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Federal and State Quarantine and Isolation Authority

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January 23, 2007

Abstract. This report provides an overview of federal and state public health laws as they relate to the quarantine and isolation of individuals, a discussion of constitutional issues that may be raised should individual liberties be restricted in a quarantine situation, and federalism questions that may arise where federal and state authorities overlap. In addition, the possible role of the armed forces in enforcing public health measures is discussed, specifically whether the Posse Comitatus Act would constrain any military role and other statutory authorities that may be used for the military enforcement of health measures.

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Federal and State Quarantine and Isolation Authority

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Summary

In the wake of recent terrorist attacks and increasing fears about the spread of highly contagious diseases, such as severe acute respiratory syndrome (SARS) and pandemic influenza, federal, state, and local governments have become increasingly aware of the need for a comprehensive public health response to such events. An effective response could include the quarantine of persons exposed to infectious biological agents that are naturally occurring or released during a terrorist attack, the isolation of infected persons, and the quarantine of certain cities or neighborhoods.

The public health authority of the states derives from the police powers reserved to them by the Tenth Amendment to the U.S. Constitution. The authority of the federal government to prescribe quarantine and other health measures is based on the Commerce Clause, which gives Congress exclusive authority to regulate interstate and foreign commerce. Thus, state and local governments have the primary authority to control the spread of dangerous diseases within their jurisdictions, and the federal government has authority to quarantine and impose other health measures to prevent the spread of diseases from foreign countries and between states. In addition, the federal government may assist state efforts to prevent the spread of communicable diseases if requested by a state or if state efforts are inadequate to halt the spread of disease. Some state laws are antiquated and, until recently, have not been reviewed to address the spread of disease resulting from a biological attack. Other state laws do not cover newly emerging diseases such as SARS or pandemic influenza. In light of recent events, however, many states are reevaluating their public health emergency authorities and are expected to enact more comprehensive laws relating to quarantine and isolation. Public health experts have developed a Model State Emergency Health Powers Act to guide states as they reevaluate their emergency response plans.

This report provides an overview of federal and state public health laws as they relate to the quarantine and isolation of individuals, a discussion of constitutional issues that may be raised should individual liberties be restricted in a quarantine situation, and federalism questions that may arise where federal and state authorities overlap. In addition, the possible role of the armed forces in enforcing public health measures is discussed, specifically whether the Posse Comitatus Act would constrain any military role, and other statutory authorities that may be used for the military enforcement of health measures.

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One very simple principle [justifies state coercion]. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interference with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. John Stuart Mill (1856)

Introduction

The practice of avoiding persons with contagious diseases may be found in the oldest of writings, including Leviticus and Numbers in the Old Testament, wherein specific instructions are given for the inspection and sequestration of lepers.¹ The term “quarantine” is derived from the Italian words *quaranta giorni*, which refer to the 40-day period during which certain ships arriving at the port of Venice during the Black Death plague outbreaks of the 14th century were obliged to sit at anchor before any persons or goods were allowed to go ashore.² Following a plague epidemic in London in 1664, England passed rigorous quarantine laws. All quarantined vessels were required to show a solid yellow flag to indicate they were under quarantine. As late as 1721, some ships coming to England from infected areas were burned at sea.³ The earliest evidence of quarantine in colonial America occurred in the Massachusetts Bay Colony in 1647, when vessels from the West Indies were forbidden to land or discharge passengers and cargo during a plague outbreak. The first federal quarantine law was passed in 1796 in response to continued yellow fever epidemics.⁴

In the event of a biological attack or the introduction of a highly contagious disease affecting the public, the U.S. health system may take measures to prevent those people infected with or exposed to a disease or a disease-causing biological agent from infecting others.⁵ The terms used to describe these measures, *quarantine* and *isolation*, generally apply to distinct groups of persons but are often used interchangeably. Quarantine typically refers to the “(s)eparation of individuals who have been exposed to an infection but are not yet ill from others who have not been exposed to the transmissible infection.”⁶ Isolation refers to the “(s)eparation of infected individuals from those who are not infected.”⁷ Varying degrees of quarantine exist, and the authority to order quarantine or isolation is generally very broad.

First, both complete quarantine and isolation usually involve the confinement of contagious individuals to their residences pursuant to orders from the state health department. Health officials post a public notice forbidding anyone from entering or exiting the dwelling. Alternatively, health authorities may confine an infected person to either a hospital or a prison. Second, health authorities may order a modified quarantine, which selectively restricts an individual from participation in certain activities, e.g. jobs involving food

¹ *Leviticus* 14:4-8 and *Numbers* 5:2. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 204-5 (2002).

² Centers for Disease Control and Prevention (CDC), History of Quarantine, at <http://www.cdc.gov/ncidod/dq/history.htm>.

³ 1911 Encyclopedia Britannica, available at <http://www.1911encyclopedia.org/quarantine>.

⁴ An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796).

⁵ See, generally, CRS Report RL33145, *Pandemic Influenza: Domestic Preparedness Efforts*, by Sarah A. Lister. See also Homeland Security Council, *National Strategy for Pandemic Influenza*, (GPO November 2005), and Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan* (GPO May 2006).

⁶ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan* 209 (GPO May 2006).

⁷ *Id.* at n. 207.

preparation, school attendance, or particularly hazardous activities. The quarantine power also includes the authority to place a contagious individual under surveillance to insure strict compliance with quarantine orders. Finally, the health department may issue segregation orders which require the separation of an entire group of people from the general population. Quarantine orders may extend to any persons who come into contact with the infected individual.⁸

Primary quarantine authority typically resides with state health departments and health officials; however, the federal government has jurisdiction over interstate and foreign quarantine. In addition, the federal government may assist with or take over the management of an intrastate incident if requested by a state or if the federal government determines local efforts are inadequate.⁹ This report examines federalism and other constitutional issues related to quarantines, discusses current federal and state statutes and regulations, and explains the military's role in enforcing quarantines.

Constitutional Issues

The preservation of the public health has historically been the responsibility of state and local governments.¹⁰ Although the federal government has the authority to authorize quarantine under certain circumstances, the primary authority exists at the state level as an exercise of the state's police power. The 4th Congress appears to have recognized this principle when, in 1796, it debated whether to authorize the President to establish regulations to impose quarantines at ports of entry.¹¹ After opponents argued that the authority belonged to the states, Congress passed a law authorizing the President to assist states in enforcing their health laws,¹² which it soon replaced with a law requiring certain federal officials to observe restraints and quarantines imposed by state laws and to aid state officials in their execution.¹³

In 1824, the Supreme Court alluded to a state's authority to enact quarantine laws in *Gibbons v. Ogden*.¹⁴ In *Gibbons*, the Court noted that although quarantine laws may affect commerce, they are, by nature, health laws, and thus fall under the authority of state and local governments. Courts have noted that the duty to ensure that the public health is preserved is inherent to the police power of a state and cannot be surrendered.¹⁵ However, the Supreme Court has recognized

⁸ Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441, 460 - 461 (1988). During the 2003 outbreak of SARS, U.S. patients were isolated until they were no longer infectious, allowing them to receive medical care and helping to contain the spread of the illness. However, there were no individual or population-based quarantines of persons who may have been in contact with infected persons. The CDC advised persons who were exposed but not symptomatic to monitor themselves for symptoms and advised home isolation and medical evaluation if symptoms appeared. CDC, *Isolation and Quarantine Fact Sheet*, 2004, available at http://www.cdc.gov/ncidod/dq/sars_facts/isolationquarantine.pdf.

⁹ 42 U.S.C. § 264(e) and 42 C.F.R. § 70.2.

¹⁰ *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922); see, generally, James G. Hodge, *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309 (1998) (Hereafter cited as, Hodge).

¹¹ 5 *Annals of Congress* 1349-59 (1796).

¹² 1 Stat. 474 (1796).

¹³ Act of Feb. 23, 1799, ch. 12, § 1, 1 Stat. 619 (presently codified at 42 U.S.C. 97). This section applies to maritime quarantines. Federal officials include customs officials, the Coast Guard, and "military officers commanding in any fort or station upon the seacoast."

¹⁴ 22 U.S. 1, 25 (1824).

¹⁵ 134 N.E. at 817.

that state health laws that intrude on a matter within Congress's power to legislate must give way under the Supremacy Clause.¹⁶

The federal or state origin of quarantine laws may influence the means and methods of their enforcement. The Constitution does not expressly vest the executive branch with the authority to execute state laws, and the federal government has no authority to order state officials to execute federal law.¹⁷ Article IV, § 4, guarantees federal assistance to states only in cases of invasion or insurrection, or at the request of the state legislature (or the executive, if the legislature cannot be convened) in the case of "domestic violence." The Tenth Amendment provides that powers not expressly vested in the federal government are retained by the states or the people.¹⁸ It may be argued that a distinctly federal interest must exist before Congress can legislate with respect to public health and that, although the Constitution does not expressly say so, federal law enforcement officers may not ordinarily enforce state laws without the permission of the state government.¹⁹

Federal and state quarantine laws are also subject to constitutional due process constraints. The Fifth and Fourteenth Amendments prohibit governments at all levels from depriving individuals of any constitutionally protected liberty interest without due process of law.²⁰ What process may be due under certain circumstances is generally determined by balancing the individual's interest at stake against the governmental interest served by the restraints, determining whether the measures are reasonably calculated to achieve the government's aims,²¹ and deciding whether the least restrictive means have been employed to further that interest. In addition, some have suggested that military enforcement of quarantines raises additional civil liberties concerns. These aspects are discussed more fully below.

Federal Quarantine Authority

Current Law and Regulations

Federal quarantine authority derives from the Commerce Clause, which states that Congress shall have the power "(t)o regulate Commerce with foreign Nations, and among the several States....

¹⁶ U.S. CONST. art. VI, par. 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; ..."). See *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455, 464 (1886).

¹⁷ *United States v. Printz*, 521 U.S. 898, 935 (1997).

¹⁸ In practice, the Tenth Amendment has not barred Congress from enacting legislation, and the boundaries of federal and state powers are neither clear nor static. See S. DOC. NO. 108-17 at 1611 *et seq.*; Hodge, note 9, at 319 (discussing federalism in the context of public health law).

¹⁹ U.S. CONST. art. II (vesting in the President the obligation to see that the laws are executed, *Id.* art. I, § 8, cl. 15 (empowering the Congress to provide for calling forth the militia to execute the *laws of the Union*) (emphasis added).

²⁰ It is well settled that freedom from physical restraint is a "liberty interest" protected by the due process clause of the Fourteenth Amendment. *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

²¹ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (enforcement of public health laws must have some "real or substantial relation to the protection of the public health and the public safety"); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900) (quarantine of San Francisco district inhabited primarily by Chinese immigrants purportedly to control the spread of bubonic plague; invalidated because the measure was found to increase the risk of spreading the disease).

²² Thus, under section 361 of the Public Health Service (PHS) Act, 42 U.S.C. § 264, the Secretary of Health and Human Services (HHS) has the authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”²³ While providing the Secretary with broad authority to promulgate regulations “as in his judgement may be necessary,” this law limits the Secretary’s authority to the communicable diseases published in an Executive Order of the President.²⁴ The list of communicable diseases in Executive Order 13295 currently includes cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, SARS, and influenza caused by novel or reemergent influenza viruses that are causing or have the potential to cause a pandemic.²⁵

Generally, federal regulations authorizing the apprehension, detention, examination, or conditional release of individuals are applicable only to individuals coming into a state or possession from a foreign country or possession.²⁶ Thus, federal regulations require the reporting of ill passengers on international conveyances such as airplanes and boats.²⁷ During the 2003 response to the SARS epidemic, federal officials provided health alert information to air travelers returning to the United States from areas with SARS outbreaks, boarded airplanes with travelers reported to be ill to assess their symptoms, and facilitated transport of ill passengers to hospitals. Federal officials also provided updates to the public and worked with state and local public health agencies to investigate possible SARS cases.²⁸

In addition, section 361 of the PHS Act authorizes the apprehension and examination of “any individual reasonably believed to be infected with a communicable disease in a qualifying stage²⁹ and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State.”³⁰ If found to be infected, such individuals may be detained for such time and in such manner as may be reasonably necessary.³¹ During times of war, the authority to apprehend and examine individuals extends to any individual “reasonably believed (1) to be infected with such disease [as specified in an Executive order of the President]

²² U.S. CONST. art I, § 8.

²³ 42 U.S.C. § 264(a). Subsection (a) also authorizes other public health measures, including destruction of animals or articles determined to be sources of communicable disease. Originally, the statute conferred this authority on the Surgeon General; however, pursuant to Reorganization Plan No. 3 of 1966, all statutory powers and functions of the Surgeon General were transferred to the Secretary of Health, Education, and Welfare (now Secretary of HHS). In 2000, the Secretary of HHS transferred authority under this provision to the Director of the Centers for Disease Control and Prevention (CDC). CDC’s Division of Global Migration and Quarantine carries out quarantine and related activities. <http://www.cdc.gov/ncidod/dq/index.htm>.

²⁴ 42 U.S.C. § 264(b).

²⁵ Executive Order 13295, as amended by Executive Order 13375, on April 1, 2005. See <http://www.whitehouse.gov/news/releases/2005/04/20050401-6.html>.

²⁶ 42 U.S.C. § 264(c).

²⁷ 42 C.F.R. § 71.21.

²⁸ See Mark A. Rothstein et al., *Quarantine and Isolation: Lessons Learned From SARS: A Report to the Centers for Disease Control and Prevention* (2003), at <http://www.instituteforbioethics.com> (hereinafter, *Quarantine and Isolation*).

²⁹ “Qualifying stage” means that such a disease is (1) in a communicable stage or (2) in a precommunicable state, if the disease would likely cause a public health emergency if transmitted to other individuals. 42 U.S.C. § 264(d)(2).

³⁰ 42 U.S.C. § 264(d)(1).

³¹ *Id.*

and (2) to be a probable source of infection to members of the armed forces of the United States” or to individuals engaged in the production or transportation of supplies for the armed forces.³²

Regulations promulgated pursuant to this authority under the PHS Act may be found in Parts 70 and 71 of Title 42 of the Code of Federal Regulations. Part 70 deals with interstate matters; Part 71 deals with foreign arrivals.³³ Following a transfer of authority from the Secretary of HHS to the Director of the CDC in 2000, the Director of the CDC is authorized to take measures as may be necessary to prevent the spread of a communicable disease from one state or possession to any other state or possession if he or she determines that measures taken by local health authorities are inadequate to prevent the spread of the disease.³⁴ To prevent the spread of diseases between states, the regulations also prohibit infected persons from traveling from one state to another without a permit from the health officer of the state, possession, or locality of destination, if such a permit is required under the law applicable to the place of destination.³⁵ Additional requirements apply to persons who are in the “communicable period of cholera, plague, smallpox, typhus or yellow fever, or who having been exposed to any such disease, is in the incubation period thereof.”³⁶

The PHS Act and related statutes also authorize measures to aid or enforce a quarantine in the event of a public health emergency. Section 322(a) of the PHS Act³⁷ authorizes the PHS to care for and treat persons under quarantine. Such persons may also receive care and treatment at the expense of the PHS from public or private medical facilities when authorized by the officer in charge of the PHS station at which the application is made.³⁸ Section 311 of the PHS Act³⁹ provides for federal-state cooperative activities to enforce quarantines. The federal government may help states and localities enforce their quarantines and other health regulations and, in turn, may accept state and local assistance in enforcing federal quarantines. Under the authority of 42 U.S.C. § 97, the Secretary of HHS may request the aid of Customs, Coast Guard, and military officers in the execution of quarantines imposed by states on vessels coming into ports.

Criminal sanctions are prescribed for violations of federal regulations issued pursuant to section 361 of the PHS Act.⁴⁰ Violation of a federal quarantine or isolation order is a criminal misdemeanor, and individuals may be subject to a fine of up to \$250,000, one year in jail, or both. Organizational violations may be subject to fines of up to \$500,000 per event. Federal district courts may enjoin individuals and organizations from violation of CDC quarantine regulations.⁴¹

³² 42 U.S.C. § 266.

³³ In response to the SARS epidemic, the Secretary of HHS in 2003 amended 42 C.F.R. §§ 70.6 and 71.3 to incorporate by reference Executive Order 13295, thus eliminating rulemaking delays for the publication of new diseases.

³⁴ 42 C.F.R. § 70.2.

³⁵ 42 CFR § 70.3.

³⁶ 42 CFR § 70.5.

³⁷ 42 U.S.C. § 249(a).

³⁸ 42 U.S.C. § 249(c).

³⁹ 42 U.S.C. § 243.

⁴⁰ 42 U.S.C. § 271, 18 U.S.C. §§ 3559 and 3571(c).

⁴¹ 28 U.S.C. § 1331.

Proposed CDC Regulations

Responding to the possible threat of an influenza pandemic, the CDC on November 22, 2005, announced proposed changes to its quarantine regulations.⁴² If adopted, these changes would constitute the first significant revision of the regulations in Parts 70 and 71 in 25 years. The proposed changes are an outgrowth of the CDC's experience during the spread of SARS in 2003, when the agency experienced difficulties locating and contacting airline passengers who might have been exposed to the SARS virus during their travels. In announcing the proposed regulations, CDC Director Julie Gerberding said, "These updated regulations are necessary to expedite and improve CDC operations by facilitating contact tracing and prompting immediate medical follow up of potentially infected passengers and their contacts."⁴³

The proposed regulations would expand reporting requirements for ill passengers⁴⁴ on board flights and ships arriving from foreign countries. They would also require airlines and ocean liners to maintain passenger and crew lists with detailed contact information and to submit these lists electronically to CDC upon request.⁴⁵ The lists would be used to notify passengers of their suspected exposure if a sick person were not identified until after the travelers had dispersed from an arriving carrier. The proposed regulations address the due process rights of passengers who might be subjected to quarantine after suspected exposure to disease; the regulations also provide for an appeal process.⁴⁶

State Police Powers and Quarantine Authority

Although every state has the authority to pass and enforce quarantine laws as an exercise of their police powers, these laws vary widely by state. Generally, state and local quarantines are authorized through public health orders, though some states may require a court order before an individual is detained.⁴⁷ For example, in Louisiana, the state health officer is not authorized to "confine any person in any institution unless directed or authorized to do so by the judge of the parish in which the person is located."⁴⁸ Diseases subject to quarantine may be defined by statute, with some statutes addressing only a single disease, or the state health department may be granted the authority to decide which diseases are communicable and therefore subject to quarantine.⁴⁹

⁴² The proposed regulations may be viewed at <http://www.cdc.gov/ncidod/dq/nprm/> and are published at 70 *Fed. Reg.* 71892 (Nov. 30, 2005). These proposed regulations were available for a 60-day comment period, and later extended for an additional 30 days, closing on March 1, 2006. See 71 *Fed. Reg.* 4544 (January 27, 2006).

⁴³ *CDC Proposes Modernizing Control of Communicable Disease Regulation, USA*, Medical News Today, November 23, 2005, at <http://www.medicalnewstoday.com/medicalnews.php?newsid=34042>. Since the SARS outbreak, the CDC has increased its quarantine stations nationwide from 8 to 18.

⁴⁴ The definition of ill person would be expanded to include anyone who has a fever of at least 100.4 degrees plus one of the following: severe bleeding, jaundice, or severe, persistent cough accompanied by bloody sputum, or respiratory distress. (Section 70.1 of proposed regulations).

⁴⁵ *Id.* The lists, in electronic format, would have to be kept for 60 days after arrival, and be able to be submitted within 12 hours of a CDC request. The lists would include names, contact information and seat assignments.

⁴⁶ Proposed section 70.20 and 71.23 of 42 CFR.

⁴⁷ Paula Mindes, Note, *Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States*, 10 J.L. & HEALTH 403, 409 (1995).

⁴⁸ LA. REV. STAT. ANN. § 40:17(A) (West 2005). Exceptions are provided for certain diseases, including smallpox, cholera, yellow fever, bubonic plague, and tuberculosis.

⁴⁹ 10 J.L. & HEALTH at 409. See e.g., MD. CODE ANN., [Health] § 18-324 (2005), which formerly addressed only (continued...)

States also employ different methods for determining the duration of the quarantine or isolation period. Generally, “release is accomplished when a determination is made that the person is no longer a threat to the public health, or no longer infectious.”⁵⁰

One common characteristic of many state quarantine laws is their “overall antiquity,” with many statutes being between 40 and 100 years old.⁵¹ The more antiquated laws “often do not reflect contemporary scientific understandings of disease, [or] current treatments of choice.”⁵² In the past, state laws were often enacted with a focus on a particular disease, such as tuberculosis or typhoid fever, leading to inconsistent approaches in addressing other diseases.⁵³

Until recently, despite the inconsistencies and perceived problems with such laws, state legislatures have not been forced to reevaluate their quarantine and isolation laws due to a decline in infectious diseases and advances in public health and medicine.⁵⁴ However, in light of recent threats and security concerns, many states have begun to reconsider their emergency response systems, including the state’s authority to quarantine.⁵⁵ A review of quarantine authority was listed as a priority for state governments in the President’s 2002 *National Strategy for Homeland Security*.⁵⁶

Federal authority over interstate and foreign travel is clearly delineated under constitutional and statutory provisions. Less clear, however, is whether the state police powers may be used to restrict interstate travel to prevent the spread of disease.⁵⁷ In a public health emergency, federal, state, and local authorities may overlap. For example, both federal and state agencies may have quarantine authority over an aircraft arriving in a large city from a foreign country. Thus, coordination between the various levels of government would be essential during a widespread public health emergency.⁵⁸ Bioterrorism exercises such as TOPOFF 2 in May 2002 have

(...continued)

quarantine in tuberculosis cases. However, recent 2004 amendments grant the governor quarantine power during a “catastrophic health emergency” involving “deadly agents,” which include “anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability.” MD. CODE ANN., [Public Safety] § 14-3A-01 (2005).

⁵⁰ *Id.* at 410.

⁵¹ Lawrence O. Gostin, et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 102 (1999). For a recent 50-state survey of quarantine provisions, see *State Quarantine and Isolation Laws*, compiled by Trust for America’s Health, 2004, at <http://healthyamericans.org/reports/bioterror04/Quarantine.pdf>.

⁵² *Id.* at 106.

⁵³ *Id.* Following the SARS outbreak, some states had to quickly amend their public health laws to deal with that disease under their authorities.

⁵⁴ But see Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441, 448 (1988); 10 J.L. & HEALTH at 413, citing Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 54-55 (1985). No large-scale human quarantine has been implemented within the United States since the 1918 influenza pandemic. G. A. Gernhart, *Forgotten Enemy: PHS’s Fight Against the 1918 Influenza Pandemic*. PUBLIC HEALTH REP. 559-561 (1999).

⁵⁵ Justin Gillis, “States Weighing Laws to Fight Bioterrorism,” *Washington Post*, Nov. 19, 2001, at A01. See the “Model State Emergency Health Powers Act” discussed, *infra*.

⁵⁶ Office of Homeland Security, *National Strategy for Homeland Security*, June 2002. http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf.

⁵⁷ Rothstein, et al., Quarantine and Isolation, *supra* footnote 28, at 7-8 (discussing restrictions on travel to combat the spread of disease).

⁵⁸ *Id.* at 13 (suggesting that memoranda of understanding be developed between federal and state health officials setting (continued...))

highlighted the legal issues that may arise when federal, state, and local authorities respond simultaneously to a public health emergency. One author's comments on lessons learned from TOPOFF 2 are instructive:⁵⁹

Perhaps the most significant lesson in reference to the law and TOPOFF 2 is the most obvious, namely the fact that the law at the intersection of public health and bioterrorism is extremely unsettled. There is not a lack of law to draw upon in addressing specific questions, but rather a myriad of laws that must be considered, most of which were developed to address more mundane public health matters, or designed to respond to more traditional emergency situations. It is critical for the legal responders to be sensitive to the rights of affected individuals and the public at large, because in the heat of the moment concern for individual rights may be seen as a secondary matter. In particular, heightened sensitivity to human rights must be exhibited in areas where physical imposition or restraint come into question, such as isolation, quarantine, and mandated medical examinations. While considerable progress is being made in coordinating approaches to the age-old practices of isolation and quarantine, other rights issues in this context remain open questions, such as the need to be sensitive to post-deprivation rights, the right to legal counsel, the nature of clinical evidence required to justify such measures, and the policies concerning the application of isolation and quarantine to populations.

Model State Emergency Health Powers Act

The Model State Emergency Health Powers Act (the Model Act) was drafted by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.⁶⁰ The Model Act seeks to "grant public health powers to state and local public health authorities to ensure a strong, effective, and timely planning, prevention, and response mechanism to public health emergencies (including bioterrorism) while also respecting individual rights."⁶¹ It is important to note that the act is intended to be a model for states to use in evaluating their emergency response plans; passage of the Model Act in its entirety is not required, so state legislatures may select the entire model, parts of it, or none at all. Many states have used parts of the Model Act while tailoring their statutes and regulations to respond to unique or novel situations that may arise in their jurisdiction.

The Model Act provides a comprehensive framework for state emergency health powers, including statutory authority for quarantine⁶² and isolation.⁶³ Section 604 of the Model Act

(...continued)

forth responsibilities in cases of concurrent quarantine jurisdiction).

⁵⁹ John D. Blum, *Too Strange to Be Just Fiction: Legal Lessons from a Bioterrorist Simulation, the Case of TOPOFF 2*, 54 LA. L. REV. 905, 916 (summer 2004).

⁶⁰ The text of the Center's Model State Emergency Health Powers Act from 2001 is available at <http://www.publichealthlaw.net/Resources/Modellaws.htm>. The Center has also developed a Turning Point Model State Public Health Act, which addresses public health issues more broadly and is available at the same website.

⁶¹ *Id.*

⁶² For purposes of the Model Act, quarantine is defined as "the physical separation and confinement of an individual or groups of individuals, who are or may have been exposed to a contagious or possibly contagious disease and who do not show signs or symptoms of a contagious disease, from non-quarantined individuals, to prevent or limit the transmission of the disease to non-quarantined individuals."

⁶³ Isolation is defined as "the physical separation and confinement of an individual or groups of individuals who are infected or reasonably believed to be infected with a contagious or possibly contagious disease from non-isolated individuals, to prevent or limit the transmission of the disease to non-isolated individuals."

authorizes the quarantine or isolation of an individual or groups of individuals during a public health emergency.⁶⁴ The Model Act encourages the public health authority to adhere to specific conditions and principles when exercising quarantine or isolation authority.⁶⁵ These conditions and principles include ensuring that the measures taken are the least restrictive means necessary to prevent the spread of the disease; monitoring the condition of quarantined or isolated individuals; and providing for the immediate release of individuals when they no longer pose a substantial risk of transmitting the disease to others.⁶⁶ The Model Act provides that a failure to obey the rules and orders concerning quarantine and isolation shall be treated as a misdemeanor.⁶⁷

The Model State Emergency Health Powers Act sets forth procedures for quarantine and isolation under two different sets of circumstances. Section 605(a) addresses procedures for temporary quarantine and isolation without notice if a “delay in imposing the isolation or quarantine would significantly jeopardize the public health authority’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.” The quarantine or isolation must be ordered through a written directive specifying the identity of the individuals subject to the order, the premises subject to the order, the date and time at which the quarantine or isolation are to commence, the suspected contagious disease, and a copy of the provisions set forth in the act relating to isolation and quarantine.⁶⁸ The public health authority is required to petition within 10 days after issuing the directive for a court order authorizing the continued isolation or quarantine if needed.⁶⁹

Apart from the emergency procedures outlined above, the public health authority may petition a court for an order authorizing the quarantine or isolation of an individual or groups of individuals, with notice of the petition given to the individuals or groups of individuals in question within 24 hours.⁷⁰ The public health authority’s petition must include the same information as required in the emergency directive discussed above, in addition to “a statement of the basis upon which isolation and quarantine is justified in compliance with this Article.”⁷¹ A hearing must be held within five days of the petition being filed, and the court “shall grant the petition if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.”⁷² An order authorizing quarantine or isolation may not do so for a period exceeding 30 days, though the public health authority may move to continue quarantine or isolation for additional periods not exceeding 30 days.⁷³

⁶⁴ A public health emergency is defined to include “an occurrence or imminent threat of an illness or health condition” that is believed to be caused by bioterrorism or the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin, and that poses a high probability of a large number of deaths, a large number of serious or long-term disabilities, or a significant risk of substantial future harm to a large number or people.

⁶⁵ For a complete list of the conditions and principles, see Section 604(b) of the Model Act.

⁶⁶ The SARS epidemic highlights the need to take into account possible political and social reactions to stringent public health measures. “Officials in Taiwan now believe that its aggressive use of quarantine contributed to public panic and thus proved counterproductive.” Rothstein, et al., *Quarantine and Isolation*, *supra*, footnote 28 at 9.

⁶⁷ Section 604(c).

⁶⁸ Section 605(a)(2).

⁶⁹ Section 605(a)(4).

⁷⁰ Section 605(b).

⁷¹ Section 605(b)(2).

⁷² Section 605(b)(5).

⁷³ Section 605(b)(6).

The Model Act provides procedures that allow individuals subject to quarantine or isolation to challenge their detention and obtain release, and it provides remedies where established conditions were not met.⁷⁴ Individuals subject to quarantine or isolation would be appointed counsel if they are not otherwise represented in their challenge.⁷⁵

Legal Challenges to State Quarantine Authority

Public health measures in emergency situations, including quarantine, involve balancing the rights of individuals with the state's police power to protect the needs of the public health, safety, and general welfare. Historically, this balance can be seen in public health crises over the past century or so:⁷⁶

It is well known that public health raises conflicts between individual and societal interests. The context may vary, but the essential tension of balancing individual and group interests is largely the same. For example, at the beginning of the twentieth century, a key issue was vaccination against smallpox. In the 1980s, a contentious issue was the reporting of human immunodeficiency virus ("HIV") test results by name to public health authorities. After September 11, 2001, and the anthrax episode shortly thereafter, there has been a debate about whether broad emergency powers to protect public health should be given to governors and state health departments and, if so, whether special new legislation is needed. Many of the same issues arise in the use of large-scale quarantine measures, such as those used to combat SARS. [Footnotes omitted.]

The Supreme Court in *Gibbons v. Ogden*, in 1824, alluded to a state's authority to quarantine under the police powers. In 1902, the Court directly addressed a state's power to quarantine an entire geographic area in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*,⁷⁷ where both the law and its implementation were upheld as valid exercises of the state's police power. A shipping company in this case challenged an interpretation of a state statute that conferred upon the state board of health the authority to exclude healthy persons, whether they came from without or within the state, from a geographic area infested with a disease.⁷⁸ The shipping company alleged that the statute as interpreted interfered with interstate commerce, and thus was an unconstitutional violation of the Commerce Clause. The Court rejected this argument, holding that although the statute may have had an effect on commerce, it was not unconstitutional.⁷⁹

When a quarantine is established in a geographic area due to adverse conditions in the area, courts are thus likely to uphold the restrictions. The Supreme Court has stated that the right to travel "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area."⁸⁰ In *Miller v. Campbell City*,⁸¹ an order to evacuate an

⁷⁴ Section 605(c).

⁷⁵ Section 605(e).

⁷⁶ Mark A. Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMPLE L. REV. 175 (Summer, 2004).

⁷⁷ 186 U.S. 380 (1902).

⁷⁸ 186 U.S. at 384.

⁷⁹ *Id.* at 387. See also, *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886).

⁸⁰ *Zemel v. Rusk*, 381 U.S. 1, 15 (1965).

area was issued due to leaking methane and hydrogen gases. After some residents from a subdivision in the area became ill, the County Commissioners declared the subdivision uninhabitable. The plaintiff was arrested when he crossed the roadblock enforcing the quarantine in an attempt to return home. The court upheld a finding that the evacuation order was substantially related to the public health and safety, and found no evidence that the quarantine action was taken in bad faith or maliciously.⁸² The county needed to act quickly because of the potential danger, so no liability was found.

Courts have recognized an individual's right to challenge his or her quarantine or isolation by petitioning for a writ of habeas corpus.⁸³ Although the primary function of a writ of habeas corpus is to test the legality of the detention,⁸⁴ petitioners often seek a declaration that the statute under which they were quarantined is unconstitutional or violative of due process. Due process is a concern, though courts are reluctant to interfere with a state's exercise of police powers with regard to public health matters "except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable."⁸⁵ The courts appear to defer to the determinations of state boards of health and generally uphold such detentions as nonviolative of due process and as valid exercises of a state's duty to preserve the public health. Thus, the court in *United States v. Shinnick*⁸⁶ upheld the Public Health Service's medical isolation of an arriving passenger because she had been in Stockholm, Sweden, a city declared by the World Health Organization to be a smallpox-infected area, and she could not show proof of vaccination.

In *People ex rel. Barmore v. Robertson*,⁸⁷ the court refused to grant a habeas corpus petition for a woman who ran a boarding house where a person infected with typhoid fever had boarded. The woman was not herself infected with the disease, but she was a carrier and had been quarantined in her home. She argued that her quarantine was unwarranted because she was not "actually sick," though the court noted that "[i]t is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberties by quarantine regulations."⁸⁸ In justifying quarantine under these circumstances, the court explained that because disease germs are carried by human beings, and as the purpose of an effective quarantine is to prevent the spread of the disease to those who are not infected, anyone who carries the germs must be quarantined.⁸⁹ The court found that in the case of a person infected with typhoid fever,

(...continued)

⁸¹ 945 F.2d 348 (10th cir. 1991).

⁸² *Id.* at 354.

⁸³ *Ex parte Hardcastle*, 208 S.W. 531(Tex. Crim. App. 1919).

⁸⁴ *Habeas corpus* is "the name given to a variety of writs, having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are usually understood to mean the *habeas corpus ad subjiciendum*." Specifically, *habeas corpus ad subjiciendum* is "a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of *habeas corpus* writ, the purpose of which is to test the legality of the detention or imprisonment; not whether he is guilty or innocent." Black's Law Dictionary, 6th Edition, 1990.

⁸⁵ *People ex. rel. Barmore v. Robertson*, 134 N.E. 815, 817 (citations omitted) (Ill.1922).

⁸⁶ 219 F. Supp. 789 (E.D.N.Y. 1963).

⁸⁷ 134 N.E. 815 (Ill.1922).

⁸⁸ *Id.* at 819.

⁸⁹ *Id.* at 819-820.

anyone who had come into contact with that person must be quarantined to prevent the spread of the disease.⁹⁰

However, some courts have refused to uphold the quarantine of an individual in cases where the state is unable to meet its burden of proof concerning that individual's potential danger to others, or if a restriction is viewed as unreasonable or oppressive.⁹¹ In *Wong Wai v. Williamson*,⁹² the San Francisco Board of Health ordered all Chinese residents to be inoculated against bubonic plague and restricted their right to leave the city, citing nine deaths allegedly from plague. The inoculations were tainted, causing severe consequences. The court inferred that the regulations were properly authorized, but nevertheless struck them down as "not based on any established distinction in the conditions that are supposed to attend the plague, or the persons exposed to its contagions."⁹³ Shortly after, in *Jew Ho v. Williamson*, the same court held that the quarantine requirements applied only to Chinese and questioned whether bubonic plague actually caused the reported deaths. It invalidated the quarantine as "unreasonable, unjust and oppressive."⁹⁴

Additional legal issues might be raised if quarantine, isolation, and other public health measures were used to deal with a widespread public health emergency such as a biological terror attack or an influenza pandemic. If government agencies requisition private facilities for quarantine purposes, such as in the case of overburdened medical facilities, the legal questions regarding eminent domain power may arise.⁹⁵ If a person with symptoms of a contagious disease is involuntarily isolated in a hospital for a period of days or weeks, who pays for the person's hospital stay? What if medical personnel or hospital employees refuse to come to work because of a medical emergency?⁹⁶ Discrimination issues may arise if health care providers refuse to treat infected patients or individuals who appear to be from an area of the world where a disease outbreak originates, or if persons discriminate against health care providers who treat individuals with infectious conditions.⁹⁷ The legality concerning mandatory vaccinations as a health measure

⁹⁰ *Id.* at 820.

⁹¹ See *State v. Snow*, 324 S.W.2d 532 (Ark. 1959), where the court found insufficient evidence to show a person who had tuberculosis was in an active and communicable stage so that he could be involuntarily isolated. On the other hand, see *City of New York v. Antoinette, R.*, 630 N.Y.S. 2d 1008 (N.Y. Sup. Ct. 1995), wherein the court upheld detaining a tuberculosis patient in a hospital setting until the patient completed an appropriate course of medication.

⁹² 103 F. Rep. 10 (1900).

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 26.

⁹⁵ Compelled public use of private property in a public health emergency is not unheard of. "In Paris, in August 2003, after 11,000 deaths were caused by a heat wave, the government took over refrigerated warehouses and similar facilities to use them as temporary morgues." Rothstein, *et al.*, Quarantine and Isolation, *supra*, footnote 28 at 42. Compensation may be appropriate in some circumstances, but following a volcanic eruption, the state of Washington successfully argued that continued restricted access to a town near the volcano was a permissible exercise of police power and did not require compensation. *Cougar Business Owners Assn. v. State of Washington*, 647 P.2d 481, 486 (Sup. Ct. Wash. 1982). See David G. Tucker and Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837 (2001).

⁹⁶ See Section 502(b) of the Model State Emergency Health Powers Act, discussed *supra*, which provides that a health care facility could face loss of its license if it is not able to provide services during a public health emergency.

⁹⁷ Rothstein, *et al.*, Quarantine and Isolation, *supra*, footnote 28 at 118-119 (discussing antidiscrimination legislation). For information on the possible applicability of the Americans with Disabilities Act to persons with contagious diseases see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by Nancy Lee Jones.

may arise during an infectious disease outbreak,⁹⁸ and health authorities may face the related issue of rationing limited supplies of available vaccines.⁹⁹

The application of statutes such as the Emergency Medical Treatment and Active Labor Act (EMTALA)¹⁰⁰ to a public health emergency situation may need to be assessed. EMTALA requires hospitals to evaluate all patients who come to an emergency room and to stabilize patients needing emergency care prior to any transfer. Compliance with EMTALA during a health emergency may be compromised if hospitals are overwhelmed by large numbers of persons seeking treatment.¹⁰¹ The Health Insurance Portability and Accountability Act (HIPAA),¹⁰² and its implementing regulations at 45 C.F.R. Parts 160 and 164 (Privacy Rule), may also need to be assessed. While HIPAA requirements do not include broad waivers that would exempt hospitals from compliance during an emergency situation, there are provisions in the Privacy Rule that may be relaxed under emergency circumstances.

A new development in the law relating to quarantine is the possible use of self-imposed or home quarantines. States may need to consider whether their ability to impose quarantine also includes the authorities necessary to support a population asked to voluntarily stay at home for a period of time.¹⁰³ Such authority may include the ability to offer legal immunity to businesses asked to provide facilities for quarantine. Compliance with public health measures such as quarantine or isolation may also be affected by employment-related issues, because individuals may fear losing their jobs or benefits while staying at home for social distancing measures such as “snow days” or voluntary quarantines, or for caring for a sick relative.¹⁰⁴

Military Enforcement of Health Measures

In light of recent concerns that a strain of avian influenza could mutate to cause a pandemic, President Bush has suggested that Congress should authorize him to employ military forces to enforce any quarantine that might become necessary in the event of an outbreak in the United States.¹⁰⁵ President Bush also suggested that the National Guard might be employed under federal

⁹⁸ See CRS Report RS21414, *Mandatory Vaccinations: Precedent and Current Laws*, by Kathleen S. Swendiman.

⁹⁹ See CRS Report RL32655, *Influenza Vaccine Shortages and Implications*, by Sarah A. Lister and Erin D. Williams.

¹⁰⁰ 42 U.S.C. § 1395dd. See also Sara Rosenbaum & Brian Kamoie, *Finding a Way Through the Hospital Door: The Role of EMTALA in Public Health Emergencies*, 31 J.L. Med. & Ethics 590-601 (2003).

¹⁰¹ After Hurricane Katrina, HHS Secretary Michael Leavitt waived sanctions under EMTALA for the redirection of an individual to another location to receive a medical screening pursuant to a state emergency preparedness plan. The Secretary also waived sanctions for transfers of individuals who had not been stabilized if the transfer arose out of hurricane-related emergency circumstances. HHS, “Waiver Under Section 1135 of the Social Security Act,” Sept. 4, 2005. See, generally, James G. Hodge, Jr., *Legal Triage during Public Health Emergencies and Disasters*, 58 Admin. L. Rev. 627 (2006).

¹⁰² 42 U.S.C. §§ 300gg *et seq.* See Rothstein, et al., *Quarantine and Isolation*, *supra*, footnote 28 at 8 (noting that misunderstanding HIPAA requirements can lead to a failure to report infectious disease cases to public health officials).

¹⁰³ Federal and state authorities generally provide for the care of persons mandatorily quarantined (see 42 U.S.C. § 249, and Section 604 of the Model State Emergency Health Powers Act, discussed *infra*), but voluntary home-quarantine situations may pose new issues. See Steven D. Gravely, et al., *Emergency Preparedness and Response: Legal Issues in a Changing World*, 17 THE HEALTH LAWYER 1 (June 2005).

¹⁰⁴ See CRS Report RL33609, *Quarantine and Isolation: Selected Legal Issues Relating to Employment*, by Nancy Lee Jones and Jon O. Shimabukuro.

¹⁰⁵ See David Brown, “Military’s Role in a Flu Pandemic; Troops Might Be Used to ‘Effect a Quarantine,’ Bush Says,” *Washington Post*, Oct. 5, 2005, p. A5 (noting that “the [P]resident gave no details on the specific role troops might play (continued...)”).

rather than state control to carry out measures to contain such an outbreak.¹⁰⁶ Critics of the proposal have expressed concern that an additional exception to the Posse Comitatus Act,¹⁰⁷ which prohibits active military personnel from carrying out certain law enforcement activities without express statutory authority,¹⁰⁸ would lead to a form of martial law, with the attendant threats to civil liberties.¹⁰⁹ The 109th Congress passed a measure that may enhance the President's authority to use military forces to restore law and order in the event of a "natural disaster, epidemic, or other serious public health emergency," possibly including the enforcement of health measures.¹¹⁰

Posse Comitatus Act

The Posse Comitatus Act, 18 U.S.C. § 1385, punishes those who, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully use any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws."¹¹¹ Some view the act as the embodiment of the American tradition that abhors the use of soldiers to compel citizens to obey the law.¹¹² Yet the Constitution does not explicitly bar the use of military forces in civilian situations or in matters of law enforcement; in fact, it empowers Congress to provide for calling forth the militia to execute federal law.¹¹³

Courts have held that, absent a recognized exception, the Posse Comitatus Act is violated when (1) civilian law enforcement officials make "direct active use" of military investigators, (2) the use of the military "pervades the activities" of the civilian officials, or (3) the military is used to subject citizens to the exercise of military power that is "regulatory, prescriptive, or compulsory in nature."¹¹⁴ To the extent that quarantine enforcement measures involve the compulsion of civilians to remain in or leave an area, for example, it appears that the Posse Comitatus Act would

(...continued)

or what sort of quarantine might be invoked").

¹⁰⁶ *Id.*

¹⁰⁷ 18 U.S.C. § 1385.

¹⁰⁸ See CRS Report RS22266, *The Use of Federal Troops for Disaster Assistance: Legal Issues*, by Jennifer K. Elsea.

¹⁰⁹ See John Reichard, *Critics Argue Use of Military to Enforce Flu Quarantine Would Undermine Compliance, Civil Liberties*, CQ Healthbeat, Oct. 5, 2005, <http://www.cq.com/display.do?docid=1900272&prod=5&binderName=healthbeat-20051005>.

¹¹⁰ Defense Authorization bill for FY2007, P.L. 109-364, § 1076.

¹¹¹ See CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle.

¹¹² See Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 91 (2003)(arguing that "courts analyzing the act [have written] about the law as if it was the only law or principle that limited the use of the armed forces in a law enforcement role. Some, therefore, have claimed to discern a broader policy or 'spirit' behind the act that is not supported by the historical record or the statute's text. While these wider policies are sound, they are embodied in federalism, the law concerning federal arrest authority, election law, and especially fiscal law. The ... Posse Comitatus Act ... doesn't have to do all the work, a view that even the act's original proponents appeared to recognize. Trying to force-fit all these other principles into the surviving part of the act has only created a need to 'discover' a number of implied exceptions and has sowed a great deal of confusion."); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383 (2003).

¹¹³ U.S. CONST. art. I § 8 cl. 15.

¹¹⁴ See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C.Cir. 1991); *United States v. McArthur*, 419 F.Supp. 186 (D.N.D. 1975), *aff'd*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Bacon*, 851 F.2d 1312, 1313-14 (11th Cir. 1988).

be implicated. Thus, unless a pandemic were to lead to significant civil unrest or call for other military activity already authorized pursuant to existing exceptions,¹¹⁵ Congress would have to enact a law to authorize military enforcement of health measures.

The act does not prohibit activities conducted for a military purpose, which could encompass restrictions implemented on bases or to control a communicable disease affecting service members. The Posse Comitatus Act does not apply to the National Guard unless it is employed in federal service as a reserve force of the armed forces. If the National Guard is called up to enforce U.S. laws, however, it is not subject to the Posse Comitatus Act.¹¹⁶

Possible Military Enforcement Under Other Statutes

The President may be authorized by the Constitution or by statute to use the military to enforce a quarantine or conduct other law enforcement activities as needed during an epidemic. Prior to the Civil War, Congress was generally reluctant to involve itself with any type of disaster assistance,¹¹⁷ and health measures, except in areas under exclusive federal jurisdiction, were generally left to the regulation of the states. However, Congress has given the President, through the Secretary of HHS, the authority to help states enforce quarantine laws with respect to any vessels arriving in or bound to any of their ports or districts, including the use of the military.¹¹⁸ This authority, which originated in a law passed in 1796,¹¹⁹ does not extend to the control of movement of persons within the United States.

In 1866, when issues involving military government and states' rights figured prominently in the nation's political discourse, the Senate considered a bill that would have given the Secretary of War the responsibility, "with the cooperation of the Secretary of the Navy and the Secretary of the Treasury ... to cause a rigid quarantine against the introduction into this country of the Asiatic cholera through its ports of entry."¹²⁰ The bill would have further authorized the Secretary of War to "use the means at [his] command" to enforce "sanitary cordons to prevent the spread of said disease from infected districts adjacent to or within the limits of the United States." After the bill's sponsor affirmed that the power could extend to the declaration of martial law,¹²¹ the questioner responded, "I would rather have the cholera than such a proposition as this."¹²² Most of the ensuing debate centered around Congress's power to legislate, either under the Commerce Clause, the Guarantee Clause, or the "war power" and on whether the legislation would

¹¹⁵ See, generally, CRS Report RS20590, *The Posse Comitatus Act and Related Matters: A Sketch*, by Jennifer K. Elsea; and CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle.

¹¹⁶ 10 U.S.C. § 12406 (The President may call National Guard units or members into federal service to repel an invasion, suppress a rebellion, or execute federal laws when he is unable to execute them using the regular forces.)

¹¹⁷ See GAINES M. FOSTER, *THE DEMANDS OF HUMANITY: ARMY MEDICAL DISASTER RELIEF 8-13* (1983) (describing the emergence of federal disaster assistance during the 19th century).

¹¹⁸ 42 U.S.C. § 97.

¹¹⁹ See notes 10-12, *supra*.

¹²⁰ H.J.Res. 116, 39th Cong. (1866) as reported from the Senate Committee on Commerce, CONG. GLOBE, 39th Cong., 1st sess. 2444 (1866).

¹²¹ CONG. GLOBE, 39th Cong., 1st Sess. 2445 (1866)(Sen. Chandler responded, "they may use any power requisite to stop the cholera").

¹²² *Id.* (Sen. Anthony).

impermissibly intrude on the police powers of the states.¹²³ The power to regulate foreign commerce appears to have attracted the most support; as finally passed, the bill gave authority to the Secretary of the Treasury, until January of 1867, to make and enforce quarantine regulations deemed necessary to help state and municipal authorities guard against cholera.¹²⁴

Outside of the Coast Guard's role in enforcing CDC health regulations with respect to foreign passengers and cargo,¹²⁵ the armed forces have not historically played a major role in enforcing quarantines during epidemics.¹²⁶ The Army Medical Corps has provided medical assistance to victims of yellow fever and other epidemics and contributed extensively to medical research,¹²⁷ but it does not appear that an outbreak of disease has ever overwhelmed state and local authorities to the point where federal military intervention was required. It is, however, conceivable that in a major epidemic, opposition to quarantine measures could lead to civil disorder and significant numbers of state and local law enforcement officials could themselves fall victim to the disease, in each case to such an extent that federal assistance or intervention would be needed to ensure the execution of federal or state laws. In such circumstances, the President could invoke the Insurrection Act, 10 U.S.C. §§ 331-335, to employ the National Guard or regular armed forces to execute federal law or state law (if requested by the state legislature).

Section 331 of title 10, U.S. Code, authorizes the President to use the military to suppress an insurrection at the request of a state government. This authorization is meant to fulfill the federal government's responsibility to protect states against "domestic violence." Section 332 delegates Congress's power under the Constitution, art. I, § 8, cl. 15, to the President, authorizing him to determine that "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States" and to use the armed forces as he considers necessary to enforce the law or to suppress the rebellion. Section 333 permits the President to use the armed forces to suppress any "insurrection, domestic violence, unlawful combination, or conspiracy" if law enforcement is hindered within a state and local law enforcement is unable to protect individuals' rights guaranteed by the Constitution, or if the unlawful action "obstructs the execution of the laws of the United States or impedes the course of justice under those laws." This section was enacted to implement the Fourteenth Amendment and does not require the request or even the permission of the governor of the affected state. The Insurrection Act has been used to send the armed forces to quell civil disturbances a number of times during U.S. history, most recently during the 1992 Los Angeles riots and during Hurricane Hugo in 1989.¹²⁸

¹²³ *Id.* pp. 2483-85, 2521-22, 2548-50, 2581-87.

¹²⁴ 14 Stat. § 357 (1866).

¹²⁵ 42 U.S.C. § 97.

¹²⁶ Military governments established in the South during and after the Civil War may have had occasion to order quarantines. According to one account, the Commanding General in New Orleans established a quarantine to prevent ships from carrying yellow fever upriver in 1862, although no cases of the disease had yet appeared, mainly because troops occupying the city were thought to be more susceptible than the local "acclimated" population. See Benjamin F. Butler, *Some Experiences with Yellow Fever and its Prevention*, 147 NORTH AM. REV. 530 (1888).

¹²⁷ See FOSTER, *supra* note 115, at 16 (noting that "[s]oldiers served primarily as administrators; they estimated needs, purchased supplies, delivered them in bulk, and left to local authorities the actual distribution to the needy"); MARY C. GILLET, *THE ARMY MEDICAL DEPARTMENT 1865-1917*, at 39-49 (1995).

¹²⁸ President Bush reportedly considered invoking the Insurrection Act to take federal control of Louisiana National Guard units during the aftermath of Hurricane Katrina, but the Louisiana governor had resisted the proposal and no proclamation was issued. See Manuel Roig-Franzia and Spencer Hsu, "White House Shifts Blame to State and Local Officials," *Washington Post*, Sept. 4, 2005, p. A01.

The President could use the Insurrection Act, now titled “Enforcement of the Laws to Restore Public Order,” to enforce health measures in the event that civil officials were overwhelmed during a pandemic and unable to enforce those laws. The 109th Congress included in the Defense Authorization bill for FY2007 (P.L. 109-364), a provision that amended 10 U.S.C. § 333 explicitly to cover instances of “domestic violence” where public order is disrupted due to a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” (Section 1076). Section 333, as amended, authorizes the President to employ federal troops to “restore public order and enforce the laws of the United States,” without a request from the governor or legislature of the state involved, in the event he determines that local authorities are unable to maintain public order, where, as before, either the enjoyment of equal protection of the laws is impeded or the execution of federal law and related judicial process is obstructed.

On exercising the authority, the President is required to notify Congress as soon as practicable and every 14 days until ordinary law enforcement is restored. The authority to employ military force in section 333 remains unchanged, except that the President’s recourse to “any other means” is eliminated, and the relevant state is to be deemed to have denied constitutional equal protection any time the authority is exercised outside of the newly described disaster scenario, rather than when “any part or class of [the state’s] people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law,” although this remains one of the alternative prerequisites for invoking the authority even under disaster conditions. The amendment has been criticized as encouraging recourse to federalization of National Guard troops and employment of other military troops in the event of a natural disaster, even if the governor of the affected state does not believe the situation calls for federal troops.

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