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# Federal and State Quarantine and Isolation Authority

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## Summary

In the wake of increasing fears about the spread of highly contagious diseases, 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 granted by their constitutions and 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.

This report provides an overview of federal and state public health laws as they relate to the quarantine and isolation of individuals and a discussion of constitutional issues that may be raised should individual liberties be restricted in a quarantine or isolation situation.

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## Introduction

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. 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.”<sup>1</sup> In contrast, isolation refers to the “(s)eparation of infected individuals from those who are not infected.”<sup>2</sup>

Varying degrees of quarantine exist, and the authority to order quarantine or isolation is generally very broad. 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.<sup>3</sup>

The variety of potential responses—from federal, state, and local authorities—implicates a number of legal issues. Namely, who is responsible for preventing an outbreak of the disease; and precisely what may be done? This report will examine federal and state authority to impose quarantine and isolation measures in order to prevent the spread of infectious disease.<sup>4</sup>

## Federal Authority

### Quarantine and Isolation

Federal quarantine and isolation authority derives from the Commerce Clause of the U.S. Constitution, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several states.”<sup>5</sup> Section 361 of the Public Health Service Act (PHS Act) grants the Secretary of Health and Human Services (Secretary) the authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of

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<sup>1</sup> Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan 209* (GPO May 2006) available at <http://www.flu.gov/planning-preparedness/federal/pandemic-influenza-implementation.pdf>.

<sup>2</sup> *Id.* at n.207.

<sup>3</sup> 42 U.S.C. § 264; 42 C.F.R. § 70.2. During the 2003 outbreak of severe acute respiratory syndrome (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 further 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](http://www.cdc.gov/ncidod/dq/sars_facts/isolationquarantine.pdf).

<sup>4</sup> See generally CRS Report R40554, *The 2009 Influenza Pandemic: An Overview*, by Sarah A. Lister and C. Stephen Redhead; 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).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3.

communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”<sup>6</sup> The law provides the Secretary with broad authority to apprehend, detain, or conditionally release a person. However, the Secretary may only exercise this authority in relation to communicable diseases published in an executive order issued by the President.<sup>7</sup> Executive Order 13295<sup>8</sup> lists the communicable diseases for which this quarantine authority may be exercised.<sup>9</sup> In 2000, the Secretary transferred certain authorities related to persons, including quarantine authority, to the Director of the CDC.<sup>10</sup> Both interstate and foreign quarantine measures are now carried out by CDC’s Division of Global Migration and Quarantine.<sup>11</sup>

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.<sup>12</sup> To facilitate containment efforts, federal regulations require airline pilots and ship captains to report immediately the presence of ill passengers on board their vessels.<sup>13</sup>

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 stage<sup>14</sup> and

(A) to be moving or about to move from a State to another State; or

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<sup>6</sup> 42 U.S.C. § 264(a). Violation of federal quarantine and isolation regulations is a criminal misdemeanor, punishable by fine and/or imprisonment, 42 U.S.C. § 271. The statute also authorizes other public health measures, including destruction of animals or articles determined to be sources of communicable disease. 42 U.S.C. § 264(a). 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>.

<sup>7</sup> 42 U.S.C. § 264(b).

<sup>8</sup> See Exec. Order No. 13674, 79 Fed. Reg. 45671 (Aug. 6, 2014); Exec. Order No. 13375, 70 Fed. Reg. 17299 (April 1, 2005).

<sup>9</sup> Exec. Order No. 13295, 68 Fed. Reg. 17255 (April 4, 2003). The diseases currently listed are cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (including ebola), severe acute respiratory syndrome (SARS), and influenza viruses which have the potential to cause a pandemic.

<sup>10</sup> Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49906. Regulations regarding quarantine upon entry into the United States from foreign countries are also administered by the CDC, see 42 C.F.R. Part 71.

<sup>11</sup> See CDC Division of Global Migration and Quarantine home page at <http://www.cdc.gov/ncpcid/dgmgq/index.html>.

<sup>12</sup> 42 U.S.C. § 264(c).

<sup>13</sup> 42 C.F.R. § 71.21. During the 2003 response to the severe acute respiratory syndrome (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. See Mark A. Rothstein et al., *Quarantine and Isolation: Lessons Learned From SARS: A Report to the Centers for Disease Control and Prevention (2003)* available at <http://www.instituteforbioethics.com> (hereinafter, *Quarantine and Isolation*).

<sup>14</sup> “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).

(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.<sup>15</sup>

If found to be infected, such individuals may be detained for such time and in such manner as may be reasonably necessary.<sup>16</sup> 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] 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.”<sup>17</sup>

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 applies to interstate travel, Part 71 to foreign arrivals.<sup>18</sup> The implementing regulations authorize the quarantine and isolation of individuals in order to prevent the spread of diseases identified in Executive Order 13295.<sup>19</sup>

In addition, pilots of both interstate flights and flights to the United States are required to report certain illnesses they encounter during flight in advance of their arrival into the United States to the CDC Quarantine Station closest to their destination airport.<sup>20</sup> There are currently 20 such stations operated by the CDC located at ports of entry into the United States.<sup>21</sup> While there are not CDC officials at every port of entry, various agencies in the Department of Homeland Security (DHS) are authorized to assist the CDC in “the enforcement of quarantine rules and regulations.”<sup>22</sup>

The Director of the CDC is also 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 determines that measures taken by local health authorities are inadequate to prevent the spread of the disease.<sup>23</sup> To prevent the spread of diseases between states, the regulations prohibit infected

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<sup>15</sup> 42 U.S.C. § 264(d)(1).

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. § 266.

<sup>18</sup> 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.

<sup>19</sup> See 42 C.F.R. § 70.6 (interstate); 42 C.F.R. § 71.32 (foreign). The diseases currently listed are cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (including ebola), severe acute respiratory syndrome (SARS), and influenza viruses which have the potential to cause a pandemic.

<sup>20</sup> 42 C.F.R. §§ 70.4, 71.21(b). It appears as though pilots would report illnesses to the Federal Aviation Administration (FAA) Air Traffic Services Unit, which would then communicate with the CDC Emergency Operations Center. See Press Release, “FAA Statement on Ebola,” Oct. 3, 2014, available at [http://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=17375](http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17375).

<sup>21</sup> See Centers for Disease Control and Prevention, U.S. Quarantine Stations available at <http://www.cdc.gov/quarantine/quarantine-stations-us.html>.

<sup>22</sup> 42 U.S.C. § 268. HHS also works closely with the Department of Homeland Security (DHS) and its agencies. HHS and DHS signed a Memorandum of Understanding in 2005 that sets forth specific cooperation mechanisms to implement their respective statutory responsibilities for quarantine and other public health measures. Memorandum of Understanding Between the Department of Health and Human Services and the Department of Homeland Security, available at [http://www.aclu.org/pdfs/privacy/hhs\\_dhs\\_mou.pdf](http://www.aclu.org/pdfs/privacy/hhs_dhs_mou.pdf). DHS has three agencies that may aid CDC in its enforcement of quarantine rules and regulations pursuant to 42 U.S.C. § 268(b). They are CBP, U.S. Immigration and Customs Enforcement (ICE), and the U.S. Coast Guard. In addition to DHS, CDC may also rely on other federal law enforcement agencies and state and local law enforcement agencies.

<sup>23</sup> 42 C.F.R. § 70.2.

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.<sup>24</sup> 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.”<sup>25</sup>

The Secretary is also authorized to bar the entry of persons from foreign countries where the “existence of any communicable disease” poses a “serious danger” of entering the United States such that “a suspension of the right to introduce such persons and property is required in the interest of public health.”<sup>26</sup> A rule implementing this statutory authority was proposed in 2005, but was not adopted.<sup>27</sup>

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 Act<sup>28</sup> 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.<sup>29</sup> Section 311 of the PHS Act<sup>30</sup> provides for federal-state cooperative activities to enforce quarantines. The federal government may assist states and localities in enforcing 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 may request the aid of CBP, the 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.<sup>31</sup> Violation of a federal quarantine or isolation order is a criminal misdemeanor, and individuals may be subject to a fine of up to \$100,000, one year in jail, or both; organizational violations may be subject to fines of up to \$200,000 per event.<sup>32</sup> Federal district courts may enjoin individuals and organizations from violation of CDC quarantine regulations.<sup>33</sup>

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<sup>24</sup> 42 C.F.R. § 70.3.

<sup>25</sup> 42 C.F.R. § 70.5.

<sup>26</sup> 42 U.S.C. § 265. 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. In 1979, the Department of Health, Education, and Welfare (HEW) was redesignated as the Department of Health and Human Services (HHS). P.L. 96-88, Title V., § 509. In 2003, the President’s authorities under the original statute were delegated to the Secretary. Exec. Order No. 13295, 68 Fed. Reg. 17255.

<sup>27</sup> See Control of Communicable Diseases, Notice of Proposed Rulemaking, 70 Fed. Reg. 71892.

<sup>28</sup> 42 U.S.C. § 249(a).

<sup>29</sup> 42 U.S.C. § 249(c).

<sup>30</sup> 42 U.S.C. § 243.

<sup>31</sup> 42 U.S.C. § 271.

<sup>32</sup> See 18 U.S.C. §§ 3559, 3571.

<sup>33</sup> Federal district courts have jurisdiction over civil claims involving federal law. See 28 U.S.C. § 1331.

## Do Not Board List

In recent years, federal agencies have developed a travel restriction tool to prevent the spread of communicable diseases of public health significance.<sup>34</sup> The public health Do Not Board (DNB) list was developed by DHS and the CDC, and made operational in June 2007.<sup>35</sup> The DNB list enables domestic and international health officials to request that persons with communicable diseases who meet specific criteria and pose a serious threat to the public be restricted from boarding commercial aircraft departing from or arriving in the United States.<sup>36</sup> The list provides a tool for management of emerging public health threats when local public health efforts are not sufficient to keep certain contagious individuals from boarding commercial flights.<sup>37</sup>

In order to place a person on the DNB list, state and local health officials contact their local CDC quarantine station. The CDC determines if the person is (1) likely contagious with a communicable disease that presents a serious public health threat, (2) unaware of or likely not to comply with public health recommendations and medical treatment, and (3) likely to try boarding a commercial aircraft.<sup>38</sup> Once a person is placed on the DNB list,<sup>39</sup> airlines are instructed not to issue a boarding pass to the person for any commercial domestic flight or for a commercial international flight arriving in or departing from the United States. Other forms of transportation, such as buses and trains, are not covered by the DNB list. Once a patient is determined to be noncontagious, the CDC and DHS must remove the person from the list, usually within 24 hours.<sup>40</sup>

In September 2008, the CDC released a report<sup>41</sup> in which it analyzed the first year's experience with the DNB list. According to the report, the CDC received 42 requests to add persons to the DNB list, all of whom had suspected or confirmed pulmonary tuberculosis.<sup>42</sup> The agency approved 33 of the requests, of which 28 were placed by public health departments in the United States, and 14 were placed on the list while they were outside of the country.<sup>43</sup> Two of the 33 persons placed on the DNB list attempted to evade the air travel restriction, and both were

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<sup>34</sup> For a summary of actions taken by DHS and the CDC to improve procedures to restrict persons with serious communicable diseases who intend to travel despite medical advice, see *Public Health and Border Security: HHS and DHS Should Further Strengthen Their Ability to Respond to TB Incidents*. GAO-09-58, October, 2008 [hereinafter *GAO Public Health and Border Security Report*].

<sup>35</sup> CDC, "Federal Air Travel Restrictions for Public Health Purposes—United States, June 2007-May 2008", *Morbidity and Mortality Weekly Report*, Sep. 19, 2008, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm> [hereinafter *MMWR Report*].

<sup>36</sup> Airlines also have general authority to refuse to board passengers with communicable diseases under certain circumstances pursuant to Air Carrier Access Act of 1986 (ACAA) and its implementing regulations. See 49 U.S.C. § 41705; 14 C.F.R. §§ 382.19, 382.21.

<sup>37</sup> The list, which applies to all citizens and foreign nationals, appears to have been developed under the general authority of the Aviation and Transportation Security Act of 2001, at 49 U.S.C. § 114(f) and (h).

<sup>38</sup> *MMWR Report*, *supra* note 35, at 1009.

<sup>39</sup> The Transportation Security Administration maintains the DNB list, which is separate from the No Fly List used to prevent known terrorists from boarding airplanes, but it serves a similar purpose. *GAO Public Health and Border Security Report*, *supra* note 34, at 29.

<sup>40</sup> *MMWR Report*, *supra* note 35, at 1010.

<sup>41</sup> See generally *id.*

<sup>42</sup> *Id.* at 1010.

<sup>43</sup> *Id.*



detained by border officials and taken to local hospitals for evaluation and treatment.<sup>44</sup> The CDC found that “[j]udicious use of the public health DNB list can obviate the human and economic costs associated with conducting contact investigations when people with communicable diseases travel on commercial aircraft.”<sup>45</sup>

## State Police Powers and Quarantine Authority

While the federal government has authority to authorize quarantine and isolation under certain circumstances, the primary authority for quarantine and isolation exists at the state level as an exercise of the state’s police power. CDC acknowledges this deference to state authority as follows:

In general, CDC defers to the state and local health authorities in their primary use of their own separate quarantine powers. Based upon long experience and collaborative working relationships with our state and local partners, CDC continues to anticipate the need to use this federal authority to quarantine an exposed person only in rare situations, such as events at ports of entry or in similar time-sensitive settings.<sup>46</sup>

Although every state has the authority to pass and enforce quarantine laws as an exercise of its 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.<sup>47</sup> For example, in Louisiana, the state health officer is not authorized to “confine [a person] in any institution unless directed or authorized to do so by the judge of the parish in which the person is located.”<sup>48</sup> 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.<sup>49</sup> States also employ different methods for determining the duration of the quarantine or isolation

<sup>44</sup> *Id.* at 1011.

<sup>45</sup> *Id.*

<sup>46</sup> CDC, “Questions and Answers on the Executive Order Adding Potentially Pandemic Influenza Viruses to the List of Quarantinable Diseases,” May 30, 2014, available at <http://www.cdc.gov/quarantine/qa-executive-order-pandemic-list-quarantinable-diseases.html>. The complexities of this shared power have been noted. One analysis observed that “When it comes to the exercise of isolation and quarantine powers, reality tends to be messier than the conceptual realm. Public health officials need clear lines of authority in emergency situations, often the moments when isolation and quarantine might be required. Unfortunately, confusion about which level of government should take the lead often occurs, thus revealing the ability of quarantine powers to spotlight difficulties federalism poses for public health.” David P. Fidler, Lawrence O. Gostin, and Howard Markel, *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law and Ethics*, 35 J. OF LAW, MEDICINE & ETHICS 616 (2007). Another commentator has noted that “Given the variation in due process rights in connection with quarantine, which may be afforded under federal and state law, one can foresee the possibility of considerable conflict.” Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 119 (2007).

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

<sup>48</sup> LA. REV. STAT. ANN. § 40:17(A). Exceptions are provided for certain diseases, including smallpox, cholera, yellow fever, bubonic plague, and tuberculosis. See La. Rev. Stat. Ann. § 40:17(B).

<sup>49</sup> Mindes, *supra* note 47, at 409. See e.g., MD. CODE ANN., [Health] § 18-324, which formerly addressed only quarantine in tuberculosis cases. The governor may now exercise 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.

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.”<sup>50</sup>

One common characteristic of many state quarantine laws is their “overall antiquity,” with many statutes being between 40 and 100 years old.<sup>51</sup> The more antiquated laws “often do not reflect contemporary scientific understandings of disease, [or] current treatments of choice.”<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> A review of quarantine authority was listed as a priority for state governments in the President’s 2002 *National Strategy for Homeland Security*.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

## Legal Challenges to 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,

<sup>50</sup> Mindes, *supra* note 47, at 410.

<sup>51</sup> 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 50-state survey of quarantine provisions, see National Conference of State Legislatures, State Quarantine and Isolation Statutes, <http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

<sup>52</sup> Gostin, *supra* note 51, at 106106.

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

<sup>54</sup> *But see* Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. REV. 441, 448 (1988); Mindes, *supra* note 47, 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).

<sup>55</sup> Justin Gillis, “States Weighing Laws to Fight Bioterrorism,” *Washington Post*, Nov. 19, 2001, at A01.

<sup>56</sup> Office of Homeland Security, *National Strategy for Homeland Security*, June 2002, <http://www.dhs.gov/sites/default/files/publications/nat-strat-hls-2002.pdf>.

<sup>57</sup> Rothstein, *supra* note 13, at 7-8 (discussing restrictions on travel to combat the spread of disease).

<sup>58</sup> *Id.* at 13 (suggesting that memoranda of understanding be developed between federal and state health officials setting forth responsibilities in cases of concurrent quarantine jurisdiction).

and general welfare. Historically, this balance can be seen in public health crises over the past century or so. The U.S. Constitution and federal civil rights laws provide for individual due process and equal protection rights as well as a right to privacy, but these rights are balanced against the needs of the community. However, classic public health measures such as quarantine, isolation, and contact tracing are, nevertheless, available in appropriate situations, and, as new or resurgent diseases have become less treatable, some of these classic public health measures have been increasingly used. Therefore, the issue of how to balance these various interests in a modern culture that is sensitive to issues of individual rights has become critical.<sup>59</sup>

Some courts have recognized an individual's right to challenge his or her quarantine or isolation by petitioning for a writ of habeas corpus.<sup>60</sup> Although the primary function of a writ of habeas corpus is to test the legality of the detention,<sup>61</sup> petitioners often seek a declaration that the statute under which they were quarantined is unconstitutional.

## Dormant Commerce Clause Challenges

In 1824, the Supreme Court in *Gibbons v. Ogden* alluded to a state's authority to quarantine under the police powers.<sup>62</sup> 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*,<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> In a subsequent case, the Court made clear that at least where Congress has not

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<sup>59</sup> For a detailed discussion of constitutional issues relating to quarantine see Michelle A. Daubert, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFFALO L. REV. 1299 (2007). For an analysis of how to balance the sometimes competing interests of personal and economic liberties with the public's health and security see Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?* 55 FLA. LAW REV. 1105 (December 2003). See also David P. Fidler, Lawrence O. Gostin, and Howard Markel, "Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law and Ethics," 35 J. OF LAW, MEDICINE & ETHICS 616 (2007), where the authors note that courts have set four limits on isolation and quarantine authority: the subject must actually be infectious or have been exposed to infectious disease; the subject must be placed in a safe and habitable environment; the authority must be exercised in a non-discriminatory manner; and there must be procedural due process.

<sup>60</sup> *Ex parte Hardcastle*, 208 S.W. 531 (Tex. Crim. App. 1919).

<sup>61</sup> 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, 6<sup>th</sup> Edition, 1990.

<sup>62</sup> *Gibbons v. Ogden*, 22 U.S. 1, 18 (1824).

<sup>63</sup> 186 U.S. 380 (1902).

<sup>64</sup> *Id.* at 384.

<sup>65</sup> *Id.* at 387. See also *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886).

taken action, it is “well settled” that states may impose quarantines to prevent the spread of disease even though quarantines “affect interstate commerce.”<sup>66</sup>

## Due Process Challenges

In general, courts appear to have declined 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.”<sup>67</sup> For example, in *Miller v. Campbell City*,<sup>68</sup> an order to evacuate an 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 Tenth Circuit Court of Appeals 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.<sup>69</sup> The court noted that the county needed to act quickly because of the potential danger, and did so “with appropriate concern for the situation and the interests of all involved.”<sup>70</sup> The court therefore found that the plaintiffs were not denied substantive due process. The court also held that because the plaintiffs were given the opportunity to present their objections orally to the local authorities, and could have entered written materials as well, the protections of procedural due process were satisfied.<sup>71</sup>

Similarly, a federal district court in *United States v. Shinnick*<sup>72</sup> upheld the PHS’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.

Likewise, a state court in *People ex rel. Barmore v. Robertson*<sup>73</sup> 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.”<sup>74</sup> In justifying quarantine under these circumstances, the court explained

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<sup>66</sup> *Oregon-Washington R. & Nav. Co. v. State of Washington*, 270 U.S. 87, 93 (1926); see *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, J., concurring) (“There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease”).

<sup>67</sup> *People ex. rel. Barmore v. Robertson*, 134 N.E. 815, 817 (citations omitted) (Ill.1922); see also *Zemel v. Rusk*, 381 U.S. 1, 15 (1965) (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.”).

<sup>68</sup> 945 F.2d 348 (10<sup>th</sup> Cir. 1991).

<sup>69</sup> *Id.* at 354.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 219 F. Supp. 789 (E.D.N.Y. 1963).

<sup>73</sup> 134 N.E. 815 (Ill.1922).

<sup>74</sup> *Id.* at 819.

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.<sup>75</sup> The court found that in the case of a person infected with typhoid fever, anyone who had come into contact with that person must be quarantined to prevent the spread of the disease.<sup>76</sup>

More recently, a federal district court in New York dismissed a claim alleging violation of substantive and procedural due process by a plaintiff who was diagnosed with tuberculosis and confined to a hospital for a few days against his will.<sup>77</sup> The court cited to Justice Burger's concurrence in *O'Connor v. Donaldson*, which noted that, pursuant to its police powers, a "[s]tate may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease."<sup>78</sup> However, at least one state court has ruled that when a state confines an individual in order to prevent the spread of disease, the state must provide the individual with procedural due process protections such as, *inter alia*, notice explaining the grounds for confinement, the right to counsel, and the right to engage in cross-examination.<sup>79</sup>

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.<sup>80</sup> In *Wong Wai v. Williamson*,<sup>81</sup> 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. A 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."<sup>82</sup> Shortly after, in *Jew Ho v. Williamson*, the same court noted that the quarantine requirements applied only to Chinese residents and questioned whether bubonic plague actually caused the reported deaths. It invalidated the quarantine because it was "unreasonable, unjust and oppressive" and constituted discrimination in violation of the Fourteenth Amendment.<sup>83</sup>

## Additional Potential Challenges

Additional legal issues might be raised if quarantine, isolation, and other public health measures were used to deal with a widespread domestic public health emergency. If government agencies

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<sup>75</sup> *Id.* at 819-20.

<sup>76</sup> *Id.* at 820.

<sup>77</sup> *Best v. Bellevue Hosp. Ctr.*, 03CIV.365(RMB)(JCF), 2003 WL 21767656 (S.D.N.Y. July 30, 2003) *aff'd in part, vacated in part, remanded sub nom. Best v. Bellevue Hosp.* New York, NY, 115 F. App'x 459 (2d Cir. 2004).

<sup>78</sup> *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, J., concurring).

<sup>79</sup> *Greene v. Edwards*, 164 W. Va. 326, 329 (1980).

<sup>80</sup> 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.

<sup>81</sup> 103 F. Rep. 10 (1900).

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Jew Ho v. Williamson*, 103 F. 10, 26 (C.C.N.D. Cal. 1900).

requisition private facilities for quarantine purposes, such as in the case of overburdened medical facilities, the legal questions regarding eminent domain power may arise.<sup>84</sup>

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.<sup>85</sup> Such authority may include the ability to offer legal immunity to businesses asked to provide facilities for quarantine.

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<sup>84</sup> 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, *Quarantine and Isolation*, *supra* note 13, 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).

<sup>85</sup> Federal and state authorities generally provide for the care of persons mandatorily quarantined (see 42 U.S.C. § 249), 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).