

\begin{itemize}
\item \textsuperscript{28} Jacobson v. Commonwealth of Mass., 197 U.S. 11 (1905) (upholding compulsory smallpox vaccination).
\item \textsuperscript{29} Crosby, supra note 1, at 102.
\item \textsuperscript{30} Kroplin v. Truax, 119 Ohio St. 610 (1929).
\item \textsuperscript{34} Md. Code Ann., Pub. Safety § 14-3A-02(a).
\end{itemize}
biological toxin or agent capable of causing extensive loss of life or serious disability.\textsuperscript{35} Some states, following the definition of public health emergency found in the Model Act,\textsuperscript{36} apply different limits; Minnesota, for instance, limits the applicability of many statutory provisions to diseases caused by bioterrorism or new, novel, or previously controlled or eradicated communicable diseases.\textsuperscript{37}

**Power to Seize and Control Property**

The declaration of a CHE triggers sweeping powers to control property and persons. To ensure that the state possesses and can efficiently allocate resources and supplies needed to control the disease or outbreak, the governor may order the secretary or other official to:

- seize anything needed to respond to the medical consequences of the emergency;
- designate and gain access to a facility needed to respond to the emergency, after working collaboratively with health-care providers to the extent feasible; and
- regulate the use, sale, dispensing, and transportation of anything needed to respond to the medical consequences of the emergency, including using:

\textsuperscript{35} Id. § 14-3A-02(c).

\textsuperscript{36} Model State Public Health Act § 1-102 (45) (see supra note 27):

Public health emergency means an occurrence or imminent threat of an illness or health condition that: (a) is believed to be caused by any of the following: (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; or (iii) a natural disaster, a chemical attack or accidental release, or a nuclear attack or accident; and (b) poses a high probability of any of the following harms: (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

\textsuperscript{37} Minn. Stat. Ann. § 144.419. The statute limits the definition of communicable disease to diseases "caused by a living organism or virus and believed to be caused by bioterrorism or a new or novel or previously controlled or eradicated infectious agent or biological toxin that can be transmitted person to person and for which isolation or quarantine is an effective control strategy . . . ." Id. at § 144.419(1)(a)(2).
• rationing;
• stockpiles;
• shipment prohibitions;
• price controls; and
• any other appropriate action.\textsuperscript{38}

These provisions are less expansive than those in the Model Act dealing with control of property during an emergency. The Model Act does not, for instance, require collaboration with health-care providers before using their facilities.\textsuperscript{39} These powers would be useful during, for instance, an influenza pandemic, when medical supplies would likely be in short supply and health-care facilities overwhelmed with both the sick and the worried well. Rationing and otherwise controlling distribution of medicines and other supplies could prevent hoarding and price gouging. Designating ambulatory care centers as medical "surge" sites would allow state officials to ease the pressure on hospitals and emergency rooms.

\textbf{Power to Control and Utilize Health-Care Providers}

To complement the power to commandeer supplies and facilities for the purpose of managing the medical consequences of an emergency, the Maryland CHE Act also authorizes the governor to "order any health care provider, who does not voluntarily participate, to participate in disease surveillance, treatment, and suppression efforts or otherwise comply with the directives of the Secretary or other designated official" during a declared CHE.\textsuperscript{40} Whether or not a CHE has been declared, the secretary has the authority to require health-care providers to develop and implement emergency plans\textsuperscript{41} and to assist in surveillance and investigations related to deadly agents by providing information, making regular reports, and providing the secretary access to facilities that may have been exposed to deadly agents.\textsuperscript{42} The statute defines "health care provider" to include both individual health-care practitioners and health-care facilities.\textsuperscript{43}

\begin{footnotes}
\footnotetext{38. \textit{Md. Code Ann.}, Pub. Safety \textsection 14-3A-03(b)(1)&(2).}
\footnotetext{39. Model State Public Health Act \textsection 6-103(a)(3) (see supra note 27).}
\footnotetext{40. \textit{Md. Code Ann.}, Pub. Safety \textsection 14-3A-03(c).}
\footnotetext{41. \textit{Md. Code Ann.}, Health-Gen. \textsection 18-903.}
\footnotetext{42. \textit{Id.} \textsection 18-904(b).}
\footnotetext{43. \textit{Md. Code Ann.}, Pub. Safety \textsection 14-3A-01(e); \textit{Md. Code Ann.}, Health-Gen. \textsection 18-901(g).}
\end{footnotes}
In addition to being subject to conviction of a misdemeanor for violating an order under the statute,\textsuperscript{44} an individual health practitioner who defies an order issued by the secretary may face punishment by his licensing board, including suspension or revocation of his license and a civil fine.\textsuperscript{45} The Model Act grants state and local health officials even greater authority over health-care providers during a public health emergency, allowing the officials to require providers to "assist in the performance of vaccination, treatment, examination, testing, decontamination, quarantine, or isolation of any individual as a condition of licensure . . . .\textsuperscript{46} The "stick" of mandatory participation in response efforts is accompanied by an important "carrot" in both the Maryland statute and the Model Act: health-care providers are immune from civil liability for acts done in good faith or without gross negligence or willful misconduct when attempting to comply with orders promulgated pursuant to the statute.\textsuperscript{47}

Quarantine, Isolation, and Compelled Medical Testing and Treatment

Finally, both the Model Act and the Maryland CHE Act authorize compelled medical testing and treatment, immunizations, and quarantine and isolation. The Maryland Act generally requires that these steps be "medically necessary and reasonable to treat, prevent, or reduce the spread" of a disease caused by a "deadly agent,"\textsuperscript{48} although the secretary may order an individual to undergo "appropriate and necessary" medical evaluation and treatment if he has "reason to believe" that the individual has been.

\begin{itemize}
\item \textsuperscript{44} Md. Code Ann., Pub. Safety § 14-3A-08 (violations of governor's orders); Md. Code Ann., Health-Gen. § 18-907(a) (violations of secretary's orders).
\item \textsuperscript{45} Md. Code Ann., Health-Gen. § 18-907(c).
\item \textsuperscript{46} Model State Public Health Act § 6-104(d)(1) (see supra note 27).
\item \textsuperscript{47} Md. Code Ann., Pub. Safety § 14-3A-06 (civil and criminal immunity for acts in good faith under a CHE proclamation); Md. Code Ann., Health-Gen. § 18-907(d) (immunity for acts in good faith while attempting to comply with the CHE Act, so long as there is no willful misconduct); Model State Public Health Act § 6-105(b) (see supra note 27) (immunity for actions under the direction of the state during a public health emergency, so long as there is no gross negligence or willful misconduct).
\item \textsuperscript{48} Md. Code Ann., Pub. Safety § 14-3A-03(b)(3) (governor's power to order the secretary to issue orders during a CHE); Md. Code Ann., Health-Gen. § 18-905(a)(1)(ii) (secretary's power to order quarantine on his own initiative).
\end{itemize}
exposed to a deadly agent. In Maryland, these powers may be utilized by the secretary even when there has been no CHE declaration if the secretary determines that the disease can be medically contained without a declaration. The Model Act grants even greater power, permitting state and local public health agencies to compel medical examination, treatment, quarantine, and isolation of individuals who have been or may have been exposed to a contagious disease that poses a "significant risk or danger to others or the public's health[,]" although the action must be the least restrictive means of protecting the public health and safety.

The Model Act and state statutes based upon it took modern, post-
Goldberg v. Kelly due process jurisprudence into account when drafting the provisions relating to quarantine and isolation orders. Under both the Maryland CHE Act and the Model Act, individuals are entitled to appointed counsel and expedited review of the validity of a quarantine order. The acts also allow hearings to be conducted without the personal presence of affected individuals who are unable to appear, as long as either their authorized representative can appear or the hearing is conducted by a means (such as videoconferencing) that allows the individual to fully participate.

50. Id. § 18-905(b)(1).
51. Model State Public Health Act § 5-101(b)(4) (see supra note 27). The breadth of this authority has been criticized because it could, according to some interpretations, include mandatory testing, treatment, quarantine, and isolation for such diseases as seasonal influenza or HIV (see, e.g., George Annas, Blinded by Terrorism: Public Health and Liberty in the 21st Century, 87 Health Matrix 33, 51–52 (2003)).
52. Model State Public Health Act § 5-106 (c) (referring to mandatory testing and examination) (see supra note 27). See also Model State Public Health Act § 5-107(b) (referring to mandatory treatment) and § 5-108 (referring to quarantine and isolation).
54. Md. Code Ann., Pub. Safety § 14-3A-05(c)(3) (requiring that a hearing be held within 3 days of the individual filing a request) and (f)(2) (requiring the court to appoint counsel for individuals not represented by counsel); Model State Public Health Act § 5-108(f)(1) (requiring courts to rule on applications for relief within 48 hours and to hold hearings related to breaches of conditions of quarantine within 5 days) and (4) (requiring courts to appoint counsel at government expense).
The Maryland Act and the Model Act differ in one important respect: the Maryland Act does not contemplate a role for the courts unless an affected individual chooses to exercise her right to appeal the quarantine order, while the Model Act requires that quarantine orders either be issued by a court or, if a temporary order is permitted, be confirmed by a court within 10 days of issuance after notice and opportunity for the affected individuals to participate. Although a detailed discussion of the constitutional due process requirements that might apply to quarantine and isolation is outside the scope of this chapter, it should be noted that the nineteenth- and early twentieth-century cases addressing the constitutionality of quarantines do not require such a pre-quarantine process. However, as previously mentioned, these decisions predate contemporary due process jurisprudence, and several states have chosen to adopt the Model Act framework for quarantine orders.

FEDERAL AUTHORITY DURING PUBLIC HEALTH EMERGENCIES

Congress has enacted several statutes authorizing the federal government to assist with, and sometimes assume operational control over, emergency response and prevention efforts. These include:

- The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (the Stafford Act), which authorizes the federal government to provide assistance to states and individuals

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56. See Md. Code Ann., Pub. Safety § 14-3A-05(a) & (b); Md. Code Ann., Health-Gen. § 18-905 & § 18906(a). The Maryland Act provides that the secretary (or other official) issue a quarantine directive and does not require the state to seek court approval either before or after the order is issued.

57. Model State Public Health Act § 5-108(d) (temporary orders may be issued by the public health agency if “delay in imposing the isolation or quarantine would significantly jeopardize the agency’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others[1],” but a court must authorize continued quarantine or isolation within 10 days) & (e) (requiring the public health agency to petition the court for a quarantine or isolation order in all other circumstances).


59. See, e.g., 20 Del. Code Regs. § 3136(5).
during emergencies after a governor declares a state of emergency and requests assistance from the federal government;

- The Homeland Security Act of 2002, vesting the Department of Homeland Security with authority over most federal disaster preparedness and response activities;

- The Insurrection Act, authorizing deployment of active military for domestic law enforcement purposes to suppress insurrections and enforce federal laws;

- The Pandemic and All Hazards Preparedness Act of 2006, vesting the Department of Health and Human Services with authority over public health emergency preparedness and response activities;

- The Public Health Act, authorizing the Secretary of Health and Human Services to declare, prepare for, and provide assistance in responding to and preparing for public health emergencies (including disease outbreaks and bioterrorism); and

- 42 U.S.C.A. § 264, authorizing the Surgeon General to make and enforce regulations, including quarantines, necessary to prevent the introduction or spread of communicable disease from foreign countries into the United States or between the states.

Despite the variety of statutes that authorize federal emergency response activities, the scope of the federal government’s public health emergency powers is less expansive than that of the states. The federal government does have authority under the statutes listed above to provide virtually any type of assistance, including deploying military personnel for law enforcement purposes, to a state upon request by the state’s governor. However, the federal power to deploy resources or assume operational control of response efforts is circumscribed by statute and the Constitution.

64. 42 U.S.C.A. §§ 243(c) & 247d.
Posse Comitatus Act, the Insurrection Act, and the Use of Active Duty Military

Because public health emergencies often lead to civil unrest, military resources are sometimes needed to supplement or replace state and local law enforcement. If federal troops are deployed domestically to respond to such an emergency, the United States Northern Command (NORTHCOM) has operational control. NORTHCOM provides command and control of Department of Defense (DoD) efforts and coordinates defense support of civil authorities. As DoD assistance is normally required only during emergencies that exceed the capabilities of local, state, and federal agencies, once the lead responder agency can resume full control of the incident without military assistance, NORTHCOM will relinquish operational control.

The use of military to restore order and enforce the law is among the most controversial steps the government can take during an emergency. The Posse Comitatus Act (PCA), enacted in 1878 in the wake of Reconstruction, prohibits use of the military to enforce domestic law "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." The PCA’s prohibition covers active-duty military, including reservists, and the federalized National Guard, but not the Coast Guard or National Guard units acting under state control.

There are several statutory exceptions to the PCA’s general prohibition. First, the Insurrection Act allows the president, even in the absence of a state request, to direct the armed forces and federalized militia to suppress an “insurrection, domestic violence, unlawful combination, or conspiracy” if state or local law enforcement is incapable of protecting individuals or if the problem activity “opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.” President George H.W. Bush used the authority to deploy troops at a state’s request to suppress domestic violence to respond to the

66. Id.
68. Id.
1992 Los Angeles riots.\textsuperscript{71} President Washington used an early version of the act to suppress the Whiskey Rebellion in 1795, despite the reluctance of Pennsylvania’s governor.\textsuperscript{72} Finally, President Eisenhower used this authority to deploy federal troops to enforce a desegregation order in Little Rock in 1957.\textsuperscript{73}

The Stafford Act also permits deployment of the military for law enforcement purposes during a disaster at the request of an affected state’s governor or on the president’s own initiative if the disaster affects a subject area over which “the United States exercises exclusive or preeminent responsibility and authority.”\textsuperscript{74} Additionally, during an emergency involving chemical or biological weapons of mass destruction, the U.S. Attorney General may request direct law enforcement assistance from the Department of Defense when it is “considered necessary for the immediate protection of human life and civilian law enforcement officials are not capable of taking action.”\textsuperscript{75} These and other statutory exceptions are in addition to the constitutional powers outlined below, which, to the extent they permit the president to deploy military for law enforcement purposes without congressional authorization, are also exceptions to the PCA.

**Constitutional Authority for Federal Action during Emergencies**

Statutes authorizing the federal government to provide emergency assistance at an affected state’s request fall squarely within Congress’s Spending Clause authority to tax and spend for the general welfare.\textsuperscript{76} However, the unilateral deployment of military or other resources to an affected


\textsuperscript{73} See Lemann, *supra* note 71, at 68.

\textsuperscript{74} 42 U.S.C.A. § 5191(b).

\textsuperscript{75} 10 U.S.C.A. § 302(d)(2)(B)(i).

\textsuperscript{76} U.S. Const. art. I, § 8, cl. 1.
area, imposition of quarantines by the Surgeon General, or conditions placed on the assistance provided may invite challenges to the federal government’s constitutional authority to assume control of matters traditionally left to the states. Authority for such potentially controversial federal actions is based primarily on the Commerce Clause, the Insurrection Clause, the Guarantee Clause, the Necessary and Proper Clause, and the Spending Clause.

**Commerce Clause**

The Commerce Clause affords Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” The Supreme Court has long held that the Commerce Clause permits Congress to “regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce[].” The Commerce Clause thus provides the primary authority for federal quarantine regulations, which permit the Surgeon General to detain individuals to prevent the spread of communicable disease from foreign countries into the United States or among the states, and other statutes authorizing the federal government to directly control channels of interstate commerce or persons or things in interstate commerce during a disaster.

The Commerce Clause justifies unilateral federal intervention even when an event is not so directly tied to commerce. Some public health law scholars have argued that recent jurisprudence has significantly limited Congress’s power to intrude on the state’s traditional police powers. It is true that since the Supreme Court held in *United States v. Lopez* that Congress only had the power to regulate “those activities that substantially affect interstate commerce,” courts have evaluated legisla-

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77. See 42 U.S.C.A. § 264 (granting the Surgeon General authority to apprehend, detain, or conditionally release individuals to prevent the spread of communicable disease from foreign countries into the U.S. or from one state or U.S. possession to another).
78. U.S. Const. art. I, § 8, cl. 3.
tion touching on areas within the states' traditional police powers more rigorously. However, the devastating economic impact of public health emergencies is almost never limited to the affected state. For example, the terrorist attacks of September 11 cost the nation's businesses, including airlines, insurers, and others, billions of dollars and cost tens of thousands of workers their jobs. More recently, Hurricane Katrina caused $100 billion of property damage in several states, sent thousands of victims across state borders, and seriously disrupted oil production and refining. Even under the stricter Commerce Clause jurisprudence that has emerged in recent years, statutes authorizing unilateral federal action during catastrophic emergencies easily meet the standard of regulating activities that "substantially affect" interstate commerce.

Moreover, Gonzalez v. Raich strongly suggests that major public health emergencies would be deemed to affect interstate commerce substantially enough to justify unilateral federal intervention even if the immediate emergency itself was confined to one state. In Raich, the Supreme Court ruled that Congress, through the Controlled Substance Act, could regulate intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes and preempt state legislation supporting such commerce, because the production in question affected interstate commerce by endangering the nation's public health. In so ruling, the majority rejected the argument that this exercise of Commerce Clause authority "encroached on the States' traditional police powers to . . . protect the health, safety, and welfare of their citizens." Considering Raich's confirmation of federal authority over state regulation of even purely local activities if they could have a substantial effect on interstate commerce by endangering public health, unilateral federal response to any major emergency is likely to be considered a proper exercise of Congress's authority.

86. Gonzales v. Raich, 545 U.S. 1 (2005).
88. Raich, 545 U.S. at 29-32.
89. Id. at 66 (Thomas, J., dissenting).
Insurrection Clause

The Insurrection Clause authorizes Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, to suppress Insurrections, and repel Invasions."\(^90\) As the name suggests, this is a primary source of authority for the Insurrection Act. Along with the Guarantee Clause (discussed infra), the Insurrection Clause has its roots in the Founding Fathers’ concern with the safety and democratic stability of state governments.\(^91\) Shays Rebellion in 1787, an insurrection against Massachusetts’s high taxes, stoked this concern and exposed the flaws in the Articles of Confederation that prevented Massachusetts from being able to rely on either a federal government or its fellow states for support.\(^92\) A few years after the Constitution was ratified, Congress used its authority under the Insurrection Clause to enact the Insurrection Act of 1792. As has been discussed, various versions of the act have been used to suppress insurrection and riots, enforce federal laws, and protect citizens’ civil rights, both with and without states’ consent. A public health emergency that causes widespread lawlessness, as occurred in New Orleans during Hurricane Katrina,\(^93\) means that state and local governments are unable to protect the basic civil rights of their citizens or enforce federal law. Even without the affected state’s consent, congressionally authorized unilateral federal action would be permissible under the Insurrection Clause to enforce federal law.

Guarantee of a Republican Form of Government Clause

The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."\(^94\) Along with the Insurrection Clause, it is a primary source of authority for the Insurrection Act. Like the Insurrection Clause, the Guarantee Clause has its roots in the turbulent post-

\(^{90}\) U.S. Const. art. I, § 8, cl. 15.
\(^{91}\) Greenberger, supra note 12, at 417 (2007).
\(^{93}\) Greenberger, supra note 12, at 403–04 (2007).
\(^{94}\) U.S. Const. art. IV, § 4.
Revolutionary environment. However, unlike the Insurrection Clause, the Guarantee Clause imposes an affirmative duty on the federal government to act. Neither the duty nor the power it creates is confined to a particular branch of government, indicating that it confers authority on both Congress and the president.

The scope of the Guarantee Clause authority is untested, but it is noteworthy that President Lincoln based his authority for taking military action against the South during the Civil War on the Guarantee Clause rather than on his war powers. The complete breakdown of orderly government services within a state during a public health emergency may trigger the Guarantee Clause, because such a breakdown deprives citizens of the benefits and protection of a republican form of government. Even in the absence of express congressional authorization, the president may be within his constitutional powers to unilaterally deploy troops and authorize other federal action to restore a republican form of government.

**Necessary and Proper Clause**

The Necessary and Proper Clause provides Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [in Article I], and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

This power is important to regulation of local, non-economic activity incidental to Congress's power under the Commerce Clause. For instance, the majority opinion in *Raich* rested in part on the Necessary and Proper Clause. Justice Scalia's concurrence stressed this, stating that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." According to Justice Scalia, inasmuch as local production, sale, and use of marijuana could undermine the prohibition on interstate commerce in marijuana, Congress had the power to regulate it.

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99. *Id.* at 34 (Scalia, J., concurring).

100. *Id.* at 42 (Scalia, J., concurring).
The reasoning in both the majority and concurring opinions in *Raich* indicate that the Necessary and Proper Clause is a proper basis to legislate on matters that, while not squarely within a subject matter covered by its other constitutional authorities, are nevertheless necessary to exercise the federal government's constitutional powers effectively.

**Spending Clause**

The Spending Clause authorizes Congress to tax and spend for the general welfare. 101 As mentioned above, many of the statutes authorizing disaster relief to the states are exercises of this power. These statutes generally require a state request in order to trigger federal action, thereby avoiding some of the constitutional challenges associated with unilateral federal actions. However, statutes enacted pursuant to Congress’s Spending Clause authority often require states to meet certain standards or take certain actions to be eligible for aid. States may challenge such conditions as congressional overreaching, but they are generally upheld as long as they meet the standard set forth in *South Dakota v. Dole*. 103 Conditions on the provision of funds are a valid exercise of Congress’s spending power as long as the conditions (1) are stated clearly; (2) serve the general welfare; (3) are reasonably related to the purpose for which federal funds are being allocated; and (4) do not induce states to violate an independent constitutional bar. 103 Even statutory requirements that states accept increased federal authority over disaster relief efforts in exchange for receiving aid would likely be permissible under this standard.

**CONCLUSION**

Throughout history, public health emergencies have required swift and flexible responses from all levels of government. State and local governments will continue to take the lead in response, but the federal government has an important constitutional and statutory role in preparing for and responding to emergencies. It is important to understand the range of legal powers and authorities at all levels of government to ensure that these powers are effectively and efficiently utilized during a catastrophic event.

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