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## Public Health Updates in Light of Ebola and Public Health Police Powers Circumscribed by Due Process

2015 ACLM 55<sup>th</sup> Annual Meeting  
February 27, 2015  
General Session IV 2:45pm – 4:45pm

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## Definitions

- **Quarantine** is the restriction of persons who are presumed to have been exposed to a contagious disease but are not ill.
- **Isolation** is the separation of ill persons with contagious diseases.
- **Cordon Sanitaire** (Community-wide quarantine) refers to closing of community borders or the erection of a real or virtual barrier around a geographical area<sup>1</sup>.


1. Donald G. McNeil Jr. (August 13, 2014). "Using a Tactic Unseen in a Century, Countries Cordon Off Ebola-Racked Areas". [www.nytimes.com](http://www.nytimes.com). The New York Times.



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## Isolation & Quarantine Authority

- Federal and State authority coexist
- Sometimes this may cause confusion




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## Federal: Isolation & Quarantine Authority

- Federal quarantine and isolation authority derives from the Commerce Clause of the U.S. Constitution, which states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several states."<sup>2</sup>
- Section 361 of the Public Health Service Act


2. U.S. CONST. art. I, § 8, cl.3.



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## Section 361 of the Public Health Service Act

- Grants the Secretary of Health and Human Services 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."



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## Exec. Order No. 13295

- Found in 68 Fed. Reg. 17255 (April 4, 2003).
- The diseases currently listed are:
  - Cholera
  - Diphtheria
  - Infectious tuberculosis
  - Plague
  - Smallpox
  - Yellow fever
  - Viral hemorrhagic fevers (including EBOLA)
  - Severe acute respiratory syndrome (SARS)
  - Influenza viruses which have the potential to cause a pandemic.

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### Transfer of Authority to the CDC

- In 2000, the Secretary transferred certain authorities related to persons, including quarantine authority, to the Director of the CDC.
- Both interstate and foreign quarantine measures are now carried out by CDC's Division of Global Migration and Quarantine.<sup>3</sup>

3. See CDC Division of Global Migration and Quarantine home page at <http://www.cdc.gov/ncpdcid/dgma/index.html>

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### CDC: Federal Authority

- Federal 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 possession
- In addition, Section 361 of the PHS Act authorizes the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a "qualifying stage" and
  - To be moving or about to move from a State to another State; or
  - 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.<sup>4</sup>

4. 42 U.S.C. § 264(d)(1).

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### "Qualifying Stage"

- "Qualifying stage" means that such a disease is
  - in a communicable stage or
  - in a precommunicable state, if the disease would likely cause a public health emergency if transmitted to other individuals.<sup>5</sup>

5. 42 U.S.C. § 264(d)(2).

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### U.S. Quarantine Stations

- U.S. Quarantine Stations are part of a comprehensive system that serves to limit the introduction and spread of contagious diseases in the United States. U.S. Quarantine Stations are located at 20 ports of entry and land-border crossings where international travelers arrive.
- They are staffed with medical and public health officers from the Centers for Disease Control and Prevention (CDC) and managed by CDC's Division of Global Migration and Quarantine. These health officers decide whether ill persons can enter the United States and what measures should be taken to prevent the spread of contagious diseases.

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### Map of U.S. Quarantine Stations

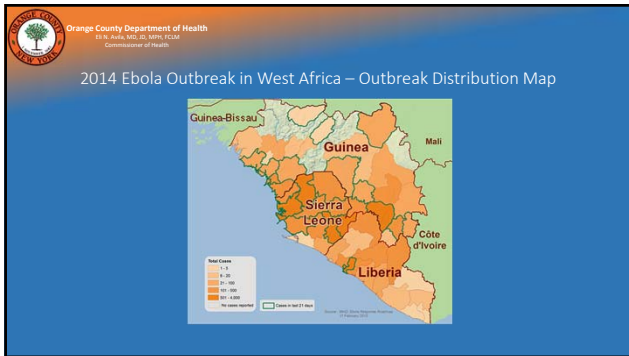
● CDC Quarantine Station (n=20)

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### U.S. Airports

- Yaw, Pitch, and Roll. Quarantine and Isolation at United States Airports.* J Leg Med. 2009 Jan-Mar ;30(1):51-81. doi: 10.1080/01947640802694551.
- "We share the genuine concern over the fact that our borders are not impervious to infectious disease, in spite of the best efforts of the CDC and DHHS and its components. Unless draconian health screening techniques are routinely implemented at each port of entry as a standard operating procedure for the millions of people crossing the border, there will always be opportunities for people who are ill to cross our borders undetected."<sup>6</sup>

6. *The XDR Tuberculosis Incident: A Poorly Coordinated Federal Response to an Incident with Homeland Security Implications: Hearing Before the H. Comm. on Homeland Security*, 110th Cong. (2007) (statements of Jeffrey Runge, W. Ralph Basham, and Jayson P. Ahern).



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### State Police Powers & Quarantine Authority

- The federal government has authority to authorize quarantine and isolation under certain circumstances; however the primary authority for quarantine and isolation exists at the state level as an exercise of the state's police power.
- Every state has the authority to pass and enforce quarantine laws as an exercise of its police powers, these laws vary widely by state.
- State and local quarantines are authorized through public health orders, though some states may require a court order before an individual is detained.

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### Court Order Model

- In Louisiana, the state health officer is not authorized to “confine [a person] in any institution unless directed or authorized to do so by the judge of the parish in which the person is located.”<sup>7</sup>

7. See, LA. REV. STAT. ANN. § 40:17(A). Exceptions are provided for certain diseases, including smallpox, cholera, yellow fever, bubonic plague, and tuberculosis. See La. Rev. Stat. Ann. § 40:17(B).

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### State Health Department Model

- Some statutes only address a single disease.
- In some states, the State Health Department is granted the authority to decide which diseases are communicable and therefore subject to quarantine.

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### State Quarantine Laws

- A common element is antiquity among these laws.
- A complete list of State quarantine and isolation statutes and where the power resides within the State may be found at <http://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>

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### Examples of State Public Health Police Powers via Statutes (1)

- California
  - Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases. Cal. [Health & Safety] Code § 120175 (Deering 2009).
- Maryland
  - The order of the [health official] or the health officer may also contain such other conditions as the [health official] or the health officer believes are necessary to protect either the health of the infected individual or the public health. Md. Code Ann., Health-Gen. § 18-324 (LexisNexis 2009).

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Examples of State Public Health Police Powers via Statutes (2)

- D.C.
  - Each and every provision of this subchapter shall be constructed liberally in aid of the powers vested in the public authorities looking to the protection of the public health, comfort, and welfare and not by way of limitation. D.C. Code § 7-144 (2009).
- Vermont
  - [TB control statutory provisions] of this title are in addition to any other statutes relating to communicable diseases generally or to tuberculosis specifically and shall not abrogate or repeal those other statutes unless in direct conflict therewith, in which case the provisions of such sections shall control. Vt. Stat. Ann. tit. 18, § 1061 (2009).

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Examples of State Public Health Police Powers to Isolate (1)

- California:
  - An order for isolation of persons with infectious tuberculosis disease to their place of residence until the health officer has determined that they no longer have infectious tuberculosis disease. Cal. [Health & Safety] Code § 121365 (Deering 2009).
- New Jersey:
  - If the location of commitment is a private residence, law enforcement may use an electronic device to monitor adherence to the commitment order. N.J. Admin. Code § 8:57-5.11 (2009).

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Examples of State Public Health Police Powers to Isolate (2)

- Colorado:
  - In a case of a person with multidrug-resistant tuberculosis, the health officer may issue an isolation order to such person if it is determined that the person has ceased taking prescribed medications against medical advice. Such order may be issued even if the person is no longer contagious so long as the person has not completed an entire course of therapy. Colo. Rev. Stat. § 25-4-507 (2009).
- Maryland:
  - A health officer may require an individual having tuberculosis in a noncommunicable stage to be under medical supervision, which may include physical isolation from others, if the individual refuses to receive adequate chemotherapy. Md. Code Regs. 10.06.01.21 (2009).

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Examples of State Public Health Police Powers to Isolate (2)

- Massachusetts:
  - Minimum period of isolation of patient – pulmonary tuberculosis (also includes mediastinal, laryngeal, pleural, or miliary). Until bacteriologically negative based on three appropriately collected and processed sputum smears that are collected in eight – 24 hour intervals (one of which should be an early morning specimen), and/or until 14 days after the initiation of appropriate effective chemotherapy, provided therapy is continued as prescribed, and there is demonstration of clinical improvement (i.e., decreasing cough, reduced fever, resolving lung infiltrates, or AFB smears showing decreasing numbers of organisms). 105 Mass. Code Regs. § 300.200 (2009).

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Legal Challenges to Quarantine Authority

- Dormant Commerce Clause Challenges
- Due Process Challenges
- Auxiliary Potential Challenges

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Dormant Commerce Clause Challenges

- Gibbons v. Ogden, 22 U.S. 1, 18 (1824).
- Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380 (1902).
- Oregon-Washington R. & Nav. Co. v. State of Washington, 270 U.S. 87, 93 (1926); see O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, J., concurring)

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### Due Process Challenges

- People ex. rel. Barmore v. Robertson, 134 N.E. 815, 817 (citations omitted) (Ill.1922); see also Zemel v. Rusk, 381 U.S. 1, 15 (1965)
- Miller v. Campbell, 945 F.2d 348 (10th Cir. 1991)
- United States v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963).
- People ex rel. Barmore v. Robertson, 134 N.E. 815 (Ill.1922).
- Best v. Bellevue Hosp. Ctr., 03CIV.365(RMB)(JCF), 2003 WL 21767656 (S.D.N.Y. July 30, 2003) aff'd in part, vacated in part, remanded sub nom. Best v. Bellevue Hosp. New York, NY, 115 F. App'x 459 (2d Cir. 2004).
- Greene v. Edwards, 164 W. Va. 326, 329 (1980).

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### Maine Controversy

Dr. Sheila Pinette, Director of Maine CDC

Kaci Hickox, RN, BSN, MS, MPH



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### The Catholic Church and Ebola



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### NY State Senate Roundtable on Ebola - Summary

