02-069

MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW — MILITARY LAWS OF VIRGINIA.

CONSTITUTION OF VIRGINIA: EXECUTIVE (EXECUTIVE AND ADMINISTRATIVE POWERS) — BILL OF RIGHTS (LAWS SHOULD NOT BE SUSPENDED) — (TAKING OF PRIVATE PROPERTY).

HEALTH: ADMINISTRATION GENERALLY — DEPARTMENT OF HEALTH AND STATE HEALTH COMMISSIONER ¾ DISEASE PREVENTION AND CONTROL.

ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT.

Authority of Governor to suspend licensure requirements of health professionals, enforce quarantines, and control and allocate services and resources under federal and state emergency services programs in response to state of emergency. Requirement that Commonwealth provide just compensation for taking of private resources.

The Honorable John M. O’Bannon, III
Member, House of Delegates
November 13, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You ask whether the Governor, in responding to a public health emergency, has the legal authority (1) to suspend health professional licensure requirements, including those for out-of-state and retired health care professionals; (2) to enforce quarantines; and (3) to control and allocate private resources, including medical personnel and supplies, for emergency response.

Response

It is my opinion that, in the event of a state of emergency, the Governor has the authority to suspend licensure requirements of health professionals, including those for out-of-state and retired health professionals, and to enforce quarantines. It is further my opinion that the Governor has the authority to control and allocate services and resources, including state government and private medical personnel and supplies, under any state or federal emergency services program. The Commonwealth’s authority to
take private resources is limited by the constitutional requirement to provide just compensation.

Background

You relate that the Health and Medical Subpanel of Governor Warner's Secure Virginia Panel has issued recommendations that have been accepted by the full panel. The Secure Virginia Panel is a replacement for the Virginia Preparedness and Security Panel that Governor James S. Gilmore created after the September 11, 2002, terrorist attacks. One of the recommendations is to seek an official opinion from the Attorney General to determine if Virginia’s laws are adequate to allow the Commonwealth to respond efficiently and effectively to a public health emergency resulting from terrorist activity. For the purposes of this opinion, I assume that the public health emergency resulting from terrorist activity is of the magnitude to compel the President of the United States to proclaim or declare a national emergency. I further assume, for the purposes of this opinion, that such public health emergency meets the definition of a "man-made disaster" and constitutes an "emergency" as that term is defined in § 44-146.16(2).

Applicable Law and Discussion

The Commonwealth of Virginia Emergency Services and Disaster Law of 2000 sets forth the statutory framework for the Governor and the executive heads or governing bodies of the political subdivisions of the state to deal with emergency situations caused by natural and man-made disasters. Among the stated purposes of the Law, is to confer upon the Governor and the political subdivisions of the Commonwealth specific emergency powers. It is also the purpose of [the Law] and the policy of the Commonwealth that all emergency service functions of the Commonwealth be coordinated to the maximum extent possible with the comparable functions of the federal government, other states, and private agencies of every type, and that the Governor shall be empowered to provide for enforcement by the Commonwealth of national emergency services programs, to the end that the most effective preparation and use may be made of the nation’s resources and facilities for dealing with any disaster that may occur.
The Emergency Services and Disaster Law authorizes the Governor to declare a state of emergency "[w]henever, in the opinion of the Governor, the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster." Section 44-146.17(1) gives the Governor broad authority to take action in the event of a disaster, "[t]o proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of [the Law]." Accordingly, the Governor has the authority to declare an emergency and waive state law when, in the Governor's opinion, the safety and welfare of the people of Virginia require the exercise of emergency measures. The Governor, therefore, has authority under § 44-146.17 to waive the statutory and regulatory requirements related to the licensure of health professionals during a state of emergency or declared disaster.

Besides the Governor's general ability to waive statutory and regulatory requirements immediately by executive order, health boards may engage in a more lengthy process of promulgating emergency regulations. Health care practitioners are required to be licensed in accordance with regulations promulgated by their respective boards. Section 2.2-4011(A) authorizes the boards to promulgate emergency regulations in "a situation (i) involving an imminent threat to public health or safety." Each of the respective boards may, therefore, promulgate emergency regulations suspending licensure requirements in the event of a public health disaster. Section 2.2-4011(A) requires that "the agency shall state in writing the nature of the emergency and of the necessity for such action .... [S]uch regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations."

You also ask whether the Governor has the legal authority to maintain and enforce a quarantine. The State Health Commissioner has the authority, pursuant to § 32.1-43, "to require quarantine, vaccination or treatment of any individual when he determines any such measure to be necessary to control the spread of any disease of public health importance." In addition, the Board of Health may promulgate regulations and orders to meet any emergency or to prevent a potential emergency caused by a disease dangerous to public health, including procedures specifically responding to any disease listed pursuant to § 32.1-35 that is determined to be caused by an agent or substance used as a weapon.
The State Health Commissioner is further "vested with all the authority of the Board when it is not in session."\(^{13}\)

Section 44-146.17(1) authorizes the Governor to "direct and compel evacuation of all or part of the populace from any stricken or threatened area …, implement emergency mitigation, preparedness, response or recovery actions; … and control ingress and egress at an emergency area, including the movement of persons within the area and the occupancy of premises therein." These powers may reasonably be interpreted to include quarantine under the Governor's authority to control the ingress, egress and movement of persons within an emergency area. The Governor, State Health Commissioner and Board of Health have the authority in a public health emergency to issue orders or regulations to enforce a quarantine.

You further ask whether the Governor has legal authority to control and allocate private resources, including medical personnel and supplies, for emergency response. As the chief executive officer of the Commonwealth, the Governor may direct state employees who are medically trained to participate in emergency response activities as part of their job responsibilities. Similarly, as the commander-in-chief of the armed forces of the Commonwealth, the Governor may direct the National Guard to provide such services.\(^{14}\) The extent to which the Governor may order the National Guard's use of federal military assets, regularly used by the Guard, however, is subject to federal laws and regulations governing the use of such assets.\(^{15}\)

Additionally, the Governor may call for privately employed personnel to assist in an emergency response situation. If volunteers are insufficient to meet emergency response needs, the Governor has the ability to require medically trained personnel to provide emergency response services. The Thirteenth Amendment to the Constitution of the United States prohibits "involuntary servitude, except as a punishment for crime." The Thirteenth Amendment does not, however, prevent the state from requiring service of its citizens for military or certain other civic duties.\(^{16}\) Accordingly, the Governor may use his power as commander-in-chief of the state's military to call out, in addition to the National Guard, the unorganized militia.\(^{17}\) Section 44-86 provides:

> The commander in chief may at any time, in order to execute the law, suppress riots or insurrections, or repel invasion, or aid in any form of disaster wherein the lives or property of citizens are imperiled or may be imperiled, order out … the whole or any part of the unorganized militia.\(^{18}\)

Under § 44-86, the Governor has the power to order the deployment of "the whole or any part of the unorganized militia." This power includes the ability to call out privately employed medical personnel, as part of the state militia, to respond to a disaster situation.\(^{19}\) "Whenever any part of the unorganized militia is ordered out, it shall be governed by the same rules and regulations … as the National Guard or naval militia."\(^{20}\) Moreover, "[w]henever the Governor orders out the unorganized militia or any part thereof, it shall be incorporated into the Virginia State Defense Force until relieved from service."\(^{21}\)
Section 44-146.17(1) lists measures the Governor may take to respond to a public health emergency, including those actions "as are in his judgment required to control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs." In addition, public agencies are directed to utilize the services, equipment, supplies and facilities … of the Commonwealth and the political subdivisions thereof to the maximum extent practicable consistent with state and local emergency operation plans. The officers and personnel of all such departments, offices, and agencies are directed to cooperate with and extend such services and facilities to the Governor and to the State Department of Emergency Management upon request.

In 1997, pursuant to § 44-146.17(1), Governor George Allen promulgated, by executive order, the Commonwealth of Virginia Emergency Operations Plan. The Emergency Operations Plan, as modified by the Secure Virginia Initiative set forth under executive order of Governor Mark R. Warner, provides for state-level emergency operations in response to any type of disaster or large-scale emergency affecting the Commonwealth. The purpose of the Plan is to assign duties and responsibilities to departments, agencies and support organizations, including volunteers, for disaster mitigation preparedness, response and recovery. The Plan also provides that all health and medical-related professional societies and organizations and commercial health services may be requested to provide specific response teams or coordination capabilities during a declared emergency.

The state and local plans currently in place provide for the mobilization of volunteer medical personnel and equipment necessary to address a public health emergency in a disaster situation. The costs of implementing such plans are disbursed from the Virginia Disaster Response Fund, a special fund account administered by the Coordinator of Emergency Management.

The Governor’s ability to control and allocate private resources pursuant to § 44-146.17(1), however, is tempered by the Virginia and United States Constitutions. Article I, § 11 of the Constitution of Virginia prohibits the General Assembly from passing any law "whereby private property shall be taken or damaged for public uses, without just compensation." To the extent the control and allocation of resources exercised under § 44-146.17(1) amounts to a constitutional "taking," either temporary or permanent, the Commonwealth would be responsible to provide "just compensation" to the person whose property was acquired or used. In times of extreme emergency or declared disasters, time is of the essence in mobilizing public and private resources to respond to the emergency. There does not appear to be a statutory mechanism, however, to ensure that any "taking" of private property by the Commonwealth during a state of emergency is properly recorded, accounted and reimbursed once the emergency subsides.

Funds are available in specified circumstances to cover the cost of emergency operations. For example, disbursements may be made in specified circumstances from the Virginia Disaster Response Fund to cover the costs of response and recovery under § 44-146.18:1. Allotments may also be made to state agencies and localities to carry out disaster service missions and responsibilities in accordance with Department of Emergency Management.
guidelines under § 44-146.28(a). Funds may also be accepted from the federal government to pay "a portion of any disaster programs, projects, equipment, supplies or materials or other related costs." under § 44-146.27(A)-(B). Further, the Governor and political subdivisions may accept gifts, grants or loans for purposes of emergency management under § 44-146.27(C). Additionally, the General Assembly may appropriate funds after the emergency through the normal appropriations process or special claims bills.

Conclusion

Accordingly, it is my opinion that, in the event of a state of emergency, the Governor has the authority to suspend licensure requirements of health professionals, including those for out-of-state and retired health professionals, and to enforce quarantines. It is further my opinion that the Governor has the authority to control and allocate services and resources, including state government and private medical personnel and supplies, under any state or federal emergency services program. The Commonwealth’s authority to take private resources is limited by the constitutional requirement to provide just compensation.


3 Section 44-146.16 defines the following words as used in the Emergency Services and Disaster Law:

"(2) ‘Man-made disaster’ means any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of ... nuclear, radiological, chemical or biological means or other weapons or by ... terrorism, foreign and domestic ..., which threaten or cause damage to property, human suffering, hardship or loss of life;

"(2a) ‘Emergency’ means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof.["]"
Section 44-146.13 to 44-146.28:1 (LexisNexis Repl. Vol. 2002).

Section 44-146.14(a)(2).

Section 44-146.14(b).

Section 44-146.17(7).

Moreover, § 44-146.17(1) provides that "no rule, regulation, or order issued under this section shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly." Section 44-146.17:1 provides that "[t]he Governor shall cause copies of any order … proclaimed and published by him pursuant to § 44-146.17 to be transmitted forthwith to each member of the General Assembly." This reporting requirement ensures that the General Assembly is properly apprised of the Governor’s actions during an emergency or disaster situation, and that an emergency, with its attendant concentration of power and authority in the Governor, cannot last indefinitely.

See Boyd v. Commonwealth, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975); see also 1973-1974 Op. Va. Att’y Gen. 448, 449-50. "[A]ny suspension must last only as long as absolutely necessary…. Another important condition is that rights can only be suspended in the area affected by the emergency.” 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 92 (1974). In the end, a court will be the final arbitrator of how the balance is struck between individual rights and the abridgement of those rights in times of emergency, disaster or war. Id. at 93. But see Va. Const. art. I, § 7 ("[A]ll power of suspending laws, … without consent of the representatives of the people, … ought not to be exercised.").

In the context of a federally declared emergency, the United States Secretary of Health and Human Services has the power to temporarily waive or modify certain licensure requirements. Section 1135(b) of the Federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002 authorizes the United States Secretary of Health and Human Services “to temporarily waive or modify … in any emergency area … during any portion of an emergency period, the requirements of titles XVIII, XIX, or XXI, or any regulation thereunder … pertaining to—

"…

"(2) requirements that physicians and other health care professionals be licensed in the State in which they provide such services, if they have equivalent licensing in another State and are not affirmatively excluded from practice in that State or in any State … included in the emergency area[.]"


11See, e.g., Va. Code Ann. § 54.1-2400(3) (LexisNexis Repl. Vol. 2002) (authorizing health regulatory boards "[t]o … license qualified applicants as practitioners of the particular profession or professions regulated by such board[s]"). Section 54.1-2902 makes it "unlawful for any person to practice medicine, osteopathic medicine, chiropractic, podiatry, or as a physician’s or
podiatrist’s assistant” without a valid license, and § 54.1-3310 makes it “unlawful for any person to practice pharmacy … unless licensed by the Board [of Pharmacy] as a pharmacist.”


14“The Governor shall be commander-in-chief of the armed forces of the Commonwealth and shall have power to embody such forces to repel invasion, suppress insurrection, and enforce the execution of the laws.” Va. Const. art. V, § 7; see also Va. Code Ann. § 44-8 (LexisNexis Repl. Vol. 2002) (parallel statutory authority); 1945-1946 Op. Va. Att'y Gen. 144, 147 (“This power may be used wherever a situation arises where, on account of obstructions, or threats of obstructions to the enforcement of the laws or obedience thereto, the functioning of the government or the health and safety of the people of the State are jeopardized…. The Governor is vested with absolute discretion in its use and in the selection of members of the militia he will embody …. He is the sole judge of whether an exigency exists which requires the aid of the militia and has full discretion as to the method of utilizing that aid. On the other hand, of course, if the facts leave no room for doubt that an emergency does not exist, the power cannot be exercised under a mere pretense that it does.”).


17The Governor may "order [the unorganized militia] out either by calling for volunteers or by draft [pursuant to § 44-89]." Section 44-87 (LexisNexis Repl. Vol. 2002).

18Pursuant to § 44-4, "[t]he unorganized militia shall consist of all able-bodied persons as set out in § 44-1, except such as may be included in §§ 44-2, 44-3, and 44-54.6 and except" as otherwise provided by law. Section 44-1 provides, in part, that 

19See 1945-1946 Op. Va. Att'y Gen. supra note , at 152 ("[T]he Governor may … order out those militia members best qualified to meet the demands of the occasion.").


22. ‘Emergency services’ … include, without limitation, fire fighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection.” Section 44-146.16(3).

23 Section 44-146.24.


25 Exec. Order No. 7, supra note (requiring review of all current disaster, emergency management, and terrorism management plans, including Executive Order No. 73).

26 Exec. Order No. 73, supra note, at 3676; Exec. Order No. 7, supra note, at 1707.


28 Id. at G-1.

29 See § 44-146.18:1. Under § 44-146.17(2), the Governor has the authority to "appoint a State Coordinator of Emergency Management."

30 See also U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

31 Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.” United States v. Russell, 80 U.S. (13 Wall.) 623, 629 (1871).

32 A federal declaration of disaster or national emergency may make available federal funds for emergency response services. See 42 U.S.C. § 5191 (2000) (requiring request for declaration of emergency by President to be made by Governor of affected state; situation must be severe and magnitude beyond state’s capability to provide effective response; request must provide information regarding resources used, type of request, and extent of aid required); id. §§ 5192, 5193 (2000) (providing President with broad powers to direct federal agencies, with or without reimbursement, to provide resources, including personnel and equipment, for state and local emergency assistance; setting limits for funding of support efforts).
33 See § 44-146.18(a) (continuing State Office of Emergency Services and State Department of Emergency Services as Department of Emergency Management).

34 Section 44-146.27(A).

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