

CRS Report for Congress

Federal and State Responses to Biological Attacks: Isolation and Quarantine Authority

Updated July 22, 2002

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Prepared for Members and
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Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 22 JUL 2002		2. REPORT TYPE		3. DATES COVERED 00-00-2002 to 00-00-2002	
4. TITLE AND SUBTITLE Federal and State Responses to Biological Attacks: Isolation and Quarantine Authority				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Congressional Research Service, The Library of Congress, 101 Independence Ave SE, Washington, DC, 20540-7500				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 11	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Federal and State Responses to Biological Attacks: Isolation and Quarantine Authority

Summary

In the wake of the September 11 attacks, federal, state and local governments have become increasingly aware of the need for an effective response to future terrorist activities. Of significant concern is the government's ability to respond to a biological attack, including the introduction of an infectious or contagious disease into a population. An effective response could include the isolation of persons exposed to infectious biological agents or infected with a communicable disease as a result of the attacks, as well as the quarantine of certain states, cities, or neighborhoods.

Currently, state and local governments have the primary authority to control the spread of dangerous diseases within their jurisdiction, with the federal government's role limited to interstate and foreign quarantine. However, many states have inadequate procedures in place for isolating individuals who are infected or believed to be infected and quarantining areas that are or may be infected. Generally, the laws currently in effect do not address the spread of disease resulting from a biological attack, and for the most part only address specific diseases that were the cause of past epidemics. In light of recent events, many states are reevaluating their public health emergency response plans and are expected to enact more comprehensive regulations relating to isolation and quarantine in the event of a biological attack. Public health experts have developed a Model State Emergency Health Powers Act to guide states as they reevaluate their plans.

This report provides an overview of federal and state quarantine laws as they relate to the isolation or quarantine of individuals, as well as a discussion of the relevant case law. The Model State Emergency Health Powers Act is also discussed.

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Federal and State Responses to Biological Attacks: Isolation and Quarantine Authority

Introduction

In the event of a biological attack, the public health system may respond by taking measures to prevent those infected with or exposed to a disease causing biological agent from infecting others. The terms used to describe these measures generally apply to distinct groups of persons, but are often used interchangeably. Isolation typically refers to "the separation of a known infected person or animal from others during the period of contagiousness in order to prevent the direct or indirect conveyance of the infectious agent."¹ Quarantine refers to "the restriction of movement of a healthy person who has been exposed to a communicable disease in order to prevent contact with unexposed persons."² There are varying degrees of quarantine 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 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.³

State health departments or health officials typically have primary quarantine authority, though the federal government does have jurisdiction over interstate and foreign quarantine. Both federal and state statutes and regulations will be discussed *infra*.

¹ See Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U.L. Rev. 441, n24 (1988).

² *Id* at n23.

³ *Id* at 460 - 461.

Federal Quarantine Authority

Under the Public Health Service Act, the Secretary of Health and Human Services 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.”⁴ While providing the Secretary with broad authority to promulgate regulations “as in his judgement may be necessary,” the law places limitations on the Secretary’s authority to enact regulations providing for the “apprehension, detention, or conditional release of individuals.”⁵ Such apprehension, detention, or conditional release may be authorized for the purpose of “preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.”⁶

Generally, 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 a possession.⁷ However, the regulations may provide for the apprehension and examination of “any individual reasonably believed to be infected with a communicable disease in a qualifying stage⁸ 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.”⁹ If found to be infected, such individuals may be detained for such time and in such manner as may be reasonably necessary.¹⁰ 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.¹¹

Regulations promulgated pursuant to the Public Health Service Act addressing interstate quarantine primarily restrict travel for persons infected with a

⁴42 U.S.C. 264. 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.

⁵42 U.S.C. 264.

⁶42 U.S.C. 264(b).

⁷42 U.S.C. 264(c).

⁸“Qualifying stage” means that such disease (A) is in a communicable stage; or (B) is 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).

⁹42 U.S.C. 264(d).

¹⁰Id.

¹¹42 U.S.C. 266.

communicable disease.¹² Following a transfer of authority from the Secretary of Health and Human Services to the Director of the Centers for Disease Control and Prevention (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.¹³ In an effort to prevent the spread of diseases between states, the regulations prohibit infected persons from traveling from one state to another state without a permit from the health officer of the state, possession, or locality of destination, if such permit is required under the law applicable to the place of destination.¹⁴ 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."¹⁵

State Police Powers and Quarantine Authority

The preservation of the public health has historically been the responsibility of state and local governments.¹⁶ While 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.¹⁷ The Supreme Court alluded to a state's authority to enact quarantine laws in 1824, *Gibbons v. Ogden*.¹⁸ In *Gibbons*, the Court noted that while quarantine laws may affect commerce, they are, by nature, health laws, and thus under the authority of state and local governments. Courts have noted that the duty to insure that the public health is preserved is inherent to the police power of a state and cannot be surrendered.¹⁹

¹²The regulations apply to the apprehension, detention, or conditional release of individuals for the purpose of preventing the introduction, transmission, or spread of the following diseases: anthrax, chancroid, cholera, dengue, diphtheria, granuloma inguinale, infectious encephalitis, favus, gonorrhea, leprosy, lymphogranuloma venereum, meningococcus meningitis, plague, poliomyelitis, psittacosis, relapsing fever, ringworm of the scalp, scarlet fever, streptococcal sore throat, smallpox, syphilis, trachoma, tuberculosis, typhoid fever, typhus, and yellow fever. 42 CFR 70.6.

¹³42 CFR 70.2. Effective September 15, 2000, the Department of Health and Human Services transferred authority for interstate quarantine to the Centers for Disease Control and Prevention, with the Food and Drug Administration retaining authority over animals and other products that may transmit or spread communicable diseases. 65 FR 49906, August 16, 2000.

¹⁴42 CFR 70.3.

¹⁵42 CFR 70.5.

¹⁶ *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill.1922).

¹⁷Federal quarantine law does not supersede state law unless state law conflicts with an exercise of federal authority as discussed *supra*. 42 U.S.C. 264(e).

¹⁸22 U.S. 1, 25 (1824).

¹⁹134 N.E. at 817.

While every state has acknowledged the authority to pass and enforce quarantine laws, these laws vary widely by state. Generally, quarantine is authorized through public health orders, though some states may require a court order before an individual is detained.²⁰ 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.”²¹ 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.²² States also employ different methods for determining when the quarantine or isolation period shall end. 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.”²³

One common characteristic of most state quarantine laws is their “overall antiquity,” with many statutes being between forty and one hundred years old.²⁴ The more antiquated laws “often do not reflect contemporary scientific understandings of disease, [or] current treatments of choice.”²⁵ 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.²⁶

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 medicine.²⁷ However, in light of recent biological terror threats, many states have begun to reconsider their emergency response systems, including the state’s authority to quarantine.²⁸ Several states have recently enacted legislation related to emergency health powers that would revise or expand state quarantine authority.²⁹ A review of quarantine authority was listed as

²⁰Paula Mindes, Note, *Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States*, 10 J.L. & Health 403, 409 (1995).

²¹La. R. S. 40:17(A).

²²10 J.L. & Health at 409. See e.g., Md. Code Ann. 18-324, which addresses only quarantine in tuberculosis cases.

²³*Id.* at 410.

²⁴Lawrence 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).

²⁵*Id.* at 106.

²⁶*Id.*

²⁷10 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).

²⁸*States Weighing Laws to Fight Bioterrorism*, by Justin Gillis, Washington Post, November 19, 2001, p. A01. See section *infra* on the Model State Emergency Health Powers Act.

²⁹See e.g. Arizona, House Bill 2044; Florida, S1262; Maine, LD2164; New Hampshire, HB 1478.

priority for state governments in the President's *National Strategy for Homeland Security*.³⁰

Model State Emergency Health Powers Act

The Model State Emergency Health Powers Act was drafted by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.³¹ The purpose of the Model Act is to "facilitate and encourage communications among the various interested parties and stakeholders about the complex issues pertaining to the use of state emergency health powers."³² It is important to note that this is intended to be a model for states to use in evaluating their emergency response plans, and passage of the Model Act in its entirety is not required. Many states will likely use parts of the Model Act, but tailor their statutes and regulations to respond to unique or novel situations that may arise in their jurisdiction.³³

The Model Act provides a comprehensive framework for state emergency health powers, including statutory authority for isolation³⁴ and quarantine.³⁵ Section 604 of the model act authorizes the isolation or quarantine of an individual or groups of individuals during a public health emergency.³⁶ The Model encourages the public health authority to adhere to specific conditions and principles when exercising isolation or quarantine authority. These conditions and principles include insuring that the measures taken are the least restrictive means necessary to prevent the spread of the disease; monitoring the condition of isolated and quarantined individuals; and providing for the immediate release of individuals when they no longer pose a substantial risk of transmitting the disease to others.³⁷ The Model Act provides that

³⁰Office of Homeland Security, *National Strategy for Homeland Security*, June 2002. <www.whitehouse.gov/homeland/book/nat_strat_hls.pdf>.

³¹A copy of the Model Act can be found at <www.publichealthlaw.net>.

³²<www.publichealthlaw.net/MSEHPA/MSEHPA_letter_2.pdf>.

³³See discussion of recently enacted state laws *supra*.

³⁴For the purposes of the Model Act, 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."

³⁵Quarantine 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."

³⁶A 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 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.

³⁷For a complete list of the conditions and principles, see Section 604(b) of the Model Act.

a failure to obey the rules and orders concerning isolation and quarantine shall be treated as a misdemeanor.³⁸

The Model State Emergency Health Powers Act sets forth procedures for isolation and quarantine under two different sets of circumstances. Section 605(a) addresses procedures for temporary isolation and quarantine 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 isolation or quarantine 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 isolation or quarantine are to commence, the suspected contagious disease, and a copy of the provisions set forth in the Act relating to isolation and quarantine.³⁹ The public health authority is required to petition within ten days after issuing the directive for a court order authorizing the continued isolation or quarantine if needed.⁴⁰

Apart from the emergency procedures outlined above, the public health authority may petition a court for an order authorizing the isolation or quarantine of an individual or groups of individuals, with notice of the petition given to the individuals or groups of individuals in question within twenty-four hours.⁴¹ 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.”⁴² 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.”⁴³ An order authorizing isolation or quarantine may not do so for a period exceeding thirty days, though the public health authority may move to continue isolation or quarantine for additional periods not exceeding thirty days.⁴⁴

The Model Act provides procedures which allow individuals subject to isolation or quarantine to challenge their detention and obtain release, and provide remedies where established conditions were not met.⁴⁵ Individuals subject to isolation or

³⁸Section 604(c).

³⁹Section 605(a)(2).

⁴⁰Section 605(a)(4).

⁴¹Section 605(b).

⁴²Section 605(b)(2).

⁴³Section 605(b)(5).

⁴⁴Section 605(b)(6).

⁴⁵Section 605(c).

quarantine would be appointed counsel if they are not otherwise represented in their challenge.⁴⁶

The Model Act has been challenged by groups asserting that model legislation is unnecessary and that this particular legislation is “unjustifiably broad.”⁴⁷ Others have expressed concern that the Model Act “grants unprecedented and . . . unconstitutional power.”⁴⁸ Courts will likely be asked to review any version of the Act passed by the states.

Legal Challenges to State Quarantine Authority

As noted above, the Supreme Court in *Gibbons v. Ogden* 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*, where both the law and its implementation were upheld as valid exercises of the state’s police power.⁴⁹ The petitioners in the case - a shipping company - 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.⁵⁰ The petitioner 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 affect on commerce, it was not unconstitutional.⁵¹

Courts have recognized an individual’s right to challenge his or her isolation or quarantine by petitioning for writ of *habeas corpus*.⁵² While the primary function of a writ of habeas corpus is to test the legality of the detention,⁵³ 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

⁴⁶Section 605(e).

⁴⁷*Review of The Model State Emergency Health Powers Act*, by Edward P. Richards, et. al., [http://www.plague.law.umkc.edu/blaw/bt/MSEHPA_review.htm].

⁴⁸See “Quarantine Proposal Sparks Debate,” Legal Times, November 5, 2001.

⁴⁹186 U.S. 380 (1902).

⁵⁰186 U.S. at 384.

⁵¹*Id* at 387.

⁵²*Ex parte Hardcastle*, 208 S.W. 531(Tex. Crim. App. 1919).

⁵³*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 his is guilty or innocent.” Black’s Law Dictionary, 6th Edition, 1990.

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."⁵⁴ The courts appear to give deference to the determinations of state boards of health and generally uphold such detentions as valid exercises of a state's duty to preserve the public health and not violative of due process. However, some courts have refused to uphold the quarantine of an individual where the state is unable to meet its burden of proof concerning that individual's potential danger to others.⁵⁵

In *People ex rel. Barmore v. Robertson*, the court refused to grant the petition for writ of *habeas corpus* of a woman who ran a boarding house where a person infected with typhoid fever had boarded.⁵⁶ 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."⁵⁷ In providing justification for quarantine under these circumstances, the court explained that since 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 isolated.⁵⁸ 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 isolated in order to prevent the spread of the disease to others.⁵⁹

The Florida Supreme Court upheld a quarantine statute that was challenged on due process grounds, denying the petitioners petition for writ of *habeas corpus*. In *Moore v. Draper*, the court stated that, "[t]he constitutional guarantees of life, liberty and property, of which a person cannot be deprived without due process of law, do not limit the exercise of the police power of the State to preserve the public health so long as that power is reasonably and fairly exercised and not abused."⁶⁰ In addition to the due process claim, the petitioner had challenged the statute as discriminatory against "all persons other than those of a certain religious faith and belief."⁶¹ The court rejected both arguments finding that the statute was a proper exercise of the state's police power and not violative of the petitioner's constitutional rights.

⁵⁴*People ex. rel. Barmore v. Robertson*, 134 N.E. 815, 817 (citations omitted) (Ill.1922).

⁵⁵See *State v. Snow*, 324 S.W.2d 532 (Ark. 1959).

⁵⁶134 N.E. 815 (Ill.1922).

⁵⁷*Id* at 819.

⁵⁸*Id* at 819 - 820.

⁵⁹*Id* at 820.

⁶⁰57 So.2d 648, 650 (Fla. 1952), citing *Varholy v. Sweat*, 15 So.2d 267 (Fla.1943).

⁶¹57 So.2d at 648. The court's opinion did not indicate the basis for petitioner's claim regarding religious discrimination and did not reprint the text of the statute. The statute in question was later repealed.