38 Case W. Res. J. Int'l L. 517

Case Western Reserve Journal of International Law
2006-2007

Symposium: The Fifth Plague
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BALANCING INDIVIDUAL RIGHTS AND PUBLIC HEALTH SAFETY DURING QUARANTINE: THE U.S. AND CANADA

Children and adults often try to claim that they are sick in order to stay home from school or work for a day. However, when a person is genuinely sick for any period of time, the relief or even joy of staying home quickly dissipates, turning into a desire for normalcy. What happens when a person is forbidden from leaving home or another place of confinement, even when that person thinks that he is no longer ill? In the rare instance of quarantine, the government can force a person to stay confined even if the person desires to leave.

For the purposes of this paper, quarantine is defined as when the government or a government entity, a board of health, police chief, or the National Guard, restricts a person to a particular geographic location due to that individual having or being exposed to a contagious disease. Quarantine is a severe measure that is not to be used for every cold or virus, but rather for extreme outbreaks of especially contagious diseases such as tuberculosis or bioterrorism-related attacks of diseases such as smallpox or anthrax. Those quarantined are "unable to participate normally in daily life" as they cannot leave their quarantined location without permission. [1]

Bioterrorism is neither a new phenomenon [2] nor one that is likely to disappear in the near future. [3] Historical authority for quarantine stems from the idea that a public health contract, under which "individuals agree to forgo certain rights and liberties, if necessary, to prevent a significant risk to ***518** other persons." [4] This contract is not only between an individual citizen and the government, but also among citizens to each other.

"Without protection of health, safety and security, people cannot enjoy many of the personal and economic freedoms that we have come to take for granted." [5] In order to achieve these goals, society must reach a balance between the extremes of complete protection of public health without any protection of individual rights and total protection of individual rights at the expense of public health. The equitable distribution of benefits and burdens would demonstrate an appropriate balance of public health and individual rights, a "mark of a desirable public health policy." [6]

This paper will discuss U.S. state government decisions regarding elements of quarantine and individual rights, whether and when the federal government can become involved, and the tensions between state government and federal government. After analyzing the U.S. handling of quarantine, Canada's quarantine laws will be briefly addressed. Issues of quarantine are especially important in today's world, with the increasing threat of bioterrorism. It is in the public's best interest for the state and federal governments to know what they can and cannot do before a bioterrorist attack occurs, instead of waiting until after an attack to discover uncertainty and confusion in their roles and responsibilities.

I. U.S. STATE GOVERNMENT

"Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health." [7] While public health powers were originally both state and federal, a dispute arose between these powers when the federal government took a more active role in regulating quarantine. [8] The federal government lost the conflict and "[t]oday, states are primarily responsible for the exercise of public health powers." [9] The state government that has primary control and authority for creating quarantine laws and "from an early day the power of the States to enact and enforce quarantine laws for the safety and protection of the health ***519** of their inhabitants has been recognized by Congress." [10] The ability of a state to enact measures to protect public health is part of the police power of the state. [11]

The right of the states to pass and regulate quarantine laws has also been recognized by the judiciary at the national and state level. In Railroad Co. v. Husen, the U.S. Supreme Court recognized "the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders." [12] The Supreme Court of Ohio upheld the state's right to enact quarantine laws in 1922 with Ex Parte Company. The court stated that "the power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily." [13] The District Court of Appeals in California in Ex Parte Johnson also confirmed the right of a state to create quarantine laws, stating that "the adoption of measures for the protection of the public health is a valid exercise of the police power of the state, as to which the Legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing their spread." [14] This statement can be interpreted broadly to encompass the right to adopt quarantine laws as a means to prevent the spread of disease. Therefore, states have an undeniable right to implement quarantine laws as they see fit according to their police power.

The power and ability to create quarantine laws has limits. A state has the power to create quarantine laws, but does not have the right to abuse that power. In creating quarantine laws, a state has to balance the rights of the individual to be free from government intrusion and the state's duty to protect public health. By the same token, just because the authority for quarantine "may, in a given case, be abused is no legal reason for denying the power to quarantine summarily in a case where grounds therefor [sic] concededly exist." [15] Thus, the mere opportunity for abuse of quarantine power by a state is not enough to prevent the implementation of quarantine ***520** measures. To establish the abuse of power in a specific case, one must demonstrate that the quarantine in that particular instance is arbitrary and unjustified. [16]

"With the increase of population, the problem of conserving the health of the people has grown, and public health officers and boards have been appointed for the purpose of devising and enforcing sanitary measures." [17] Within the state government, a board of health at the local or state level often determines the pragmatic concerns of quarantine. These pragmatic issues include the necessity of quarantine, the locations of quarantine, and the methods of enforcement. In California, "[e]ach health officer is directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases within his jurisdiction and to ascertain the sources of such infection." [18] These means include many options, such as gaining access to patients' private medical records, requiring physicians to report the occurrence of certain types of illnesses, or monitoring prescription medications.

A. Location of Quarantine

Individuals with an infectious disease or with exposure to one, "whose behavior or movements pose a significant risk of harm to their communities cannot legitimately claim to possess a 'right' to be free from interference necessary to control the threat." [19] In those instances no right to be free from interference exists because "public health powers may limit personal interests in autonomy privacy free expression, and liberty." [20] According to the Ohio Statute for quarantine regulations, quarantine may be imposed on "vessels, railroads, or other public or private vehicles conveying persons, baggage, or frieght, or used for such

purpose"[21] of conveying materials and people. In Ohio, a person subject to quarantine need not actually have the contagious disease at issue; any person "known to have been exposed" to such a communicable disease can be quarantined.[22] The "board shall at once cause such person to be separated from susceptible persons in such places and under such circumstances as will prevent the conveyance of the infectious agents to susceptible persons."[23] The statute ***521** further provides that such a person can be restricted to his place of residence or another suitable place as determined by the board of health[24] to curb the spread of the illness. The location of the quarantined person also must have a placard on the premises[25] to notify the public.

Other states' statues also provide public health powers, including "compulsory examination and treatment, emergency detention and quarantine."[26] Quarantine locations in other states can include in-home isolation (a person and those with whom he lives are unable to leave the residence and others are not allowed into the residence) or commitment to state facilities.[27]

B. Length of Quarantine

"Quarantine will not be over quickly"[28] because a person may be quarantined by the State until such time as he is no longer contagious, however long that may be. "The law reasonably assumes that consecutive orders for quarantine may" be issued "so long as any person continues to be infected with tuberculosis and on reasonable grounds is believed by the health officer to be dangerous to the public health."[29] Under Ohio Statute, "[n]o person isolated or quarantined by a board shall leave the premises to which he has been restricted without the written permission of such board until released in accordance with the rules and regulations of the department."[30] Therefore, it is up to either the local department or board of health to terminate quarantine.

While other states have different rules or regulations describing the end of quarantine, generally "[r]elease is accomplished when a determination is made that the person is no longer a threat to the public health, or no longer infectious."[31] Each state determines what it means to no longer be a threat; some states require specific testing before release while others vaguely provide for release when an individual is no longer a threat, without any explanation of that terminology. Individual quarantine may seem like a temporary measure, but it could last for several years if the person continues to show symptoms of the disease or to be contagious to others.[32]

*522 C. Enforcement

According to Ohio Statute, a city's board of health, general health district, or department of health has the ability to enforce the restrictive measures of quarantine as prescribed by the department.[33] Thus, in Ohio, each individual city board of health could enforce the quarantine differently; the statute does not require state-wide standardization. Also, according to Ohio law, the board of health of a city or general health district "may employ as many persons as necessary to execute its orders and properly guard any house or place containing any person affected with or exposed to a communicable disease declared quarantinable by the board or department of health."[34] Consequently, in one location, twenty people could be required to guard a quarantine site, while another jurisdiction in the same state could employ no guards to enforce the quarantine.

In Ohio, one department or board of health might enforce quarantine by asking for local police involvement, while a department or board in the neighboring area could create all new "quarantine guards, [who] have police powers, and may use all necessary means to enforce sections 3707*.*01 to 3707.53, inclusive, of the Revised Code, for the prevention of contagious or infectious disease, or the orders of any board made in pursuance thereof."[35] No rules or regulations limiting the power or training requirements of these quarantine guards seem to exist. Furthermore, unless board-created orders stipulate the termination, there seems to be no indication of when these powers might end.

A board should take all possible measures to ensure that the creation of quarantine guards does not lead to abuse. One important measure that could be taken to prevent abuse is preparing for a quarantine, "making the trade-offs [between individual liberty and a safer and healthier population] knowingly in advance of a public health emergency." [36] Through advance discussions and specific qualifications and limitations on quarantine regulations prior to an outbreak of disease, a board can avoid many potential problems.

During Dark Winter, a simulation exercise in 2001, prominent politicians played the roles of crucial actors who were dealing with a release of ***523** smallpox in shopping malls in Oklahoma City, Philadelphia, and Atlanta. [37] This exercise illustrated how underprepared the relevant government agencies were for a bioterrorism situation. "The rapidly spreading disease quickly overwhelmed the health care system" and the politicians realized how little they knew about the proper course of action in such a situation. [38]

In another exercise, TOPOFF, federal and state governments simulated the intentional dispersal of plague. [39] In that simulation, the plague was released in Denver, Colorado, which received domestic preparedness training and equipment prior to the simulation. [40] Even with that advantage, exercise participants recognized "that the systems and resources now in place would be hard-pressed to successfully manage a bioweapons attack such as that portrayed in TOPOFF." [41]

The local boards or departments of health are the first faced with the role of balancing the rights of the individual who may be infected or exposed to a disease and the rights of the public to be healthy and safe. The initial actions of the board of health largely determine the subsequent actions taken by individuals and groups involved in quarantine. Theoretically, a board of health could be so thorough and thoughtful in drafting its regulations that actual quarantine enforcement would require only minimal steps. However, history and the failure of simulated exercises such as Dark Winter and TOPOFF demonstrate that such a level of advance preparation has yet to actually happen. [42]

The National Guard of a State can help enforce quarantine as long as it is operating as a state actor pursuant to Title 32 of the U.S. Code. [43] If the National Guard is functioning as a state actor, it may be used by the local board or department of health to assist in civil law enforcement (for example, the enforcement of quarantine). The local board can draw on the National Guard as a base from which to draw quarantine guards, which effectively ***524** eliminates the need to acquire additional guards from the general public.

D. Due Process Requirements

"The protection of the health and lives of the public is paramount, and those who by conduct and association contract such disease as makes them a menace to the health and morals of the community must submit to such regulation as will protect the public." [44] In submitting to regulations that protect the public, the individual is often vulnerable. Even though thirty three states allow for the quarantining of people in their homes, in "most cases, there are no due process protections specified out in the law." [45]

Under parens patriae, the State can act as it sees fit to protect a public interest. Protecting public health is certainly a public interest; therefore, the State could act to protect under parens patriae. Through this, "just as governmental powers relating to intelligence, law enforcement, and criminal justice curtail individual interests, so too do public health powers." [46] However, individual states have taken different views as to the role they should play to ensure individual rights are protected. In determining the amount of protection to give to individual rights, "the liberty interests of the individual must be balanced against the severity of the threat [he or she] is alleged to pose to society." [47] In Arkansas, State v. Snow, the court states that a statute allowing for involuntary commitment of persons with active tuberculosis must be "strictly construed to protect the rights of the citizen" because it is similar to an insanity commitment proceeding. [48] "Quarantine is the most drastic of a number of measures

used to control infectious disease," so a person's liberty should not be restricted unnecessarily. [49] As the most drastic measure, it should also be the measure most heavily regulated to prevent individual rights from disappearing completely.

In West Virginia, a person who is to be involuntarily quarantined is protected by all of the "procedural safeguards set forth in State ex rel. Hawks v. Lazaro," a case outlining the procedural safeguards for involuntary commitment for the mentally ill, because the quarantine "impinges upon the right to 'liberty, full and complete liberty' no less than involuntary commitment for being mentally ill." [50] The aforementioned rights include: ***525** (1) "adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present, to cross-examine, to confront and to present witnesses; (4) the standard of proof to be by clear, cogent and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal." [51]

As described above, courts have held that a person does not lose fundamental rights or guarantees just because that person becomes ill with a contagious disease or is exposed to a contagious disease. While the government may restrict such a person's movement and freedom in ways that it could not with those who are healthy and unexposed, the government cannot and should not be allowed to completely disregard a person's rights. Before determining whether quarantine is applicable to a situation, a board of health should identify the particular disease of concern, the elements of the disease, and the attributes of the disease. For example, quarantine for AIDS has been rejected because one cannot contract AIDS by simply making casual contact with an infected person. Therefore, one factor to consider is whether quarantine will effectively help limit the spread of the disease.

While "the 'public health' justification may be invoked as a ground for limiting certain individual interests to deal with a serious threat to individuals or the health of the population," [52] it does not require complete disregard for a person's basic fundamental rights. As the Florida Supreme Court noted, "[g]enerally speaking, what laws or regulations are necessary to protect public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review." [53] However, courts will interfere when the "regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable." [54] One of the ways in which the courts could ensure the due process rights of those affected by quarantine laws is to make risk assessments on a "case-by-case basis. Individualized risk assessments avoid decisions made under a blanket rule or generalization about a class of persons." [55]

"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." [56] For example, ***526** in West Virginia, the Supreme Court of Appeals requires more stringent protections for individual rights. In Greene v. Edwards, the court held that a person who is to be involuntarily quarantined due to a contagious disease must be given the right to counsel, ability to cross-examine, confront and present witnesses, and be committed only upon "clear, cogent and convincing proof." [57] Greene was involuntarily confined to a hospital pursuant to the Tuberculosis Control Act. While Greene received notice of the commitment hearing, he was not informed that he was entitled to have counsel represent him at the hearing. Mr. Green, therefore, did not have an attorney at the hearing and so the court appointed an attorney for him. Nonetheless, the Court of Appeals stated that the right to counsel was not met because even though the lower court appointed an attorney for Greene, they did not allow Greene and his new attorney to consult privately before continuing with the commitment hearing. The right to counsel is not universal across states. Only thirteen states "explicitly grant the right to be represented by counsel in any part of the proceedings" for commitment to treatment facilities. [58]

The new Model State Emergency Health Powers Act (MSEHPA) aims to correct some of the shortcomings of state public health law and provide state public health departments with "more guidance in responding to acts of bioterrorism." [59] The MSEHPA tries to balance the rights and liberties of the individual with the right of the community to be healthy. It does so by creating two kinds of public health powers, those which exists in a pre-emergency environment and those only become effective after a state governor declares a public health emergency. [60]

While the MSEHPA has admirable goals, it does not address some due process concerns. The quarantine provision of MSEHPA "allows health officials to use 'every available means to prevent the transmission of infectious disease and to ensure that all cases of contagious disease are subject to control and treatment.'" [61] While the quarantine provision gives an individual the right to be heard by a court, the person can be held in quarantine for ***527** a maximum of fifteen days prior to actually being heard, and the public health authority also "may petition for an extra ten days of isolation." [62]

It has also been argued that the government should have to demonstrate that quarantine laws pass a "mean/ends test" [63] to satisfy the due process requirements for quarantine. Under this test, "it is the government's burden to defend, and rigorously evaluate, the effectiveness of regulation." [64] The government would have to defend and evaluate the legality of the quarantine and the details of its enactment to ensure that in each case, quarantine is an effective means of protecting the public health ends. Forcing the government make this kind of analysis helps guarantee the due process rights of the individual and helps to balance the rights of an individual against the rights of the public.

The standard of proof for a state to quarantine is very low; the state must only establish probable cause that a person is infectious. [65] With such a low standard of proof required to institute quarantine, a state should undergo vigorous self-examination to ensure quarantine is necessary, in order to protect due process rights of the individual. Because time is of the essence in a quarantine situation, perhaps the best way to balance conflicting interests is to allow for immediate quarantine; however a hearing with a representative of the individual and a court should be required within three days of implementing quarantine. While this would still be subject to the same criticisms as MSEHPA's hearing requirements, the critical issue is finding the right balance of time. The possibility of being held in quarantine for twenty-five days without a hearing is unreasonably weighted in favor of the public health interest.

When applying West Virginia's standard to the rest of the United States, "public health policies should be formulated and implemented in a manner allowing public scrutiny and oversight." [66] Part of that oversight should include the opportunity for all citizens to contribute to and critique policy decisions, such as those which create quarantine. [67] The best manner to get full and rational discussion of a sensitive topic is to discuss it before it is needed. Once personal interests are involved, such as when a friend or loved one has been quarantined, people lose the ability to engage in logical, rational discussions.

***528** Furthermore, a board should consider whether there are less restrictive ways to protect public health, as "public health authorities should adopt the policy that is most likely to promote health and prevent disease while incurring the fewest possible personal burdens." [68] Instead of automatically quarantining for smallpox, the local boards of health could require mandatory vaccination for it. Local boards of health in Ohio also have the authority to close any school and prohibit public gatherings for as long as necessary in order to protect public health. [69] Therefore, in balancing the rights of the individual, it may be less invasive and stigmatizing to individuals to close schools or prohibit public gatherings than to tell certain individuals they cannot leave their residence or treatment center and publicly indicate quarantine.

II. U.S. FEDERAL GOVERNMENT

While public health law, including quarantine, is inherently a state police power, the federal government has been involved in quarantine in the past and can be involved when there is an "imminent threat to national security." [70] One of the largest problems with state government oversight of quarantine, especially in the case of bioterrorism, is that the states do not have the funding, employees, or resources to do an effective job. [71] The federal government would not face some of these same limitations, but it lacks the authority the state governments possess. Federal government can only be involved in quarantine in very few and limited ways.

A. Federal Government Involvement under the Posse Comitatus Act

Under the Posse Comitatus Act, Congress limited the use of the United States Army in civilian law enforcement. Originally passed in 1878, the Act intended to remove the Army from domestic law enforcement and "return it to its role of defending the borders of the United States." [72] In removing the military from law enforcement, "the United States declared that the military should never have enforcement powers against civilians, except in a declared state of emergency." [73] However, the Posse Comitatus limitation ***529** does not apply to all branches of the armed services; its language specifically does not include either the Coast Guard or the National Guard. [74]

Posse Comitatus does not directly apply to National Guard units, as they are under the control of state governors. [75] National Guard units are not subject to Posse Comitatus when used solely in a state manner as described below. However, under the particular circumstances when National Guard units are nationalized, they are subject to federal control and legal constraints. [76]

In determining whether the federal military personnel are acting appropriately in a given situation, the courts have applied a test of "whether the role of military personnel in the law enforcement operation was 'passive' or 'active.'" [77] Courts have stated that active participation such as making arrests violates the Posse Comitatus Act, while passive supporting roles do not. [78] Federal military can provide "supplies, training, facilities, and certain types of intelligence information" and can be involved in the planning of law enforcement operations without violating the Act.

The strength of Posse Comitatus has greatly diminished since the time it was passed. It has been "repeatedly circumvented by subsequent legislation" and diminished or disregarded by the actions of several presidents. [79] Congress has authorized military use in law enforcement for drug trafficking, immigration, the Civil Disturbance Statutes, natural disasters, and homeland defense. [80] While the Posse Comitatus "remains a deterrent to prevent the unauthorized deployment of troops at the local level in response to what is purely a civilian law enforcement matter," it is a "hollow shell in place of a law that formerly was a real limitation on the military's role in civilian law enforcement and security issues." [81] The number of exceptions and policy shifts in regards to Posse Comitatus over the "past 20 years strongly indicate" that it is not a major barrier to the use of military forces in the battle against terrorism. [82]

***530** B. Federal Government Involvement Under the Stafford Act

The Stafford Act, 42 U.S.C. § 5121, also provides limited authorization for federal military involvement in certain instances. It "permits the President to support state and local governments following a major disaster." [83] According to the Stafford Act, a state governor may request use of federal military personnel in times of natural disaster. [84] However, the Act requires that the state governor request help, and that the President declare a major disaster and send in military forces on an emergency basis for up to ten days to preserve life and property. [85] In the case of a bioterrorist attack, ten days may not be enough to really make a difference. Besides the ten day restriction, a bioterrorist attack could only be declared a major disaster if it produced a fire, flood, or explosion. [86] Any actions taken by the military under this authorization are also still subject to the active/passive test used by the court to determine if the military has overstepped its bounds. [87] The time it would take for a state governor to request help may make the use of federal troops and quarantine ineffective, limiting individual rights without a corresponding increase in public safety.

C. Federal Government Involvement Under Civil Disturbance Statutes

Under the Civil Disturbance Statues or Insurrection Act, the President may "use military personnel to enforce civilian laws where the state has requested assistance or is unable to protect civil rights and property." [88] These are the only instances, under this particular aspect of the code, where the federal government can legitimately be involved in the enforcement of quarantine. If the President does not formally issue an order to activate the military for insurrection purposes, questions about the legality of the use of the military under the Posse Comitatus Act exist [89] and the use must comply with the active/passive test previously articulated.

With the Insurrection Statute, the President must first give an order for the offenders to disperse. [90] In the case of a bioterror attack, that is difficult to do. The President would only have the power to involve the federal ***531** government if those subject to quarantine staged a civil disturbance. If those infected or exposed to the disease followed the orders of the local board of health without questions, then the federal government would not need to get involved, and also would have no authority to act. For the President to use federal troops or federalize the National Guards under this Act, the President must think such actions necessary to enforce laws or suppress rebellion. [91] Therefore, sending federal troops to enforce quarantine seems to do little to suppress any kind of rebellion unless the rebellion is by those who are either infected with the disease or have been exposed to it.

D. Federal Government Involvement Under Inherent Presidential Rights and Duties

Another way to authorize federal government involvement in quarantine is through the use of the President's inherent right and duty to preserve federal functions. [92] Along with the inherent right and duty to persevere federal functions, the President has broad authority under Article II to use federal troops to faithfully execute the laws. [93] Such authority is weak though, and should be a method of last resort by a President, as this area is much more nebulous than interpreting well-defined Congressional acts.

E. Due Process

While it is "not improper to restrain the free enjoyment of liberty, privacy or property per se," it is improper "to do so unnecessarily, arbitrarily, inequitably, or brutally." [94] Because of federalism, states have the ability to enact due process guarantees as they see fit. To ensure minimum protections for all those affected by quarantine statutes, federal regulations should be enacted to establish a floor for protection of individual rights. This would allow states to give those affected more rights, but also require states to provide at least the minimum protections set by the federal level. The due process considerations discussed in the State Government section of this note also apply to the federal government. Having the federal government set a floor for regulations and allowing the states to implement stricter controls is not a new concept, as it aligns with the current legal system. The U.S. Constitution sets minimum standards for all states, and a state can provide more stringent protections for its citizens if the state so desires.

***532** "When government acts to protect the population's health or safety, it affirms the social and economic right to health." [95] However, the "compulsory interventions diminish individual interests this clash of individual and collective interests is inevitable in the theory and practice of public health." [96] Because the tension between rights and public health is inevitable, the federal and state governments should both try to ensure that the minimum due process rights that are guaranteed in criminal cases are also available and guaranteed for quarantine. [97] While there are crucial differences between a criminal proceeding and quarantine, there are also important similarities. In both cases, a person is deprived of some of his liberty interests and freedom of movement. A crucial difference, though, is that a person accused of a crime is entitled to certain rights and guarantees, such as the right to an attorney, the right to a trial with a jury of his peers, the right to confront and cross examine witnesses, etc.

If federal military personnel are used or there is a federalization of the National Guard, then it is imperative that they realize the complexity of their situation. The National Guard Units, as a whole and as individual guardsmen or armed forces, will have to balance between public health and individual rights. Unfortunately, they are not as well trained in civilian peacetime law

enforcement settings as they are for warfare conditions. Ensuring that the armed forces do not use deadly force unless absolutely necessary is especially important. One might reasonably think that a member of the armed forces is much more likely to use deadly force than an ordinary cop. Thus, it is crucial, if the federal military personnel are to be involved, that they respond to domestic law enforcement situations in the same manner as a local police force or other domestic law enforcement group would.

III. TENSION BETWEEN U.S. STATE AND FEDERAL GOVERNMENTS

While police powers, and thus public health, have traditionally been within the purview of state governmental authority, tension still exists between the state and federal government. The federal government, in the past, has tried to play a larger role in quarantine laws. However, the states fought such involvement, and the judiciary upheld that public health laws ***533** and quarantine fall squarely within a state's police powers. [98] However, a report by the National Intelligence Council for the Central Intelligence Agency determined that "infectious disease is not only a public health issue, but also a problem of national security" because such diseases can be used as bioterrorism. [99] Quarantine in a bioterrorism context raises new concerns and tensions between state and federal governments, as this balance calculation includes protecting public health and national security.

Quarantine laws are traditionally state laws, but "the regulation of national security has been exclusively given to the Congress through the Constitution." [100] This dichotomy between the public health power of the state and regulation of national security by the federal government "has given rise to a new conflict with federalism [t]his conflict suggests that federalism should give way to the constitutionally delegated powers of the United States to preserve national security." [101] At the federal level, the Center for Disease Control (CDC) "has Congressionally mandated authority to impose quarantines where there is a threat of interstate transmission of a communicable disease." [102] This power is based on Congress' power to regulate interstate commerce. [103] Under this, the "CDC shall only implement those measures where the state's measures are 'insufficient to prevent the spread of any of the communicable diseases from such State to any other." [104] Even though the CDC may have the most knowledge about a disease and how to curb its spread, it cannot get involved unless the state's measures are insufficient.

As previously stated, quarantine laws are state regulations in peacetime, "in accordance with the Tenth Amendment," and "not until there exists a national emergency, or an attack against the United State is made, does the power to take control of a response shift to the federal government." [105] Bioterrorist attacks are unlikely to be immediately identified as such, creating tension between the state, which seems to have the right and duty to respond first, and the federal government, which has the responsibility to protect national security.

One of the main problems with having separate regulations for each state is that the boundaries between states are "meaningless where the attack media, a disease agent, can travel from any one point on the globe to another ***534** in under 36 hours." [106] This is part of the reason that the federal government has the power to take over regulation during a bioterrorist attack. At that point, the federal government is better equipped to standardize actions for all states involved. Nevertheless, differing state responses to an emerging crisis at the outset of the attack might lead to complications.

Even the federal government taking over control from the states does not solve the incongruity or tensions. Taking control from the states leaves much room for contradiction between the policies of the two levels of government and also creates the possibility for conflict when either the federal government wants to step in too soon or a state government is unwilling to relinquish its regulatory. There is no clear indication of what is to happen if the federal government and state government disagree as to whether a bioterrorist attack has occurred. Perhaps at that point that the Supremacy Clause [107] takes effect, allowing the federal government to trump the rights and actions of the state government.

IV. CANADIAN QUARANTINE LAWS

The Canadian approach to quarantine and the balance of individual rights is much different from that taken by the U.S. government. In the U.S., the state or local government is the primary responder for a quarantine situation. In Canada, the federal government has express jurisdiction over quarantine. [108] Unlike the U.S. where each state legislature passes quarantine laws, the Parliament of Canada passes "laws in relation to health for the peace, order and good government of Canada," including quarantine laws. [109]

Having the federal government control the rules and regulations of quarantine allows Canada to operate consistently throughout the country in the event of a bioterrorist attack. Canadian citizens, residents, and aliens are on notice that in the case of a bioterrorist attack, the quarantine rules are standard, no matter where the individual is located at the time of the outbreak. This reduces some of the tensions the U.S. government faces between the state and federal governments.

In Canada, the Minister of Health chooses quarantine officers. These officers do not require particular skills or knowledge; the Minister may designate anyone whom he believes to be qualified. [110] A Canadian ***535** quarantine officer has many of the same powers as quarantine officers in the U.S. The quarantine officer has the power to: (1) inspect goods and cargo arriving in or leaving Canada; [111] (2) require others to assist him in carrying out his duties; [112] and (3) require a medical examination or detain an individual who has been in close proximity to a contagious disease, is ill, or may be a carrier of the disease. [113]

A. Location

Unlike the United States, Canadian detention or quarantine centers are not determined on a local basis. Canadian quarantine stations are designated as such by the Minister of Health, and the Minister has the ability to establish quarantine stations at any location in Canada. [114] These locations include "any part of a quarantine station, harbour, airport or port of entry into Canada." [115]

Once a quarantine officer determines that an individual must be detained, the individual can be held "in a quarantine station, hospital or other place having suitable quarantine facilities." [116] The individual cannot be held longer than the length of the incubation period of the suspected disease, [117] but cannot leave without permission of the quarantine officer. [118]

B. Balancing of Rights

A person who has been quarantined in Canada has the right to an immediate appeal of his detention decision. A detained individual must immediately be informed of the reason for detention and the right to appeal to the Deputy Minister of Health, or any person the Deputy Minister designates. [119] Additionally, if the person is to be held more than forty-eight hours, the individual has the right to an attorney and a hearing regarding the detention. [120] This provides a smaller pre-hearing detention time than the U.S. MSEHPA, which, as discussed earlier, allows a person to be held fifteen to twenty-five days before a hearing.

***536** For anyone held longer than forty-eight hours, the Minister of Health must confirm the detention, inform the individual, and inform a "judge of the superior court of the province in which the person is detained." [121] Therefore, Canada explicitly provides for an expedited judicial review of the quarantine detention. Judges must hear such cases within one day of receiving notice and must "make an order revoking, varying or confirming the order for detention." [122] This judicial review attempts to balance individual rights against being held and the public health safety of the nation. If the Minister does not inform a judge that an individual is being held for more than two days within forty-eight hours of the order, the individual must be released immediately. [123] This strict penalty for failure to conform to the law appropriately balances the rights of individuals.

V. CONCLUSION

While quarantine is rarely used and causes tension between the rights of an individual and the public health of the nation, it also can be very beneficial. During the SARS outbreak in 2003, the World Health Organization acknowledged that the use of quarantines combined with surveillance and travel restrictions, "sharply reduced the adverse effects of the outbreaks." [124] The U.S. federal and state governments must work together in formulating a bioterrorist response, including quarantine, because "without involvement by the federal government in a systematic way during peacetime, there is little chance that an effective response to protect our nation will be made in the context of an emergency shift in power." [125] In Canada, the federal government must maintain excellent communications with the provinces as the federal government controls the bioterrorist quarantine response.

The most difficult part of any quarantine law is determining how much to protect individual rights and liberties while still keeping the public healthy and safe. While this is true for any disease outbreak, it is especially true in the case of a bioterrorist attack. With a bioterrorist attack, the number of people who are likely to either be infected or exposed to a contagious disease would be so high that unless a local board of health had engaged in advance planning, chaos would be rampant. "Government and public health ***537** officials must be able to react quickly and intelligently to a potentially catastrophic disease outbreak." [126] Reacting "intelligently" is crucial so the government does not curtail individual liberties nor neglect the protection of public health. This balance requires cooperation between the U.S. state and federal governments to determine which roles each will play in the event of a bioterrorist attack. "[B]ecause there is an inevitable tension between individual and collective interests, finding an appropriate balance always will be fraught with difficulty." [127]

Footnotes

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1 Lawrence O. Gostin, When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?, 55 FLA. L. REV. 1105, 1128 (2003).

2 See Matthew E. Brown, Reconsidering the Model State Emergency Health Powers Act: Toward State Regionalization in Bioterrorism Response, 14 ANNALS HEALTH L. 95, 101-02 (2005) (documenting the presence of bioterrorism and biowarfare in the sixth century and the origins of modern biowarfare in Japan and the United States in the 1930s and 1940s).

3 Biological weapons are attractive to terrorists because they are easily developed, purchased, and transported due to their small and portable nature. Id. at 103-04.

4 Joseph Barbera et al., Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences, 286 JAMA 2711, 2712 (2005).

5 Lawrence O. Gostin, The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism, 13 HEALTH MATRIX 3, 6 (2003).

6 Lawrence O. Gostin, When Terrorism Threatens Health: How Far are Limitations on Human Rights Justified, 31 J.L. MED. & ETHICS 524, 527 (2003).

7 Moore v. Draper, 57 So.2d 648, 649 (Fla, 1952) (quoting People v. Robertson, 134 N.E. 815, 817 (Ill. 1922)).

8 See Barbera et al., supra note 4, at 2712.

9 Id.

10 Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U.S. 380, 287 (1920).

11 See Moore, 57 So.2d at 649 ("The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender.").

12 Jacobson v. Mass., 197 U.S. 11, 28 (1905) (citing R.R. Co. v. Husen, 95 U.S. 465, 472 (1877)).

13 139 N.E. 204, 206 (Ohio 1922).

14 Ex parte Johnson, 180 P. 644, 644-45 (Cal. Dist. Ct. App. 1919) (all judges concurring).

15 Id.

16 See id.

17 Moore v. Draper, 57 So.2d 648, 649 (Fla. 1952) (quoting People v. Robertson, 134 N.E. 815, 817 (Ill. 1922)).

18 In re Halko, 54 Cal. Rptr. 661, 662 (Cal. Dist. Ct. App. 1966).

19 Gostin, supra note 6, at 526.

20 Id. at 524.

21 OHIO REV. CODE ANN. § 3707.04 (LexisNexis 2005).

22 § 3707.08.

23 Id.

24 Id.

25 Id.

26 Paula Mindes, Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States, 10 J.L. & HEALTH 403, 409 (1995-96).

27 Id.

28 Barbera et al., supra note 4, at 2714.

29 In re Halko, 54 Cal. Rptr. 661, 664 (Cal. Dist. Ct. App. 1966).

30 OHIO REV. CODE ANN. § 3707.08 (LexisNexis 2005).

31 Mindes, supra note 26, at 410.

32 See In re Halko, 54 Cal. Rptr. at 622 (Petitioner Halko was isolated because of active tuberculosis at a hospital under the orders of a health officer. He was served with successive orders of isolation for periods of approximately six months each from January 1965 to March 1966. Halko was still being held in isolation when he sought a writ of habeas corpus on May 5, 1966.).

33 § 3707.09.

34 Id. See OHIO ADMIN. CODE 3701:3-02 (2006) for a list of diseases that are dangerous to the public health and are reportable.

35 § 3707.09.

36 Gostin, supra note 1, at 1108.

37 Id. at 1125.

38 Id. at 1126.

39 See id.

40 See id. at 1126-27.

41 Id. at 1127.

42 Brown, supra note 2, at 109-12 . "Throughout the exercise, participants [in TOPOFF] noted their confusion as to who had ultimate decision-making authority regarding issues such as quarantines." Id. at 110.

43 See Craig T. Trebilcock, The Myth of Posse Comitatus, J. HOMELAND SEC., Oct. 2000, http://www.homelandsecurity.org/journal/articles/Trebilcock.htm. Trebilcock explains that "[t]he National Guard, when it is operating in its state status pursuant to Title 32 of the U.S. Code, is not subject to the prohibitions on civilian law enforcement," and that "[i]n fact, one of the express missions of the Guard is to preserve the laws of the state during times of emergency when regular law enforcement assets prove inadequate." Id. Thus, the National Guard could help enforce quarantine when necessary during a national emergency.

44 Ex parte Company, 139 N.E. 204, 206 (Ohio 1922).

45 Mindes, supra note 26, at 409.

46 Gostin, supra note 1, at 1106.

47 Mindes, supra note 26, at 415.

48 State v. Snow, 324 S.W.2d 532, 534 (Ark. 1959). The court noted, however, that "the analogy [to involuntary commitment of insane persons] must not be carried too far." Id.

49 Mindes, supra note 26, at 407.

50 Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980).

51 Id.

52 Gostin, supra note 6, at 525.

53 Moore v. Draper, 57 So.2d 648, 649 (Fla. 1952).

54 Id.

55 Gostin, supra note 6, at 526.

56 Moore, 57 So.2d at 650.

57 Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980) However, this is not a universal standard for all the states. See, e.g. Ex Parte Martin, 188 P.2d 287, 289 (Cal Dist. Ct. App. 1948) (holding that "it is [not] necessary for a health officer to first determine that one is afflicted with such disease before subjecting such a person to quarantine, [as] all that is required is that there be probable cause to believe the person so held has an infectious disease mentioned in said statutes").

58 Mindes, supra note 26, at 409-10.

59 Brown, supra note 2, at 96-97.

60 Gostin, supra note 5, at 16-17 .

61 Brown, supra note 2, at 100 (quoting MODEL STATE EMERGENCY HEALTH POWERS ACT § 601 (Ctr. for Law & the Pub.'s Health, Draft for Discussion 2001)), available at http://publichealthlaw.net/MSEHPA/MSEHPA2.pdf.

62 Id.

63 Gostin, supra note 6, at 526.

64 Id.

65 Victoria Sutton, Bioterrorism Preparation and Response Legislation— The Struggle to Protect States' Sovereignty While Preserving National Security, 6 GEO. PUBLIC POL'Y REV. 93, 98 (2001) (citing Ex parte Martin, 188 P.2d 287, 289 (Cal. Dist. Ct. App. 1948)).

66 Gostin, supra note 6, at 527.

67 Id.

68 Id.

69 OHIO REV. CODE ANN. § 3707.26 (LexisNexis 2005).

70 Sutton, supra note 66, at 97 (noting that Federalist 44 and 41 "indicate that the ascendancy of the federal government may be favored where the exigency demands such a response, and the existence of the Union is thus dependent upon such action [w]hile we are certain that a bioterrorism threat exists, the exigency required by the Constitution to invoke federal powers means there must be an imminent threat to national security").

71 Brown, supra note 2, at 97.

72 Trebilcock, supra note 43.

73 Victoria Sutton, Biodefense: Who's in Charge?, 13 HEALTH MATRIX 117, 143 (2003).

74 Trebilcock, supra note 73.

75 Bonnie Baker, The Origins of the Posse Comitatus, AIR & SPACE POWER CHRON. ONLINE J., Nov. 1, 1999, http://www.airpower.maxwell.af/mil/airchronicles/cc/baker1.html.

76 Id.

77 Trebilcock, supra note 43.

78 Id.

79 Id. For instance, President Reagan used the Navy and Air Force in his "war on drugs." Id. Congress approved this use in 10 U.S.C. §§ 371-81. U.S. troops were also used as security during the 1996 Olympic games. Id.

80 Id.

81 Id.

82 Id.

83 William Banks, The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response, 64 LA. L. REV. 735, 745 (2004).

84 Trebilcock, supra note 43.

85 Id.

86 Banks, supra note 83, at 745.

87 Trebilcock, supra note 43.

88 Id.

89 Sutton, supra note 73, at 145.

90 Trebilcock, supra note 43.

91 Banks, supra note 83, at 746.

92 Trebilcock, supra note 43.

93 Banks, supra note 84, at 740.

94 Gostin, supra note 6, at 526.

95 Id. at 525.

96 Id. at 525-26.

97 Earlier in the paper, the similarities between civil commitment hearings and quarantine are discussed as far as making sure that in a quarantine situation, the same rights are given as with the civil commitment. [See infra text accompanying footnotes xx-yy]. An alternative approach would require quarantine subjects to be granted the same rights as subjects of a criminal proceeding, and it is those rights that are discussed in this section. This is not to suggest that either view is correct, but rather to show that both civil and criminal standards offer more guarantees to an individual than they get under quarantine laws and the best balance is likely somewhere in the middle.

98 Sutton, supra note 65, at 94.

99 Gostin, supra note 5, at 7.

100 Sutton, supra note 65, at 94.

101 Id. at 94-95.

102 Sutton, supra note 73, at 129 (citing 42 U.S.C. § 264 (2002)).

103 U.S. CONST. art. I, § 8, cl. 3.

104 Sutton, supra note 73, at 129-30 (quoting 42 C.F.R. § 70.2 (2001) (emphasis omitted)).

105 Id.

106 Sutton, supra note 65, at 95.

107 U.S. CONST. art. VI, § 2. See also Sutton, supra note 65, at 94 (stating that scholars disagree as to whether the Supremacy Clause or the Necessary and Proper Clause grants the federal government power to preempt states).

108 Chaoulli v. Quebec, [2005] S.C.R. 791.

109 Labatt Breweries v. Canada (Attorney General), [1980] S.C.R. 914.

110 Quarantine Act, R.S.C., ch. Q-1, § 4 (1985).

111 Quarantine Act § 5.

112 Quarantine Act § 6.

113 Quarantine Act § 8.

114 Quarantine Act § 3.

115 Id.

116 Quarantine Act § 8(3).

117 Quarantine Act § 8(2).

118 Quarantine Act § 3.

119 Quarantine Act § 9.

120 Quarantine Act § 12.

121 Id.

122 Id.

123 Id.

124 Gostin, supra note 6, at 526 (citing World Health Organization, First Global Consultation on SARS Epidemiology, Travel Recommendations for Hebei Province (China), Situation in Singapore-Update 58 (May 17, 2003), available at http://www.who.int/csr/sars/archive/2003_05_17/en/print.html).

125 Sutton, supra note 73, at 121.

126 Gostin, supra note 5, at 9.

127 Gostin, supra note 6, at 527.

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