No time to wait: Commandeering healthcare facilities in the age of COVID-19

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ABSTRACT

In this editorial, we address the urgent need to rapidly expand hospital and ICU capacity during the COVID-19 pandemic and future infectious disease outbreaks. As a remedy to this problem currently plaguing many US municipalities, we discuss states' Emergency Takings Power, an alternative to eminent domain proceedings that allows the immediate commandeering of vacant hospitals without exorbitant costs or the need to litigate fair market price up front. We briefly describe the legal basis for emergency takings power and how states can empower local municipalities to act on that power during public health emergencies.

Keywords: pandemic, hospitals, emergency takings power

The second wave of SARS-CoV-2 infections has once again placed unprecedented demand on US hospitals, leaving them in desperate need of additional space to house the influx of patients requiring acute care. Some hospital systems on the west coast are so overwhelmed by the surge in COVID-19 cases that patients have been transferred to facilities hundreds of miles away to find the available bed in an intensive care unit (ICU) that they so desperately need. The shortage of ICU beds has forced providers to ration hospital beds, making difficult decisions about who should be admitted and who should be sent home to self-monitor.[1]

Meanwhile, in many regions of the US hardest hit by the pandemic, there remain closed, private hospitals—hospitals that with appropriate staffing could be used to house overflow COVID-19 patients. A few municipalities have been successful in gaining access to these closed hospitals.[2] However, in other cities, like Philadelphia, closed hospitals that once served their poorest and most vulnerable populations remain shuttered. Private hospitals' reasoning not to open their facilities to COVID-19 patients—despite forgoing immediate revenues—may relate to perceived stigma, decline in reputation, and other potential long-term consequences of caring for a sicker, often more diverse patient population. Some closed hospitals have treated negotiations as a mere business deal, ignoring the dire public health consequences. They have sought prohibitive rental fees for the temporary use of the facility, opting to hold out for better business opportunities if their demands for high rents are refused.[3] For example, Joel Freedman, a private

DOI:10.5055/jem.2020.0524

equity financier, purchased Philadelphia's Hahnemann University Hospital for $170 million in 2018 and subsequently shuttered the facility in September 2019, allegedly seeking to convert the property into luxury condominiums. When the city began negotiations to re-open the hospital during the first wave of the pandemic, Freedman insisted the city pay him $6 million over the next six months for use of the facility.[4] The City of Philadelphia now remains the largest and poorest city without a public hospital.[5]

Conflicts like the one between Freedman and the City of Philadelphia have led many to call for the city to initiate eminent domain proceedings to forcibly take private properties for public use.[3] But, when state or local governments and hospital owners cannot agree on a fair price, court proceedings ensue to determine just compensation. This takes time—time that cities struggling to contain the pandemic can hardly afford. To make matters worse, courts around the country are shutting down intermittingly to contain their own COVID-19 outbreaks, thereby extending wait times for many non-emergent civil proceedings.

However, an adjacent, often overlooked legal doctrine may afford state and local governments the opportunity to immediately seize vacant hospitals to expand local capacity to treat COVID-19: the commandeering of private property, or, as it is referred to in some states, an emergency taking.

The Supreme Court has articulated this "emergency takings" power as being implicated during times of "extraordinary and unforeseen circumstances . . . [such as] in time of war or of immediate and impending public danger[.]"[6] This emergency takings power, which derives from the Takings Clause of the Fifth Amendment, does not require that just compensation be paid in advance or even contemporaneously with the taking of private property, so long as there is "as long as there is reasonable, certain and adequate provision for obtaining compensation at time of taking."[7] Statutes in over half of US states delegate this power to governors, permitting them to take private property for the benefit of the public during a declared state of emergency, before the court has ruled on the adequacy of the compensation paid.[8]

Such emergency takings laws allow state governments to seize closed hospitals immediately when the need arises and litigate over what is fair compensation later. The end result is an immediate increase in hospital capacity without the delay of extended financial negotiations. What's more, the state government may delegate this emergency takings power to local governments so that city and county leaders can leverage this same authority for their local communities. Already, commandeering of private property to facilitate COVID-19 prevention and response has received bipartisan support.[9]

While some may argue that the commandeering of closed hospitals may simply delay the inevitable payment of exorbitant fees demanded by closed hospital owners, this is unlikely. Owners of closed hospitals that have been commandeered by the government can challenge the compensation paid in court. However, in such a suit, the court will determine the fair market value for the government's period of occupancy and only adjust the compensation paid to the hospital owner if it is less than the fair market value for renting such a property.[10] In other words, the government taker is typically asked to pay the same price an ordinary tenant would have paid to rent the building, plus the costs for any physical damage done to the property.

In seeking higher levels of compensation, vacant hospital owners may claim that government use of their facilities for treating patients with COVID-19 has decreased the resale value of the property by branding it as a modern-day "pesthouse." However, our review of the caselaw dating back to the infectious disease epidemics of the 1800s suggests that there is no precedential support for such a claim. We were unable to locate a single, relevant case in which a court has ruled that a government taker was required to pay for the depreciation in value of property used to temporarily house infectious patients during a public health emergency due to the "reputation" of the building being tarnished.[11] In fact, courts determine the fair market value of property according to the time of the taking and have generally declined to engage in the prognostication of changes in market value.[12] Moreover, it is unlikely that courts will provide

compensation for alleged damage of a building's "reputation" when some courts have declined to offer any compensation for emergency takings that result in the complete destruction of the property.[13]

COVID-19 is certainly not the first infectious disease epidemic that has required the taking of private property. In order to control outbreaks of smallpox, yellow fever, and influenza, state and local governments have taken, used, and even destroyed private property in an effort to save lives. From compelling a millinery store owner to close her shop for disinfection[14] to a board of health official directing a family to isolate away from the general public in an abandoned home,[15] local, state, and federal governments have historically commandeered private property for the protection and safety of the public during health crises.

The full scope of the emergency takings power during a pandemic reaches far beyond health care facilities. As the COVID-19 pandemic continues to devastate many areas of social functioning, this government tool can be vital for securing other forms of private property, both real and intellectual. This could include housing, transportation, medications patents, and other forms of property that are necessary for effective response to this grave threat to public health. Like their counterparts in the 1900s, state and local officials today must proactively deploy emergency takings powers to commandeer closed health care or similarly-situated facilities for the public benefit. Extraordinary times call for extraordinary measures, and the spiraling COVID-19 fatalities dictate that more must be urgently done to save lives.

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