Nebraska Law Review

Volume 35 | Issue 3 Article 2

1956

Civil Defense and Law

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Federal Civil Defense Administration

NEBRASKA LAW REVIEW

Leading Articles

CIVIL DEFENSE AND LAW

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"Government under our system is a resultant of the three forces of Federal, State, and local power. It is the sum total of these forces operating upon the individual that defines his rights and obligations with reference to his community, his state, and his nation. The ways in which these forces have been weighted as against each other have always presented fascinating and significant problems in government both in peace and war. Nowhere is that more true today than in the field of civilian defense, for civilian defense either in terms of protection or in its promotion of the essential civilian war services requires the interaction of all these forces.

"Difficult problems of government, of administration, of intercommunity and interstate cooperation, consequently exist. These in a true sense are the real problems of 'law' in civilian defense, for it is their neglect that has made and will make for confusion and inefficiency."[1]

To assure a lessening of this "confusion and inefficiency" there must be an understanding and appreciation of the legislative history of the Federal Civil Defense Act of 1950.[2]

For the purposes of this brief introductory article, let us focus our attention on the broader aspects of that history.

On May 22, 1941, the President, by an Executive Order,[3] established the Office of Civilian Defense. This new office was set up within the Office for Emergency Management of the Executive Office of the President.

The Office of Civilian Defense was to serve as a planning

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1 James M. Landis, United States Director of Civilian Defense, Washington, D.C., March, 1943.

2 64 Stat. 1245 (1951), 50 U.S.C. §§ 2251-2297 (1952). Hereinafter referred to as the act.

3 Exec. Order No. 8757, 6 Fed. Reg. 2517 (1941).

and advisory body, and as a center for the coordination of federal civil defense activities which involved relationships between the federal government and state and local governments. It was the forerunner to the present Federal Civil Defense Administration.

For the purposes of our discussion, assume that in 1948 you were elected to the Congress of the United States.

You're fortunate to land an assignment on the Armed Services Committee, and your first legislative problem has to do with the civil defense of the Nation.

How do you handle it, what do you know about it, what can you contribute to its solution?

It is an overwhelming problem, complex in its organization, massive in its requirements, without precedent in its purpose.

Where do you begin to translate this tremendous task into workable legislation?

The purpose of civil defense seems to be very clear. It can be stated in simple terms by the selection of just a few words, "the reduction of damage and casualties in case of an attack." It seems simple enough, needs no further elaboration, and yet what else does it appear to be? You wonder if it isn't non-military defense in the broadest terms. You wonder if it is not the protection of our industrial capacity and our skilled labor.

Is it in fact the preservation of our total war potential and indeed our economy? Is it the preservation and continuity of our whole system of Government? With what perspective do you, as a new congressman, view the problem? You ask yourself, "Is this really a vital part of the total national defense, or simply one of those necessary local by-products whose value can be seriously questioned"?

As a member of the Committee you have at your disposal the voluminous public and private studies on the subject. Your Committee hears the testimony of governors and mayors, of businessmen and civic leaders, of soldiers and scientists, of city planners and farm leaders.

You listen to the long, the short, and the tall, and many varieties, versions and concepts of how the problem ought to be tackled. In addition, you have before you a proposed draft of legislation. Your Committee begins to shape a statute along these lines.

The proposed law begins to read:

> It is the policy and intent of Congress to provide a plan of civil defense for the protection of life and property in the United States. . . .[4]

You offer no comment when language is agreed upon defining the problem. The responsibility sounds even greater than you had visualized.

The bill reads:

> The term "civil defense" means all those activities and measures designed or undertaken (1) to minimize the effects upon the civilian population caused or which would be caused by an attack upon the United States, (2) to deal with the immediate emergency conditions which would be created by any such attack, and (3) to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such attack. Such terms shall include, but shall not be limited to, (A) measures to be taken in preparation for anticipated attack (including the establishment of appropriate organizations, operational plans, and supporting agreements; the recruitment and training of personnel; the conduct of research; the procurement and stockpiling of necessary materials and supplies; the provision of suitable warning systems; the construction or preparation of shelters, shelter areas, and control centers; and, when appropriate, the non-military evacuation of civil population); (B) measures to be taken during attack (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities; the evacuation of personnel to shelter areas; the control of traffic and panic; and the control and use of lighting and civil communications); and (C) measures to be taken following attack (including activities for fire fighting; rescue, emergency medical, health and sanitation services; monitoring for specific hazards of special weapons; unexploded bomb reconnaissance; essential debris clearance; emergency welfare measures; and immediately essential emergency repair or restoration of damaged vital facilities).[5]

After hearing this definition, you turn the page back to the declaration of policy and read part of it again:

> . . . . [T]his responsibility for civil defense shall be vested primarily in the several States and their political subdivisions. The Federal Government shall provide coordination and guidance. . . .[6]

You ponder the measure and burden of responsibility and wonder if it will work. You ponder the wisdom of calling such tragic death and destruction a local problem.

Subsequent hearings and committee sessions see legislation

4 64 Stat. 1246 (1951), 50 U.S.C. § 2251 (1952).
5 Id. § 2252(b).
6 Id. § 2251.

formed that creates a Federal Civil Defense Administration, places the Administrator directly under the supervision of the President, and directs him to prepare a national plan for the civil defense of the nation.

It anthorizes him to establish offices, communications, and stockpiles; conduct research; establish training schools; disseminate information to the public; and make financial contributions to the states for civil defense purposes.

The legislation provides for broad emergency powers to be exercised only during the existence of the emergency. Such powers can be exercised without regard to the limitations of existing law. They provide for speedy acquisition of facilities and materials needed, authority to incur obligations on behalf of the United States, provide financial assistance, reimburse the states, and grant power to direct all relief activities of the federal government.[7]

Some ten months of congressional consideration of the problem finds a bill on the floor of the Senate.

On December 21, 1950, the Senator handling the bill addresses his colleagues:

> Mr. President, we are today considering . . . a bill to round out the national defense of the United States by establishing a program for civil defense. . . .
>
> . . . The Senate Armed Services Committee and the Joint Committee on Atomic Energy are agreed that there is no more pressing problem facing the country today than is the prompt enactment of legislation in this field. . . .
>
> . . . [The legislation] is designed to provide only a small Federal agency to guide and coordinate an extensive Federal and State structure which will be largely manned by volunteer forces. . . .
>
> . . . In approaching the problem of establishing a civil defense plan. the committee has unanimously concurred in the proposition that it must be solved at the local level. . . .
>
> . . . It is estimated that this bill will cost over a period of three years between 3 billion and 3 billion, 200 million dollars. Of this amount, approximately 54 per cent will be furnished by the Federal Government and 46 per cent by the State and local communities. . . .[8]

Another Senator rises to say:

[7] Id. at 1252, § 2293.
[8] 96 Cong. Rec. 16923, 16924 (1950).

> . . . It seems to me that if the States are not sufficiently interested to put up their share of money . . . the Federal Government should not put up a penny. . . .[9]

The Senator handling the bill reads to his colleagues a portion of his committee's report:

> It is a problem of survival to be solved by the individual, the community, and the State, under the guidance and coordination of the Federal Government. It is not intended that this program will be operated and controlled by the Federal Government, but rather that the Government furnish the necessary guidance and cooperation along with certain assistance in financing the program.[10]

Before passage of the bill, a vigorous and forceful opponent of the emergency provisions of the act states:

> Mr. President, if the bill becomes law it will be one of the most drastic and far-reaching laws ever placed on the statute books of our country. . . .[11]

And in the House a member rises to state:

> . . . It is recognized that this bill will give to the Administrator considerable power, but on the other hand, it must be realized that in the event of an enemy attack such powers will be absolutely necessary. . . .[12]

A colleague indicates:

> In case of an atomic attack the power of the Administrator would be almost unlimited.
>
> . . . I am not so sure that he does not have more power than the President of the United States.[13]

Another gentleman rises to say:

> It is no exaggeration to call this civil-defense legislation a revolutionary departure in our jurisprudence. We are entering upon waters still in good part uncharted; we cannot be sure that the measure now before the Congress is the final answer to our problem—the field is too new for final answers. But I am confident that this legislation gets us off to a good start, and I know that the Congress will keep our civil-defense preparations under constant review.[14]

So with that background, in that atmosphere, and with many

[9] Id. at 16972.
[10] Id. See S. Rep. No. 2683, 81st Cong., 2d Sess. (1950).
[11] Id. at 17091.
[12] Id. at 16826.
[13] 96 Cong. Rec. 16831, 16830 (1950).
[14] Id. at 16838.

reservations, the Federal Civil Defense Act of 1950 became law. What, then, are some of the effects of this law as they relate to the private citizen if there were an enemy attack upon the Nation?

As an example of the broad powers conferred upon the Administrator under Title III, let's look at the question of his powers over private property during the emergency period. No principle of law is more firmly embedded in our jurisprudence than that of private property rights. Each legislative act or rule of law infringing upon an owner's freedom of enjoyment or use of his property is considered an exception to the rule, and ordinarily narrowly construed.

Does the Administrator have the authority to *requisition* private homes or commercial buildings for the housing of operational personnel and private automotive vehicles for transport of personnel—under conditions where a civil defense emergency exists as provided in section 301 of the act?

For our purposes here, we may define requisition as the direct appropriation of private property for public purposes without judicial proceedings and without or against the consent of the owner.

Section 201(h) of the act authorizes the Administrator to procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for civil defense, with the right to take immediate possession thereof. The third proviso of this section states:

> That on and after January 1, 1952, the Administrator shall not acquire any land, or any interest therein, pursuant to the provisions of this subsection unless such acquisition shall first have been specifically authorized by the Congress.

Section 303(a) authorizes the Administrator to exercise during a civil defense emergency the authority contained in section 201(h) without regard to the limitation of any existing law.

Section 3(d) states that "The word 'materials' shall include raw materials, supplies, medicines, equipment, component parts and technical information and processes necessary for civil defense."

Section 3(e) states that "The word 'facilities', except as otherwise provided in this Act, shall include buildings, shelters, utilities, and land."

Section 306 (a) provides that except in the case of property

acquired pursuant to section 201 (h) in conformity with the provisions of the Federal Property and Administrative Services Act of 1949 or through judicial proceedings for condemnation, the Administrator shall promptly determine the amount of compensation to be paid for the property. If the person entitled to receive the amount so determined as just compensation is unwilling to accept the same, he shall be paid promptly seventy-five per centum of such amount and shall be entitled to recover from the United States in an action in the Court of Claims or in any district court of the United States such additional amount, if any, which, when added to the amount so paid to him, shall be just compensation.

The language of section 201 (h), "procure by condemnation or otherwise," provides for the taking of private property through proceedings for condemnation in a court of competent jurisdiction and is not open to serious question. What is of concern is whether this statute also permits the property to be requisitioned in the manner previously defined.

While condemnation, as used in the law of property, is frequently associated with judicial proceedings for the acquisition of property,[15] it actually has the broader meaning of taking of private property for public use. The courts have said that any taking by one possessing the power of eminent domain is considered a condemnation,[16] and they have used "condemnation" synonymously with "taking."[17]

In discussing the taking of lands by a flooding thereof it was said:

> The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. . . . And from the taking there arose an implied promise by the United States to compensate the plaintiff for his loss.[18]

In discussing the power of requisitioning under the Lever Act of World War I the court said:

> . . . [A]cquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the neces-

[15] See Dep't of Justice, Acquisition of Property for War Purposes 42 (1944).

[16] Dickinson v. Brown-Crummer Inv. Co., 137 F.2d 615 (10th Cir. 1943).

[17] Central Nebraska Pub. Power & Irrigation Dist. v. Fairchild, 126 F.2d 302, 305 (8th Cir. 1942).

[18] Campbell v. United States, 266 U.S. 368, 370 (1924).

> sity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war.[19]

Webster's New International Dictionary (2d ed. 1954) defines condemn, as used in law, "to pronounce to be taken for public use under the right of eminent domain" and condemnation as the act of condemning. Black's Law Dictionary (4th ed. 1951) defines condemnation, in real property law, as "the process by which property of a private owner is taken for public use, without his consent, but upon the award and payment of just compensation. . . ." Thus the words "procure by condemnation" may be deemed to authorize the Administrator to seize private property without defining the method to be pursued. However, it is not necessary to resort to such legal refinement, for the authority granted by Congress is more complete, being contained in the phrase "procure by condemnation or otherwise." This phrase is set off from the rest of the sentence by a comma following the word "otherwise," indicating that "otherwise" was intended to modify "procure" and not "construct, lease," etc. "Otherwise" as used in this sense means "in a different manner," "in another way" or "in other ways"[20] and therefore the authority granted may be read as procure by condemnation or in other ways. To hold that "otherwise" modified construct, lease, etc., would lead to the absurd conclusion that the only method for acquiring title to materials or facilities would be by condemnation. Such an interpretation would also conflict with the other language of section 201 (h). For instance, the first proviso of this section provides that facilities acquired by "purchase, donation, or other means" may be occupied prior to approval of title by the Attorney General. Obviously, this contemplates acquisition by means other than condemnation.

We may therefore say that Congress has granted the broadest possible procurement authority. Now, in non-emergency periods this authority, by virtue of section 201 (h), may be exercised only in accordance with requirements of existing law. But, during an emergency the Administrator may exercise this authority without regard to limitations of any existing law. Therefore, during an emergency the Administrator need not follow the laws

[19] United States v. Benedict, 280 Fed. 76, 80 (2d Cir. 1922), aff'd, 261 U.S. 294 (1922); cf. Filbin Corp. v. United States, 266 Fed. 911 (E.D.S.C. 1920).

[20] Dunham v. Omaha & Council Bluffs Street Ry., 106 F.2d 1 (2d Cir. 1939), *cert. denied*, 309 U.S. 661 (1939).

regulating the taking of property but may directly seize property, compensating the owner as provided in section 306 (a). Section 306 (a) provides for payment of just compensation when property is acquired other than in conformity with the provisions of the Federal Property and Administrative Services Act of 1949 or through judicial proceedings for condemnation.[21] The language of this section confirms our conclusion that section 303 (a) authorizes requisitioning of property, for its sole purpose is to secure just compensation to the owner when property is taken other than by judicial proceedings.

Further evidence that Congress intended the Administrator to have authority to requisition materials and facilities is found in the legislative history of the Federal Civil Defense Act of 1950.

In the original bills as introduced in both the House and Senate[22] the procurement authority for ordinary and emergency periods was found in section 7. While the bills were in Committee (House and Senate) they were rewritten by placing the non-emergency and emergency authority in different titles. In the hearings held before the House Subcommittee the procurement authority was discussed and a question was raised as to power to seize property in non-emergency periods.[23] It was explained that under Title II it was intended to make the Administrator subject to authorizing legislation but that during an emergency the authority given was to seize property.[24] In debate on the House bill, Mr. Short, a member of the Subcommittee, explained the emergency powers as being very broad and stated that after an attack the Administrator could "confiscate land and property of any kind."[25] At the beginning of the debate in the Senate an amendment to the bill was offered by Senator Ives. This amendment is now section 306 (a) in Public Law 920. In explaining his reasons for offering this amendment, Senator Ives stated that if the Administrator exercised the authority to requisition, granted in Title II of the Defense Production Act, then the remedial language contained in that act would protect property owners; but if the Administrator acted under section 303 (a), the procedure for payment of just compensation provided in the Defense Produc-

21 Cf. Defense Production Act of 1950, 64 Stat. 799 (later amended by 65 Stat. 132 (1951)), 50 U.S.C. § 2081 (1952).

22 H.R. 9798, S. 4217 and S. 4219, 81st Cong., 2d Sess. (1950).

23 Hearings Before the Committee on Armed Services of the House on Sundry Legislation Affecting the Naval and Military Departments, 81st Cong., 2d Sess., at 7876-79 (1950).

24 Id. at 7878.

25 96 Cong. Rec. 16830 (1950).

tion Act would not attach. He therefore felt that this amendment was necessary to protect property owners, and it was accepted on this basis.[26]

Again in the Senate debate, Senator Cordon argued that the authority contained in section 303 (a) was too broad and that the phrase "without regard to the limitation of any existing law" should be deleted. It was his opinion that under this section the Administrator would be authorized to take property without payment of compensation. Senator Kefauver (manager of the bill on the floor) explained that provision for compensation was provided by reference to the Defense Production Act and also by the Ives amendment.[27]

In summation we can conclude that Congress intended the Administrator to have the authority, during a civil defense emergency, to seize real and personal property either by judicial proceedings for condemnation or through requisitioning with payment of just compensation as provided in section 306 (a). The authority for this conclusion may be found in the language of section 303 (a) and section 201 (h), in construing these sections in context with section 306 (a) and in the legislative history of the act.

Some consideration should be given to whether or not the limitations of the third proviso of section 201 (h) of the act, and the limitations of section 601 of Public Law 155, 82d Cong., 1st Sess., are applicable to the procurement of real property during an emergency.

The third proviso to section 201 (h) of the act provides:

> That on and after January 1, 1952, the Administrator shall not acquire any land, or any interest therein, pursuant to the provisions of this subsection unless such acquisition shall first have been specifically authorized by the Congress.

The question is whether this clause also qualifies section 303 (a) since that authority is not complete in itself but authorizes the Administrator to exercise the authority contained in section 201 (h). Unfortunately, the meaning of the language employed is not entirely clear; and inasmuch as this proviso was inserted in conference, the legislative history is of little value. What may be deemed determinative of the question is the fact that the pro-

[26] Id. at 16959.

[27] Id. at 16977. But cf., Testimony of Mr. James E. Palmer and Mr. Ralph Luttrell, Dep't of Justice, Hearings Before a Subcommittee of the Senate Committee on Armed Services, 81st Cong., 2d Sess., at 169 (1950).

viso quoted above is, by its very terms, applicable only to acquisitions made "pursuant to the provisions" of that subsection. The power to procure property *during an emergency* is found in section 303 (a) which authorizes the Administrator to exercise the authority contained in section 201 (h) without regard to the limitations of any existing law. It may therefore be said that emergency acquisitions are made pursuant to the provisions of section 303 (a) even though this section is dependent upon section 201 (h). Since the requirement of the proviso in question is limited to acquisitions made pursuant to section 201 (h), it can be concluded that specific congressional authorization is probably not required when land, or an interest therein, is acquired during an emergency. This construction is in accord with the presumption that "a proviso refers only to the provision to which it is attached"[28] and is borne out by the nature of the authority of section 303 (a). It is emergency authority for immediate action without regard to the limitations of any existing law. To hold that Congress intended to impede administrative action so broadly authorized would defeat the purpose of the grant.

Methods of taking property for civil defense purposes, without or against the consent of the owner, under emergency conditions, may be summarized as:

(a) "Requisitioning" under Section 303 (a).

By virtue of this provision any private property which comes within the classification of "materials" or "facilities" may be seized by FCDA during a civil defense emergency. When this power is exercised, the procedure established by section 306 (a) must be followed.

(b) Condemnation through Judicial Proceedings under section 303 (a).

FCDA may also acquire immediate possession of property during a civil defense emergency by virtue of the judicial process. When this procedure is utilized (recommended where real property is involved) immediate possession of the property may be obtained by the filing of a "Declaration of Taking" and depositing the estimated compensation along with the petition in the United States district court having jurisdiction of the area within which the land is located.

It should be apparent to both attorneys and laymen alike, that the authority to seize private property, even under conditions of enemy attack upon the home shores, is an authority which must be exercised with restraint and good judgment. Obviously, the

[28] See United States v. McClure, 305 U.S. 472, 478 (1939).

Congress in its passage of the act, when balancing the good of the Nation against private property rights during a period of emergency, considered that the property rights of the individual must be subjugated to those of the survival of the country. As the Supreme Court has indicated, the power to wage war is the power to wage war successfully. To avoid an indiscriminate and perhaps wholly unnecessary taking of private property and in order to assure the survival of the Nation, reasonable and workable plans must be formulated to permit the immediate galvanizing of measures necessary to preserve life and property under an enemy attack. As broad general guide lines, the Administrator would exercise the authority of seizure only:

(1) When the need is such as not to admit any delay or resort to other sources of supply, or

(2) When other means of obtaining the property upon fair and reasonable terms have been exhausted.

The nature of real property, and the technicalities of the law relating thereto, are usually of such a nature that time consuming and perplexing questions often require involved judicial proceedings for the determination of the proper person to receive payment, and especially of what constitutes a fair value under the circumstances. These proceedings would render ineffectual anything other than an immediate determination of the fair value of the property and payment to the owner of seventy-five per centum of this value under the Administrator's authority, thus leaving the question of fair compensation open without an unconstitutional seizure involving no recompense to the owner. Where realty is involved, plans must be made under section 303 (a) to permit the immediate taking of possession and a determination of an arbitrary fair value until the question can be judicially resolved. This is particularly true if the question of ownership is under cloud or in dispute, as so often happens when the question of title is before the court.

Thus, from this brief introduction of law as it relates to the civil defense of the Nation, it is easily perceived that serious problems of law will inevitably arise from the impact of enemy attack upon the United States in this thermonuclear age. In subsequent articles we will seek to discuss some of the legal problems inherent in civil defense activities, particularly as they reach down into the minutia and detail of daily living.