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PUBLIC HEALTH LEGAL PREPAREDNESS BRIEFING MEMORANDUM # 4¹

OVERVIEW OF FEDERAL AND STATE QUARANTINE AUTHORITY²

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ISSUE: What is the interplay between federal and state quarantine laws?

RESPONSE: There are multiple statutory and other legal authorities at the federal and state levels for conducting quarantine during bioterrorism events or other public health emergencies. The extent of authority conferred through these provisions varies extensively. The complexity and inter-working of these provisions are discussed below.

“Quarantine” refers to the separation of individuals, who are suspected of exposure to a communicable disease, from a population which is not yet suspected of having been infected. Suspicion

¹. On December 11, 2002, the CDC Public Health Law Program, the Association of State and Territorial Health Officials, and the National Association of County and City Health Officials sponsored a peer consultation workshop on selected legal and policy issues related to public health legal preparedness for bioterrorism. The *Center for Law and the Public's Health* hosted the workshop. This memorandum was prepared in response to an issue of shared interest to workshop participants.

². This Memorandum is intended as a guide for use by public health attorneys and practitioners attending the Workshop. It is not intended to be, and cannot be relied upon to offer, specific legal advice.

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of exposure could arise from information or belief; in theory, it could also arise from the presence of non-specific signs or symptoms of disease in the affected individual. Quarantine is distinguishable from “isolation” in that it is a mechanism to restrict the movement of individuals for whom exposure, and not infection, is suspected or established. Like isolation, however, quarantine has at least two goals: (1) the public health goal of preventing the spread of communicable disease to unaffected members of the population and (2) the medical goal of ensuring that affected individuals most efficiently receive specialized attention and treatment.

The authority to quarantine as a public health measure is primarily a species of “police power” reserved to the states under the 10th Amendment (U.S. Constitution). As such, the laws and regulations dealing with states’ quarantine authorities are subject to the same interstate variations as other authorities left largely within the states’ discretion. As a result it is difficult, if not impossible, to generally characterize quarantine laws across the states.

Notwithstanding quarantine’s status as a public health measure generally within the states’ purview, when public health is implicated in areas of authority delegated to the federal government, federal law controls. The two most prominent examples arise in the situation of suspected cases of communicable disease arriving from outside the United States and in the control of the spread of communicable diseases between states.

Basic provisions and concepts of federal and state law are introduced briefly below.

Federal law

Federal law provides two basic sources of authority for exercising quarantine power in the event of an outbreak of communicable disease: (1) general provisions found within Title 42 of the U.S. Code and (2) the Stafford Act.

Title 42 U.S. Code

42 U.S.C. §§264 and 266 provide the Secretary of the Department of Health and Human Services (“the Secretary”) peacetime and wartime authority, respectively, to control the movement of persons into and within the United States to prevent the spread of communicable disease. Communicable diseases for which apprehension, detention or conditional release of persons are authorized must be set forth in Executive Orders of the President.⁴

⁴The most recent Order identifies cholera or suspected cholera; diphtheria; infectious tuberculosis; plague; suspected smallpox; yellow fever; and suspected viral hemorrhagic fevers (including lassa, marburg, ebola, congo-crimean, and others not yet isolated or named). Exec. Order 12452 (1983).

42 U.S.C. §264 (2002) allows

- the Secretary, in consultation with the Surgeon General, to authorize (through regulations) the apprehension, detention, examination and conditional release of individuals coming into the United States (or its possessions) from a foreign country who are reasonably believed infected with a communicable disease in a qualifying stage⁵;
- the Secretary, in consultation with the Surgeon General, to authorize (through regulations) the apprehension and examination of individuals, reasonably believed to be infected with a communicable disease in a qualifying stage, moving between states or likely to infect individuals moving between states; and
- the Secretary to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries or from one State or possession into any other State or possession.

Corresponding regulations found at 42 C.F.R. §70.2 (2002) allow the Director of CDC to take reasonably necessary measures to prevent the spread of disease between states if local efforts are “insufficient”.⁶ Similarly, 42 C.F.R. §§70.5 and 70.6 (2002) codifies the Secretary’s regulatory authority to require permits for interstate travel by certain infected persons⁷ and to order their detention.

42 U.S.C. §266 (2002) grants a less restricted authority to the Secretary during times of war. This includes:

- the power to authorize the apprehension, examination and detention of individuals reasonably believed to be infected with communicable disease in a qualifying stage; and

⁵A “qualifying stage” is either a communicable stage of the disease or a pre-communicable stage if the disease would be likely to cause a public health emergency if transmitted to other individuals.

⁶The question of “insufficiency” or “inability” has an imperfect parallel in the Insurrection Statutes, 10 U.S.C. §331 et seq. These identify several circumstances under which State or local authorities could be considered incapable of protecting the public and/or enforcing the law – thereby justifying direct federal intervention. A State’s inability to enforce public health control measures in the face of a public health crisis could conceivably trigger operation of one of these provisions and allow direct, federal intra-state intervention.

⁷*E.g.*, those incubating or infected with cholera, plague, smallpox, typhus or yellow fever.

- for those presenting a potential risk of infection to the armed forces or its suppliers, the power to continue detention as long as reasonably necessary.

No regulations presently implement 42 U.S.C. §266.

As a final example, Title 42 also authorizes the federal government to assist States in ways that could result in the implementation of quarantine by the federal government (under a State’s auspices). 42 U.S.C. §243 directs the Secretary of the Department of Health and Human Services to:

- assist State and local governments in preventing and suppressing communicable diseases; and
- cooperate with and aid State and local governments in enforcing their quarantine and other health-related regulations.

The Stafford Act

The Stafford Act (42 U.S.C. §5121 et seq.) provides another avenue through which the federal government may be involved in implementing quarantine. In the event of the declaration of an emergency under the Stafford Act triggering the United States Government Interagency Domestic Terrorism Concept of Operations Plan⁸, for example, FEMA and its coordinating agencies (such as CDC) can be called upon to implement health and safety measures – presumably including quarantine.⁹ Quarantine would have to be implemented under the same statutory standards as those set forth in Title 42.

Similarly, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. No. 107-188, 116 Stat. 594 (2002)) directs the Secretary to “ensure that the Department of Health and Human Services is able to provide such assistance as may be needed to State and local health agencies to enable such agencies to respond effectively to bioterrorist attacks.”¹⁰

Quarantine Care, Treatment and Liability

⁸“CONPLAN” at 7 (2001). Access last verified August 23, 2002 at <http://www.fbi.gov/publications/conplan/conplan.pdf>.

⁹The question of which federal governmental personnel – if any – are available to assist in the actual implementation of a quarantine is complex though not addressed here. E.g., federal military personnel are not precluded from assisting in passive, “non-law enforcement related” activities to assist during a crisis. *See* 18 U.S.C. §1385.

¹⁰42 U.S.C. §247d-6(f) (2002).

Title 42, U.S. Code § 249, provides that any person detained in accordance with quarantine laws may be treated and cared for by the U.S. Public Health Service. Furthermore, such persons may, in accordance with regulations, receive care and treatment at the expense of the Service from public or private medical or hospital facilities other than those of the Service. Procedural review of federal quarantine is by habeus corpus. However, under the Federal Tort Claims Act (28 USC § 2680(f)), the federal government retains sovereign immunity from any claim for damages caused by the imposition or establishment of a quarantine. Persons wrongfully detained, however, would presumably still have recourse to civil rights actions against government officials (acting in their official capacities) under *Bivens v. Six Unknown Federal Agents*.

State law

State laws vary regarding quarantine. Historically some states have codified extensive provisions relating to quarantine whereas others have not. Typically, however, states provide quarantine laws and regulations in response to 3 categories of disease: (1) traditional killers – such as typhus and smallpox – which, thanks to the medical and public health revolutions of the early to mid-20th century, until recently appeared almost irrelevant in contemporary society; (2) sexually transmitted diseases; and (3) the so-called “emerging” (or re-emerging) diseases, such as tuberculosis, which in recent decades have made a dramatic (re-) appearance.

This pattern has been disrupted as security concerns have led to a recent, sharp increase in the number of states updating, instituting or re-examining their legal tools for the management of communicable diseases. This recent period of evolution includes new state laws:

- Defining “bioterrorism” (12 states);
- Identifying emergencies which might call for “special” public health powers (16 states);
- Controlling private property (10 states);
- Articulating structures for isolation or quarantine (14 states); and
- Elaborating upon due process requirements (12 states).

See MSEHPA Legislative Surveillance Table [attached]. It is impractical to generalize regarding state law in this area. States (and the District of Columbia) have still failed to achieve uniformity of the conditions and procedures under which they may exercise quarantine to control a public health emergency.

There are, however, several common concerns. Quarantine is well-established as lying within the power of a State to provide for the general health and welfare.¹¹ States, whether or not they have

¹¹*See, e.g.,* Gostin LO, Public Health Law at 211 (2000).

recently modernized quarantine powers (see MSEHPA Legislative Surveillance Table -attached), must address at least the following legal issues:

- its definition and proper uses;
- the provision of due process;
- the conditions of quarantine; and
- resultant liability.

Definition and Uses

Quarantine is a measure used to protect the public's health and should be defined clearly as such. It is not, and may not be used as, a punitive instrument. Important elements of its definition include: (1) its use in response to the threat of communicable disease; (2) its necessity to protect the public's health; and (3) its distinction from isolation (used to manage infections or suspected infections with communicable disease) and the "cordon sanitaire" (which tends to apply broadly to large geographical areas as opposed to identified individuals).¹²

Due Process

Due process considerations arise at a number of levels in the use of quarantine, including the notice required an affected individual, his right to contest the government's action, his right to challenge the conditions of his confinement, and his right of appeal. The Model Act,¹³ for example, provides different forms of notice and hearing depending upon the nature of the emergency facing the public health authority.¹⁴ The burden of proof to be met in showing quarantine's necessity is also important. Some legislation suggests a standard of "clear and convincing" evidence to demonstrate that quarantine is necessary.¹⁵ Others – including the authors of the Model Act – have concluded that the unique characteristics of quarantine in a public health emergency render it amenable to a standard of preponderance of the evidence; but that any quarantine must be by the least restrictive means necessary.

Conditions and Liability

¹²See, e.g., *Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities. The Model State Emergency Health Powers Act.* Washington, DC; 2001. Available at: <http://www.publichealthlaw.net>. Access last verified February 2, 2002. Model Act at §104(o).

¹³*Id.*

¹⁴*Id.* at §605.

¹⁵E.g., legislation proposed in New Mexico. See also Gostin at 213-215.

There is no doubt that the state, having deprived an individual of his freedom by quarantine, is under a duty to care for him (depending on the nature of the quarantine). Contemporary public health emergency legislation may choose to articulate this as an explicit requirement with stated procedures for seeking relief.¹⁶

It has already been noted that the federal government retains sovereign immunity with respect to claims arising out of quarantine. The trend in the States appears to be to accept liability only with respect to gross, and not ordinary, negligence.

“Shelter-in-Place”

An important development in the law relating to quarantine has been growing discussion of the use of self-imposed or home quarantine, sometimes known as “shelter-in-place.” Unlike a traditional quarantine that relies on a command and control approach to enforcement, shelter-in-place focuses on the initiation of individual action (such as voluntary home curfews) to accomplish public health objectives. While some quarantine schemes may explicitly address this possibility,¹⁷ a state’s code should be reviewed to ensure that the public health authority’s ability to impose quarantine also includes the authority necessary to support a population asked to voluntarily shelter-in-place. This may include, for example, the authority to license and credential potential first responders and to offer legal immunity to businesses or individuals asked to support a shelter-in-place program.

Conclusion

Quarantine is a form of “police power” and traditionally, at least within the United States, is primarily an instrument of the States. Nevertheless, the federal government has authority to quarantine to prevent the spread of communicable diseases from foreign countries and between states; in times of war; and during times when the states are unable or unwilling to provide for the protection of the public and the enforcement of the law. The federal government may provide care and treatment for quarantined individuals, but does not accept liability for damages arising in tort.

State laws and regulations dealing with quarantine vary but typically make provision for quarantine with respect to 3 categories of disease: (1) traditional killers (such as typhus and smallpox); (2) sexually transmitted diseases; and (3) emerging infectious diseases. In response to security concerns, many states have recently sought to update or re-examine their laws relating to the control of infectious diseases. This effort has not resulted in uniformity – but regardless of their state’s codification scheme, all public health actors must deal with the fundamental issues of the appropriate use of

¹⁶See, e.g., Model Act at §605.

¹⁷See, e.g., Model Act at §604.

quarantine; its due process requirements; the treatment that quarantined individuals must receive; and the extent of liability to which state actors are exposed.