

Mass Quarantines in the COVID-19 Crisis

A talk with Judge Andrew Napolitano

- Quarantine and isolation
 - Quarantine is used broadly to describe both quarantine and isolation defined below, as well as travel restrictions.
 - The CDC defines “quarantine” and “isolation” as follows:
 - Quarantine: *separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.*
 - Isolation: *separates sick people with a quarantinable communicable disease from people who are not sick.*¹
 - Quarantine laws exist at both the state and federal level. Many of those statutes were enacted decades to a century ago and have not been robustly challenged in the courts in modern times.

- Federal powers
 - In the COVID crisis, the federal government has quarantined individuals on military bases who were repatriated from specific locations or were aboard cruise ships.
 - The federal government’s authority to quarantine is derived from the Commerce Clause, which gives Congress authority to regulate interstate commerce.²
 - Federal power to quarantine
 - Public Health Service Act § 361 authorizes the Secretary of Health and Human Services to take measures to prevent the entry and spread of communicable diseases from foreign countries into the U.S. and from one state to another.³ This power is delegated to the CDC.
 - When the Secretary of Health and Human Services declares a public health emergency under Public Health Service Act § 319⁴, as Secretary Alex Azar did in January 2020⁵, the secretary (and the CDC) is authorized to take broad actions to respond to the emergency.
 - Under 42 CFR §§ 70 (regulating interstate travel) and 71 (regulating foreign arrivals), the CDC can detain, medically examine, and release persons traveling to the U.S. or between states.

¹ CDC Quarantine and Isolation, Legal Authorities for Public Health Orders:

<https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>

² U.S. Const. art. I, § 8, cl. 3.

³ 42 U.S.C. § 264, Regulations to control communicable diseases:

⁴ 42 U.S.C. § 247d

⁵ Department of Health & Human Services Press Release, January 31, 2020, Secretary Azar Declares Public Health Emergency for United States for Novel Coronavirus:

<https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>

- E.g. 42 CFR § 70.6 – Apprehension and detention of persons with quarantinable communicable diseases.
 - (a) *The Director may authorize the apprehension, medical examination, quarantine, isolation, or conditional release of any individual for the purpose of preventing the introduction, transmission, and spread of quarantinable communicable diseases... based upon a finding that:*
 - (1) *The individual is reasonably believed to be infected... in a qualifying stage and is moving or about to move from a State into another State; or*
 - (2) *The individual is reasonably believed to be infected... in a qualifying stage and constitutes a probable source of infection to other individuals who may be moving from a State into another State.*⁶

- 42 CFR § 71.32 – Persons, carriers, and things.
 - (a) *Whenever the Director has reason to believe that any arriving person is infected with or has been exposed... he/she may isolate, quarantine, or place the person under surveillance... as he/she considers necessary to prevent the introduction, transmission or spread of the listed communicable diseases.*⁷

- Federal isolation and quarantine are authorized for listed communicable diseases by Executive Order. In 2014, President Obama issued Executive Order 13674⁸, amending Bush Executive Order 13295⁹, to include “severe acute respiratory syndromes” “Severe acute respiratory syndromes” encompass COVID-19.
- Penalties for violations of quarantine orders
 - Under § 361 of the Public Health Service Act, violating quarantine orders is punishable by a fine of up to \$1,000, up to a year in jail, or both.¹⁰

⁶ 42 CFR § 70.6: https://www.govregs.com/regulations/title42_chapterI_part70_section70.6

⁷ 42 CFR § 71.32: <https://www.govregs.com/regulations/42/71.32>

⁸ Executive Order 13674: <http://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-revised-list-quarantinable-communicable-diseases>

⁹ Executive Order 13295: <https://www.cdc.gov/sars/quarantine/exec-2004-04-03.html>

¹⁰ 42 U.S.C. § 271:

[https://uscode.house.gov/view.xhtml?req=\(title:42%20section:271%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title42-section271\)&f=treesort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:42%20section:271%20edition:prelim)%20OR%20(granuleid:USC-prelim-title42-section271)&f=treesort&edition=prelim&num=0&jumpTo=true)

- State quarantine power
 - State power to quarantine is derived from the police powers under the Tenth Amendment. The states have primary authority to quarantine individuals or groups within the state. While the CDC provides recommendations and guidance, it usually defers to the states authorities in their use of their quarantine powers.
 - States authorize quarantines through public health laws. The specifics of the quarantine laws can vary, including whether they require a court order, what communicable diseases are covered, and methods of determining duration. See Additional Resources A for quarantine laws and regulations of the states.
 - E.g. New York Public Health Law § 2120 requires an investigation upon a complaint that an individual is noncompliant with a quarantine/isolation request. If found to be noncompliant, a court order must be obtained after a notice and hearing to quarantine the individual in a hospital or institution.
 - Cities and local municipalities derive their quarantine powers from the states.¹¹
- State “lockdowns,” “shelter-in-place,” “PAUSE”
 - In response to the COVID crisis, states employed various social distancing measures, including restricting public gatherings over certain sizes, closing schools, and requiring certain businesses to close. The extent to which the states can enforce some of the measures in their “shelter-in-place” orders is unclear. Are they legally enforceable orders or recommendations and policies to create public safety zones?
 - E.g. In New York, Governor Andrew Cuomo issued a 10-point policy, called “New York State on PAUSE” outlining the various measures instituted in the state.¹²
 - E.g. In California, Governor Gavin Newsome issued an executive order to Californians to “stay home... except as needed to maintain the continuity of operation of operations of the federal critical infrastructure sectors.”¹³
 - State border closures and mandatory regional lockdowns raise serious constitutional questions.
 - Because there are less restrictive alternatives like closing schools and public places, quarantines and isolations for individuals suspected, encouraging private businesses to close, and strong recommendations to avoid travel—all of which have been shown to mitigate the spread of

¹¹ See *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)

¹² New York State on Pause Policy: <https://coronavirus.health.ny.gov/new-york-state-pause>

¹³ Executive Department State of California Executive Order N-33-20: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>

- contagion—the courts may closely scrutinize border closures if challenged.
- Border closures also implicate the dormant commerce clause. The dormant commerce clause prohibits states from regulating wholly out-of-state activity and limits their ability to burden interstate commerce. Historically, the courts have upheld state quarantine laws meant prevent the spread of communicable diseases in the state.¹⁴
 - Given the exigency of the current crisis, however, it's unclear how courts will rule. They may decline to enjoin such temporary measures unless clearly arbitrary or oppressive and may defer to the health authorities of the states.
- Constitutional issues in quarantines
 - Whether the federal and state governments impose quarantines or restrict travel outside, important constitutional issues are raised. Quarantine measures curtail individual rights in the interests of public health. There is debate at both the federal and state levels as to whether quarantine and isolation laws adequately protect constitutional rights.
 - Substance and procedural due process required
 - Most implicated in cases of individual or group quarantines or isolations, due process requires that the measure cannot be arbitrary, oppressive, and unreasonable.
 - Substance due process requires that the government show an individual has the disease and is likely to act in ways that put the public at risk.
 - Precedents indicate that the state should provide notice about why the individual is being confined and other procedural due process rights like right to judicial review.
 - In the COVID crisis, the federal government quarantined on a military base individuals who were repatriated from Wuhan, China. Initially considered a voluntary quarantine, an order was issued on January 31, 2020 after an individual requested to leave the military base after a couple of days of arrival. The quarantine order provides that the individuals have a right to a “medical review” and a right to federal court review, including “any rights habeas review.”¹⁵
 - Prisoners rights in the COVID crisis
 - The prison and jail population is especially vulnerable once a contagion enters its walls. The people inside live in close proximity to one another, often

¹⁴ See *Campagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health*, [186 U.S. 380 \(1902\)](#); *Louisiana v. Texas*, [176 U.S. 1 \(1900\)](#); *Morgan v. Louisiana*, [118 U.S. 455 \(1886\)](#)

¹⁵ U.S. Dept of HHS, CDC Order for Quarantine Under § 361 of the Public Health Service Act: https://www.cdc.gov/quarantine/pdf/Public-Health-Order_Generic_FINAL_02-13-2020-p.pdf

- in shared spaces. Though they have less constitutional rights, prisoners are protected under the Eight Amendment's prohibition against cruel and unusual punishment and retain certain due process rights, including the right to appeals and judicial review. Prison officials have a responsibility to take measures to prevent the spread of COVID-19 and provide adequate medical care.
- Some states have responded by evaluating “compassionate release” for high-risk individuals or the release of those in jail for low-level non-violent crimes like parole violations.
 - The Marshall Project has curated links related to criminal justice, prisons, and immigration issues on how the COVID crisis is impacting such vulnerable populations.¹⁶

¹⁶ The Marshall Project Coronavirus curated links: <https://www.themarshallproject.org/records/8718-coronavirus>

ADDITIONAL RESOURCES:

- A. CDC Specific Laws and Regulations Governing the Control of Communicable Diseases: <https://www.cdc.gov/quarantine/specificlawsregulations.html>
- B. CDC Legal Authorities for Public Health Orders:
<https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>
- C. National Conference of State Legislatures State Quarantine and Isolation Statutes: <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>