

## at law

# Federal Executive Power and Communicable Disease Control: CDC Quarantine Regulations

by Lawrence O. Gostin

The Centers for Disease Control and Prevention (CDC) recently published official notice of proposed "Control of Communicable Diseases" regulations that empower the federal government to deprive individuals both of civil liberties (through quarantine, surveillance, and contact tracing) and of economic interests (by permitting the inspection, disinfection, and destruction of private property).<sup>1</sup> The rules also impose a mandate on airlines to collect and provide personal passenger data to the CDC. The Department of Health and Human Services justified these measures on grounds of the potential human and economic costs of dangerous biologic agents. To be sure, the federal government has a major interest in preventing the spread of communicable diseases in the United States. But to what extent do these powers conform to the rule of law? Are there adequate checks and balances?

### Scope of Federal Power

The Public Health Service Act (PHSA) authorizes the "apprehension, detention, or conditional release" of individuals for only a small number of diseases listed by executive order—cholera, diphtheria, infectious tuberculosis, yellow fever, viral hemorrhagic fevers, SARS, and novel influenza viruses with pandemic potential.<sup>2</sup> The new regulations would significantly expand the scope of federal power by defining "ill person" to include the signs or symptoms commonly associated with quaran-

tinable diseases—fever, rash, headache, persistent cough, diarrhea, severe bleeding, jaundice, and changes in cognitive functioning. This inclusive approach affords the CDC greater flexibility and adaptability. The proposed rule captures a wide, undifferentiated range of signs and symptoms, however, allowing for the unfettered exercise of discretion by lay directors of federal quarantine stations. By contrast, the WHO's new International Health Regulations contain specifications of health threats that come within its authority.<sup>3</sup> An agency's jurisdiction and power must be contained within clear boundaries, which create accountability to the public and to affected communities.

### Federal Quarantine Authority: Personal Liberty

Quarantine should be based on clear legal authority and applied safely and effectively while according respect to the individual. The regulations would empower the CDC to provisionally quarantine ill passengers for up to three business days, and to order full quarantine on grounds of a reasonable belief that a person or group is in the qualifying stage of a quarantinable disease. This standard is too vague. Quarantine should be based on clear and convincing evidence that the individual poses a significant risk to the public. The length of quarantine may not exceed the period of incubation and communicability of the disease.

During periods of quarantine, officers can "offer" individuals vaccination,

prophylaxis, or treatment, but refusal can result in continued deprivation of liberty. Furthermore, the rule does not ensure that quarantine would be safe, humane, and accompanied by high-quality medical care. HHS is authorized to pay for necessary medical and other services but is not bound to do so. In practice, quarantine may take place in numerous venues, such as private homes, hospitals, and other institutions.

The CDC does not intend to provide individuals with hearings during a provisional quarantine.<sup>4</sup> A full hearing may not be feasible, but some way of contesting arbitrary or discriminatory actions is needed.

Individuals can request an administrative hearing to contest an order for full quarantine—not to review the legal authority (which is available through habeas corpus), but to contest the factual and scientific evidence of exposure to or infection with a quarantinable disease. The administrative hearing comports with some basic elements of due process: notice, hearing officer, and communication with counsel.

The provision of procedural due process for full quarantine is long overdue and constitutionally required. Still, the proposed regulations have deficiencies. First, individuals must affirmatively request a hearing, which may delay or prevent independent review for those who cannot understand or act on information provided in the quarantine order. Second, the proceedings can be informal and may even be based exclusively on written documents. There is also no expressed right to paid legal representation for the indigent. Finally, the hearing officer may be a CDC employee who makes a recommendation to the CDC director. The European Court of Human Rights, in a case I litigated, found a similar scheme in the United Kingdom to violate Article 5 of the European Convention on Human Rights.<sup>5</sup> Article 5 requires a hearing by a "court" independent of the executive branch and the parties to the case. The CDC regulations envisage an informal hearing by an employee who is both in the executive branch and is one of the parties. The CDC claims that "due process" is

highly flexible, but the constitutional principle is not so elastic as to permit less-than-independent hearings on matters of personal liberty.<sup>6</sup>

### **Surveillance and Contact Investigations: Cost and Privacy**

Surveillance and contact investigations are critically important for early detection and response to health threats. The CDC seeks timely access to crew and passenger data from international and interstate carriers. The rules impose obligations on airlines to screen passengers at borders; report cases of illness or death to the CDC; distribute Health Alert Notices to crew and passengers; collect and maintain personal passenger information and transmit it to the CDC upon request; order physical examinations of people believed to have a quarantinable disease; and require that they provide detailed information on familial and social contacts, travel itinerary, and medical history.

These legal powers may be necessary for the public's health but come with high costs. The CDC estimates that collection and maintenance of passenger data will result in annualized costs to the travel industry of \$118 to \$425 million. Since the health benefits of the database could exceed \$1.2 billion on an annualized basis,<sup>7</sup> the social benefits and costs favor the data system, but consideration should be given to public/private cost-sharing arrangements.

Of more concern are the privacy implications of the rules. Passengers will be asked to disclose highly sensitive information such as medical history and data about friends, family, and sexual partners. The data trail could move from travel agents and airline or cruise personnel to the CDC and other federal agencies. It may find its way to state or local health agencies and potentially into the private sector, such as the clinics or hospitals providing treatment or quarantine services. The electronic form facilitates rapid movement of data and allows officials to match multiple data sets (public health, medical, security, immigration, and crime). The use of data to trace contacts means that personal information, implicitly or explicit-

ly, may be communicated to third persons.

Surveillance and contact investigations are historical, well-accepted public health practices, but that does not preclude adoption of privacy safeguards. Legal rules for collection, use, storage, and disclosure of data are warranted.

### **Sanitary Measures: Economic Interests**

The PHSA empowers the CDC to provide for inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of infected or contaminated animals or goods.<sup>8</sup> The rules specify that the CDC shall not bear the expense of sanitary measures; the property owner incurs the costs. The owner, however, may appeal an order for the destruction or export of animals or goods. The CDC can also apply sanitary measures with the person's consent.

The government's power to inspect premises and abate hazardous conditions also has historical precedent and broad judicial acceptance. The key question is whether administrative searches at quarantine stations should be based on probable cause with, or without, a judicial warrant. The CDC's claim is that routine inspections are essential for the rapid identification of health hazards. The CDC's objective is to safeguard health, not to enforce criminal laws. Health officials can rarely find probable cause for searching passengers, baggage, or cargo. Even if grounds for a search were available, there would rarely be time to secure a warrant.

The power to seize and destroy private property is one of the more controversial aspects of the rules. The political right has vociferously contested other public health regulations that confer this power. But payment for property losses would be a radical departure from historical practice. Requiring compensation to property owners would also chill health regulation and place the cost of private health hazards on the public.

### **A Modern Network of Public Health Protection**

In a report last year on the nation's response to public health threats, the In-

stitute of Medicine articulated a vision of a multijurisdictional, multisectoral, multinational network of protection.<sup>9</sup> The CDC regulations could achieve this vision, and Congress has appropriated funding.<sup>10</sup> However, as written, the proposed regulations also raise concerns about accountability, personal liberty, privacy, and cost allocation. Those exercising power in a democracy, even—perhaps especially—in times of public fear, must observe the rule of law. Expanding federal power would be more acceptable if it were coupled with careful attention to due process, privacy, and justice.

1. Public Health Service Act Secs. 361-68 (42 U.S.C. 264-71) (authorizing the Secretary to make and enforce regulations to prevent the introduction or transmission of communicable diseases from foreign countries and from one state into another); Department of Health and Human Services, Control of Communicable Diseases (Proposed Rule), 42 CFR Parts 70 and 71, 70 F.R. 71892-71948 (November 30, 2005).

2. Executive Order 13295, of April 4, 2003; Executive Order 13375, of April 1, 2005. Also see 68 F.R. 17255 (April 9, 2003); 70 F.R. 17299 (April 5, 2005).

3. D. Fidler and L.O. Gostin, "The New International Health Regulations: An Historic Development for International Law and Public Health," *Journal of Law, Medicine & Ethics*, forthcoming 2006.

4. *United States v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y. 1963) (upholding federal isolation of an arriving passenger in a hospital for 14 days).

5. *X v. United Kingdom*, judgment of November 27, 1981, 46 Eur. Ct. H.R. (ser. A).

6. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

7. Centers for Disease Control and Prevention, Division of Global Migration and Quarantine, *Regulatory Impact Analysis of Proposed 42 CFR Part 70 and 42 CFR Part 71* (Atlanta, Ga.: Centers for Disease Control and Prevention, September 26, 2005).

8. 42 C.F.R. 70.2 (2005).

9. Institute of Medicine, *Quarantine Stations at Ports of Entry: Protecting the Public's Health* (Washington, D.C.: National Academy Press, 2005).

10. Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148 (appropriating \$150 million for the CDC to "carry out global and domestic disease surveillance, laboratory diagnostics, rapid response, and quarantine").

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