Public Health Emergency Law

CDC Foundational Course
for Front-Line Practitioners
Version 3.0

Developed by the
Public Health Law Program
U.S. Centers for Disease Control and Prevention

Public Health Emergency Law: Course Overview

- Unit 1: Introduction to Emergency Management in the Federal System
- Unit 2: Emergency Powers: Protection of Persons
- Unit 3: Emergency Powers: Property and Volunteers

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Unit 2
Emergency Powers: Protection of Persons

Disclaimer

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Unit 2 Objectives

By the end of this unit, participants should be able to:

1. Identify the Constitutional framework for use of police powers to protect the public's health during an emergency
2. Describe limits of mandatory controls and other social distancing measures
3. Recognize the scope of local, state, tribal, federal, and international jurisdictional issues pertaining to protection of people
4. Identify legal issues regarding mass evacuations, re-opening facilities, special populations, and related issues

Objective 2.1

Identify the Constitutional framework for use of police powers to protect the public's health during an emergency

Protection of Public Health = Police Power

- Police power = The inherent authority of a government to impose restrictions on private rights for the sake of public welfare, order, and security

- Under the 10th Amendment of the U.S. Constitution, police powers reside with the states unless specifically delegated to the federal government

Local / State / Federal Authority and Coordination

All emergencies start locally

- As emergencies' scale / complexity increase, local governments may request support from the state
- State and local public health agencies routinely obtain assistance from CDC
- When a situation is beyond the capability of the state, a Governor may request Stafford Act assistance from the President
- The federal government has independent authority when emergencies cross state and national borders

Authority and Coordination, Cont.

- Response to catastrophic emergencies may require:
  - Resources from:
    - Multiple jurisdictions and agencies
    - Multiple levels of government
  - Collaboration between public and private sectors
- Frequently involves all three branches of government: Executive, Legislative, & Judicial

Result = A textbook example of federalism under the Constitutional framework

Jacobson v. Massachusetts, U.S. Supreme Court (1905)

- Principal case on constitutionality of mandatory public health control measures
  - 1902 smallpox outbreak in Cambridge, MA
  - Defendant Jacobson convicted for refusal to be vaccinated ($5 fine)
  - Court stated that police power embraces “reasonable regulations” to protect public health and safety
  - “Upon principle of self defense, community has a right to protect itself against an epidemic disease”

U.S. Courts Also Protect Against Abuses in Use of Public Health Police Power

- Two cases illustrate courts protecting persons when public health police powers are improperly used:
  - *Souvannarath v. Hadden* (2002): California Court of Appeals held in favor of Laotian TB patient incarcerated under quarantine and isolation order for 1 year in county jail in violation of state statute
  - *Jew Ho v. Williamson* (1900): Federal court overturned an overly broad quarantine / cordon sanitaire order that was enforced around an entire Chinese district of San Francisco

Objective 2.2

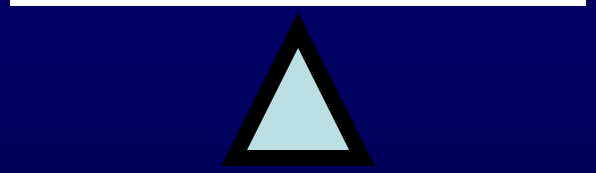
Describe limits of mandatory controls and other social distancing measures

Social Distancing Measures Used to Quench Epidemics

- Implement non-pharmaceutical interventions
  - "Snow day" restrictions (e.g., shelter-in-place)
  - Close schools, daycare centers
  - Cancel large public gatherings (e.g., concerts, theaters)
  - Limit other public contacts (e.g., markets, public transit)
  - Encourage selected / non-essential workers to stay home
  - Implement telecommuting to minimize economic impact

Social Distancing: Balancing the Public's Health with Individual Liberty Interests

Collective actions for the common good

Public good  Individual liberties

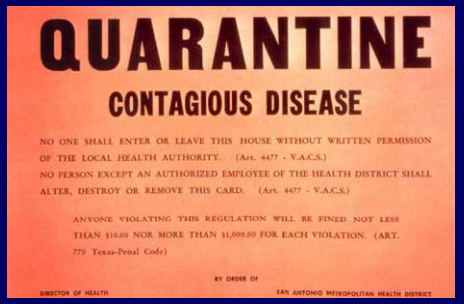
Isolation and Quarantine

- "Isolation refers to the separation of persons who have a specific infectious illness from those who are healthy and the restriction of their movement to stop the spread of that illness. . ."

- "Quarantine refers to the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious."

Quarantine Objective: Reduce Transmission of Disease

- Effectiveness depends on
  - Time period between exposure and onset of communicability
  - Mode of transmission
  - Actual distance of separation required
  - Treatment options
  - Options for isolating patients when in communicable state



Mandatory Orders: Critical Implementation Issues

The government has legal authority to require quarantine, isolation, and treatment

BUT

Public health officials must still determine:

- How to apply these powers fairly
- Who will enforce
- How much force will be used to achieve compliance

Quarantine and Isolation: Constitutional Requirements

- Quarantine and isolation restrict individual liberty
  - Similar to criminal arrest or civil commitment
- U.S. Constitution, 5th and 14th Amendments
  - 5th Due Process Clause: “nor be deprived of life, liberty, or property, without due process of law”
  - 14th Amendment makes “due process” applicable to states
- Basic Due Process for quarantine and isolation
  - Right to notice
  - Right to counsel
  - Right to hearing on request
  - Rational / reasonable basis for detention

Quarantine and Isolation Hearings: Typical Procedural Requirements

- Quarantine / isolation administrative order
- Supporting affidavits and factual findings
- Notice and explanation of due process procedures
- Service of process (likely by law enforcement officers, not private process servers)
- Opportunity to challenge factual basis:
  - Arrange for appearances at hearing
  - Possible telephonic / electronic hearings
- Right to representation

Quarantine and Isolation Procedures

Illinois example

- If individual does not consent, ordering official must:
  - Arrange notice, right to counsel, and hearing in 48 hours if practicable
  - Make determination based on “clear and convincing evidence” that “public's health and welfare are significantly endangered” by exposed / diseased individual
  - “Prove that all other reasonable means of correcting the problem have been exhausted and no less restrictive alternative exists”

Hearings and Modern Isolation Procedures Can Be Rigorous

Confinement for Treatment:

- *Best v. Bellevue Hospital*, New York (2004)
  - TB patient confined when sought to leave hospital and refused to cooperate with treatment
  - Filed suit against health department and hospitals
    - Was Mr. Best dangerous to himself and community?
    - Did Mr. Best have adequate right to hearing?
- Health department prevailed
  - But only after 4 hearings and 7 administrative and state and federal judicial orders over 2 years

Quarantine and Isolation Hearings: Considerations for the Judiciary

Procedural readiness requirements:

- Recognized need: systems for large number of hearing requests in event of mass quarantine
  - Procedures for handling service of process
  - Court-appointed counsel
- In-person vs. electronic or telephonic hearings
  - Measures to protect safety of hearing officers and participants
- Clarity in documentation and affidavits required in a mass quarantine environment

Quarantine and Isolation Hearings: Appeal Variations & *Habeas Corpus*

- In some states, health departments issue administrative quarantine orders and state courts handle any appeals
- Some states have an administrative appeal mechanism that must first be exhausted before an individual can seek judicial review
- Individuals have a constitutional right to challenge their detention through a *habeas corpus* petition before a federal court after other appeals have been exhausted

Quarantine and Isolation: Obligations to Those Confined

- Basic needs
  - Food, medical care, safety and sanitary needs
  - Separation of isolated from quarantined persons
  - Medical treatment during confinement
  - Habitable accommodation
  - Protection from known threats
- Religious and dietary considerations

Constitutional Requirement for Least Restrictive Means

- Courts tend to favor the principle of detention "by least restrictive means necessary" when applied to individual freedom in quarantine situations
  - Analogous to principles underlying Directly Observed Therapy (DOT) for TB cases
  - Includes possible confinement in individual's residence or other public or private premises
- Some states may require least restrictive means
- Public health must also protect the community in an emergency

State Powers for Examination

Iowa Example:

- In a public health disaster the health department may:
  - Order physical exam, testing, and collection of specimens
    - Unless tests are “reasonably likely to lead to serious harm to the affected individual”
  - Apply alternative sanction if individual refuses:
    - Possible isolation or quarantine

Modern Context: Mandatory Treatment Powers

Remember:

- Laws mandating treatment of individuals may be on the books

BUT

- Modern societal views regarding individual liberty rights make public health officials hesitant to enlist the use of force to treat people against their will

Objective 2.3

Recognize the scope of local, state, tribal, federal, and international jurisdictional issues pertaining to protection of people

State and Local Jurisdictional Issues Regarding Protection of People

Remember: Police powers, including public health authority, are reserved to states under the U.S. Constitution's 10th Amendment

But: federal and international jurisdictional issues may arise in a given case

Federal Jurisdictional Issues

- Current federal statute (PHS Act Sec. 361) was enacted in an era when immigrants arrived by sea
  - Designed to control international importation and interstate spread of certain diseases
  - Not designed to prevent infectious persons bound for other countries from leaving U.S.
- Requires that specific quarantinable diseases be listed in a Presidential Executive Order

Federal Powers: Quarantine and Isolation

- The Secretary of HHS (through CDC) can:
  - "detain, medically examine, or conditionally release" persons suspected of carrying certain communicable diseases
- Authority applies only if communicable disease has been designated in a Presidential Executive Order
  - SARS added 2003
  - Avian influenza added 2005

Scope of Federal Quarantine Power

- Interstate / International - persons entering:
  - Into the U.S. or possessions from foreign countries
  - From one state or possession into any other state or possession, BUT ALSO:
- Within a state, if individual is reasonably believed to be infected
  - If state / local disease control measures are inadequate to control spread of disease
    - close coordination between state and CDC is critical

Federal Quarantine: Enforcement Flexibility

- Sec. 311 of PHS Act: HHS authorized to accept state and local assistance in enforcing federal quarantine order
- Also, HHS can assist states and political subdivisions in enforcing their quarantines
- U.S. military may assist enforcement of state quarantine at seaports
  - Note: this is an exception to the normal prohibition on the use of military for domestic law enforcement

Federal Powers: Vaccination

- No existing general authority for federal government to mandate vaccination
  - DoD and State Department can require vaccination of uniformed service personnel and certain other government employees
- Smallpox Emergency Personnel Protection Act, 2003
  - Encourages vaccination by providing liability protection for some of those administering designated vaccine

    AND
  - Provides for alternative compensation system for injuries caused by smallpox vaccination

SARS Lessons from Canada

- Communications in Toronto “demystified” quarantine
  - Hotlines staffed by 80 nurses received 300,000 calls
  - Community meetings were held
  - Information posted on websites in 14 languages
- Substantial “social cohesion” prevailed
  - Over 30,000 “voluntary” quarantines took place
  - Only 27 formal quarantine orders needed
    - The sole appeal was withdrawn

Lessons from Canada: Compliance

- Despite substantial voluntary compliance in Toronto during the 2003 SARS outbreak, important detracting factors were identified:
  - Lost wages or income of those quarantined
  - Groceries and essential services
  - Boredom of persons sheltering at home
- Good communication was an essential factor in encouraging voluntary compliance with the public health orders

International Health Regulations (IHR)

- Following 2003 SARS, the World Health Organization (WHO) revised the International Health Regulations

- IHR contain operational definition of a “public health emergency of international concern” that triggers increased control responsibilities for nations

International Health Regulations (IHR)

- The WHO has no free-standing international quarantine authority
  - Quarantine is still a country-by-country power

- The revised IHR preserve the important WHO roles of collecting international outbreak information from various sources and of issuing “traveler advisories” when appropriate

Objective 2.4

Identify legal issues regarding mass evacuations, re-opening facilities, special populations, and related issues

Evacuation Powers

- The purpose of evacuation is to remove people from a location that is an imminent threat
- Examples:
  - Florida Keys as a hurricane approaches
  - Area around a chemical tank car after train crash
  - Area downstream of a dam about to collapse
- Every state / locality may exercise this fundamental police power to protect public health and safety

Questions for Evacuation Planning

- When ordering an evacuation, the following issues must be considered:
  - Is evacuation mandatory or voluntary?
    - If mandatory, how facilitated and enforced?
  - How to protect property in evacuated areas?
  - How to precisely identify areas to be evacuated?
  - How to safely evacuate special populations and pets?
  - How to ensure that mandatory evacuees are given priority over voluntary self-evacuees?
  - How to provide food, medical care, and shelter to the displaced (including persons with special needs)?

Evacuation Powers

State disaster authorities have specific provisions to order evacuation in “declared” emergencies:

Colorado Example

In a (state-) declared emergency, Governor may:

“(e) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

“(f) Prescribe routes, modes of transportation, and destinations in connection with evacuation”

Reopening a Closed Facility or Evacuated Area

- In General: The agency that issued the evacuation or closure order:
  - Determines when the area or facility no longer poses a threat to public health and that the situation is “safe” or “acceptable”
  - Issues an administrative order rescinding the closure order
- Note: multiple agencies may have roles (e.g., U.S. or state EPA in case of certain contaminants)
- *Reopening is easier IF the criteria for reopening were considered BEFORE the closure*

Evacuation Issues: Considerations for Re-entry

- If evacuation is based on finding that an area was unsafe:
  - What standard is required to determine whether area is safe for people to return?
    - Condition causing evacuation was safely resolved? OR
    - Compliance with all appropriate environmental and health standards?
  - Who decides?
    - The authority ordering the evacuation?
    - A different government body?
  - Thinking ahead is vital

Evacuation Issues: Special Populations

- Post-Katrina Emergency Management Reform Act requires:
  - Procedures are in place to inform people with disabilities or other special needs of evacuation plans
  - Disability Coordinator appointed to ensure their needs are properly addressed
  - Information must be made available in form understandable by all population groups affected by a major disaster

Evacuation of Persons: The Pet Dilemma

- Hurricane Katrina lessons learned:
  "people won't leave their pets"
- 62% of U.S. households have pets
- 85% want to take pets with them in an evacuation
- Implication: immediate logistical difficulties

Pets Evacuation and Transportation Standards Act of 2006 (PETS Act)

- Requires that state and local evacuation plans "take into account the needs of individuals with household pets and service animals prior to, during, and following a major disaster or emergency"

- Requires the provision of "rescue, care, shelter, and essential needs" to individuals and their household pets and / or service animals

Animal Control Laws: Coordination

- Coordination of agencies and statutes is an administrative challenge
  - Monkeypox outbreak of 2003 demonstrated threats due to exotic pet trade and lack of comprehensive interjurisdictional control
- WHO and the United Nations Food and Agriculture Organization have limited power over international animal shipments
- Animal control is a current planning challenge in pandemic avian influenza preparedness

Unit 2 Summary and Key Take-Aways

1. Constitutional framework for protection of people during emergencies includes clear role for the police power

2. Quarantine and other social distancing powers are circumscribed by basic procedural protections that are contained in the Constitution, laws, regulations, and public policies

Unit 2 Summary and Key Take-Aways

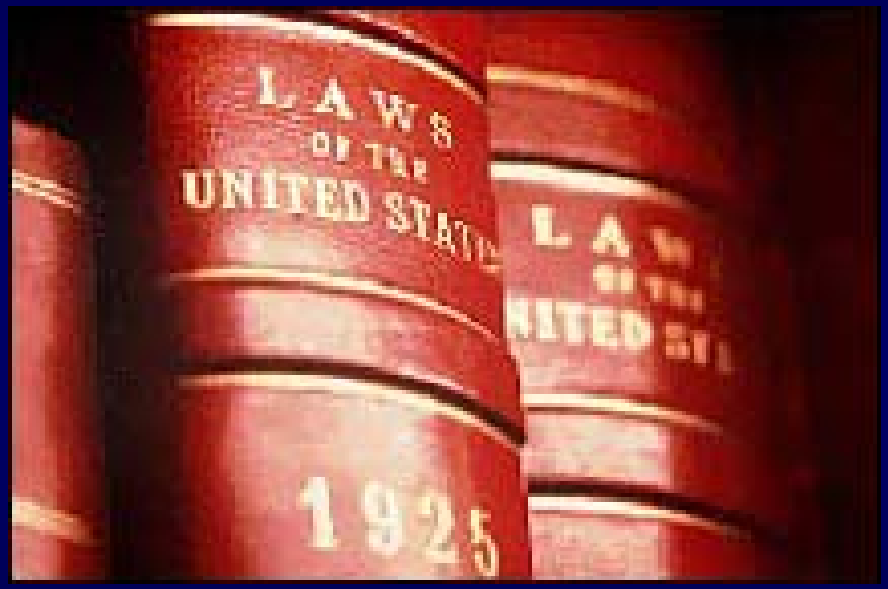
3. State and local governments have police power authority, but:
   - Federal government has significant powers over the movement of people to prevent international importation and interstate spread of diseases
   - International agencies, particularly WHO, also play a vital role in protecting people from infectious disease epidemics

Unit 2 Summary and Key Take-Aways

4. The exercise of mass evacuation powers in an emergency is significantly improved by:
   - Advance anticipation of the legal implications of using evacuation powers
   - Determination of re-entry criteria in advance
   - Careful consideration of special populations and pet evacuation issues

End: Unit 2

For additional information on public health law and legal preparedness visit the *CDC Public Health Law Program*



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