Op-Ed

A Very Long Journey: A Decade's Quest for Quarantine Regulations

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THE FEDERAL GOVERNMENT HAS THE POWER AND DUTY TO safeguard the public's health from fast-moving epidemic diseases. While states have primary public health powers, the federal government polices health threats that span international and state borders. The critical dilemma, of course, is that the public health toolbox is a dual-edged sword—necessary for public protection but also invasive of privacy and liberty. The tension between public health and civil liberties has proven to be a political thicket, both with the Model State Emergency Health Powers Act¹ and now at the federal level. The political fault lines have stalled essential modernization of public health laws.

It may be hard to believe, but the Centers for Disease Control and Prevention (CDC) still operates under the Public Health Service Act 1944, which authorizes “apprehension, detention, or conditional release” of individuals for a handful of diseases listed by executive order. Disease-specific interventions run counter to modern public health, limiting emergency preparedness. To modernize federal powers, the CDC first proposed a fundamental revision of quarantine regulations in 2005. That was more than a decade ago and, remarkably, the agency has yet to adopt a final rule.² Since those regulations were proposed in 2005, the world experienced several global health crises, including influenza H1N1, Ebola, Zika, and yellow fever. During all this time, the CDC has operated under World War II-era rules.

New regulations were again proposed in August 2016.³ This latest revision is reactive to events as the United States continues to fight the last crisis of contagion rather than proactively planning for the next one. The CDC is seeking to codify actions taken during the Ebola outbreak (ie, screening/monitoring travelers), even though there is little evidence that such actions were necessary or effective. Rather than looking over

our shoulders, we need modern regulations that afford the CDC ample power, hedged with civil liberties safeguards.

Public Health Assessments

The CDC has a broad range of powers, including inspection, fumigation, disinfection, sanitation, pest extermination, and animal destruction. The CDC now seeks to codify its Ebola practices, such as monitoring the temperature of people potentially exposed to the virus, questioning travelers, and reviewing travel documents. Even though the efficacy of border screening remains unproven, it could become “the new normal.” Public health risk assessments must be noninvasive, but they also entail routine, warrantless searches without individualized suspicion. The CDC possesses near plenary public health powers at the border, but any exercise of that power should be evidence-based and publicly acceptable.

Quarantine: The Ultimate Deprivation of Liberty

The CDC has the power to quarantine, isolate, or conditionally release anyone “reasonably believed” to have a “quarantinable communicable disease.” Currently, quarantinable diseases include cholera, tuberculosis, yellow fever, hemorrhagic fevers, and novel influenzas. (Individuals can also “agree” to quarantine, under threat of a mandatory order; or parents/guardians can consent on behalf of children or incompetent persons.) These orders include compulsory medical examination, which entails invasion of bodily integrity. Given its controversial nature, the CDC rarely uses the term “quarantine,” preferring instead to use euphemisms such as “snow day” or “shelter in place.” Reasonable belief can include clinical manifestations, suspected contact, or travel history. The Supreme Court calls civil confinement a “massive” deprivation of liberty,⁴ requiring “clear and convincing” evidence of a significant threat.⁵ Yet, the CDC need only have a “reasonable belief.”

The proposed rules have weak due process safeguards, using a 2-stage process: (1) a 72-hour mandatory reassessment, at which time the CDC reexamines the detention using current health information; and (2)

following the mandatory review, quarantined individuals can request a medical reassessment. The reassessment includes whether less restrictive alternatives exist, for example, home quarantine instead of a guarded facility.

The CDC must state in writing the medical/scientific basis for detention for quarantine, including “the process for reassessment and medical review” and the individual’s “rights and obligations.” But quarantined individuals must proactively request a hearing, assuming they understand their rights and have the capacity. The CDC will pay for a representative for indigent persons, but many low-income individuals won’t be eligible. A CDC-appointed doctor or nurse, who considers only medical evidence, conducts the reassessment and reports directly to the CDC director who makes the ultimate decision. Essentially, the CDC is policing itself, hardly the hallmark of an impartial, independent hearing.

The proposed regulations do not specify any method to challenge a quarantine order’s *lawfulness*. As the proposed rules state, “HHS/CDC does not express an opinion regarding what form the legal action should take or what legal remedies may be available.” Probably, the individual’s only remedy is to apply for habeas corpus, yet another barrier to a full and fair review.

The proposed regulations authorize *group* quarantines—for example, everyone onboard an interstate/international flight or cruise ship. During SARS, China conducted mass quarantines of large tower blocks. The CDC says group quarantines would be rare, but could undermine due process since it is hard to undertake individualized assessments for everyone in a large group. If personal service of the order is impracticable, the CDC can post or publish the notice, for example, in a conspicuous place in a building whose inhabitants are to be quarantined. Group quarantines have not occurred in recent history, and it is unclear whether the public would fully accept large-scale quarantines.

The courts require confinement conditions to be humane and therapeutic, not punitive. Yet the proposed regulations do not require high-quality conditions or amenities, and the 2-stage review does not permit challenges to confinement conditions. Home or work quarantines, or use of jails, can lack decent living standards, including nutritious food, potable water, means of communication, and nursing/medical care, especially for persons with disabilities. The International Health Regulations require states parties to meet basic human needs, while respecting a person’s gender, religion, and ethnicity.

Privacy Rights and Wrongs

The CDC proposes to gather intimate personal information to identify risks and track spread, such as health status, sexual and other contacts, and travel history. The 2005 rules were never implemented in part because the CDC required airlines to gather extensive passenger information, which imposed high costs, were unreliable, and invaded privacy. The 2016 regulations also require collection of passenger information, but carriers need not verify data accuracy or completeness. Although this ameliorates industry costs, it does little to assuage privacy advocates, even though data are subject to the Privacy Act of 1974.

Public Fears

As Americans face health scares, public health has become a subject of household conversation. The public vacillates from apathy to alarm, torn between security and civil liberties. There is a path forward. Preparedness and rapid response requires funding and political support. Congress's failure to pass Zika funding for more than 6 months after President Barack Obama made the request was unconscionable. To avoid political games in the midst of a health crisis, Congress should enact a Public Health Emergency Contingency Fund. Legislators should modernize public health laws, ensuring a full range of powers, together with safeguards to prohibit discrimination and ensure due process of law.

When will the new rules be finalized? We are now more than 10 years and counting, waiting for modern federal public health laws. The political gridlock doesn't look like it will improve any time soon.

References

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