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# REFORMING FEDERAL QUARANTINE LAW IN THE WAKE OF ANDREW SPEAKER: THE "TUBERCULOSIS TRAVELER"

*Hilary A. Fallow*[*]

## I. INTRODUCTION

### *A. Andrew Speaker Incident, Summer 2007*

In the early summer of 2007, the nation was shocked to learn that Andrew Speaker, a thirty-one year old personal injury lawyer from Atlanta, Georgia, had taken several international flights while infected with a rare and lethal strain of tuberculosis (TB).[1] On May 12, 2007, Speaker took a thirteen hour flight to Europe to get married in Santorini, Greece, returning by an eight hour flight twelve days later on May 24, 2007.[2] At the time of his flights, Speaker was aware that he had tuberculosis,[3] a highly infectious disease that is spread through the air.[4] Whenever Speaker coughed, spoke, laughed, or

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1. Eve Conant, *His Side of the Story,* NEWSWEEK, June 1, 2007, http://www.newsweek.com/id/34222.

2. Flight Itinerary of U.S. Traveler with Extensively Drug-Resistant Tuberculosis (XDR TB), May 30, 2007, http://www.cdc.gov/tb/XDRTB/caseflighthistory.htm [hereinafter Flight Itinerary]; Mike McPhee, *Doubts on TB Patient's Wedding*, THE DENVER POST, June 1, 2007, http://www.denverpost.com/nationworld/ci_6037621. Although the first flight from Atlanta to Paris was scheduled to take approximately eight hours, delays caused it to take thirteen hours. Update on CDC Investigation into People Potentially Exposed to Patient With Extensively Drug-Resistant TB, May 30, 2007, http://www.cdc.gov/media/transcripts/2007/t070530.htm.

3. McPhee, *supra* note 2. Andrew Speaker was diagnosed with tuberculosis in January 2007. *Id.*

4. Tuberculosis: General Information Factsheet, http://www.cdc.gov/tb/pubs/tbfact sheets/tb.pdf (last visited Nov. 5, 2008).

sneezed, he released living virulent bacilli into the air,[5] exposing other passengers to the infection. These bacilli can stay in the air for up to several hours, posing a threat of infection to anyone who inhales them.[6]

At the time of his first flight, Speaker had been diagnosed with "multidrug-resistant tuberculosis" [7] for at least three months.[8] Although aware of his infection, Speaker continued working, jogging, and maintaining his everyday lifestyle, claiming that doctors had told him he was not contagious and did not pose a risk to others.[9] He informed his local physicians of his wedding and travel plans; however, there are conflicting accounts of the exact medical advice he received in regard to international travel. Dr. Steven Katkowsky, director of the Fulton County Department of Health and Wellness, the local public health agency, said that Speaker was told in early May that "traveling [was] against medical advice."[10] Speaker maintained, however, that no one ordered him not to travel and that health officials only advised him not to travel to "cover" themselves.[11]

While honeymooning in Rome, Speaker's diagnosis was changed[12] to "extensively drug-resistant tuberculosis,"[13] a particularly rare and lethal

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5. *Id.*

6. *Id.*

7. Multidrug-resistant tuberculosis (MDR TB) is a strain of tuberculosis that is resistant to isoniazid and rifampicin, the two "first line" drugs used to treat all persons with tuberculosis. Multidrug-Resistant Tuberculosis (MDR TB) Factsheet, http://www.cdc.gov/tb/pubs/tbfactsheets/MDRTB.pdf (last visited Nov. 5, 2008). This strain of tuberculosis generally requires eighteen to twenty-four months of treatment with second-line drugs and the cure rate ranges from fifty to eighty percent. Recent Case of Extensively Drug Resistant TB: CDC's Public Health Response Before the H. Comm. on Homeland Security, 110th Cong. 2 (2007) (statement of Julie L. Gerberding, MD, MPH, Dir., Ctrs. for Disease Control and Prevention, U.S. Dep't of Health and Human Servs.) [hereinafter Gerberding Statement].

8. *See* Conant, *supra* note 1; McPhee, *supra* note 2.

9. McPhee, *supra* note 2.

10. *Id.*

11. *Id.*

12. Gerberding Statement, *supra* note 7, at 7; *see also* McPhee, *supra* note 2.

strain, and the Centers for Disease Control and Prevention (CDC) contacted Speaker and instructed him not to travel and to cease the use of commercial airliners.[14] According to Speaker, he was instructed to check into an Italian hospital, and told that if he wished to travel back to the United States, he would need to pay more than $100,000 for a private jet.[15] Against this mandate, Speaker took a second international flight, from the Czech Republic to Montreal, Canada,[16] and reentered the United States in a rental car at the border in Champlain, New York.[17] In a later interview Speaker reflected, "In hindsight, maybe it wasn't the best decision. But in my mind, if I waited until [U.S. doctors] showed up, I would die."[18]

Upon his reentry to the United States, Speaker was contacted by the Department of Health and Human Services/Centers for Disease Control (HHS/CDC) and served a federal order of provisional isolation.[19] A private aircraft transported him to Atlanta, Georgia, and he was issued a federal order mandating continued isolation.[20] On May 31, 2007, Speaker was again transported by private aircraft to the National Jewish Medical and Research Center in Denver, Colorado, where the federal quarantine order for isolation was rescinded and Denver health officials assumed public health responsibility.[21] Once in Denver, Speaker's attending physician, Dr. Gwen

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13. HHS/CDC laboratories diagnosed Speaker with extensively drug-resistant tuberculosis (XDR TB) on May 22, 2007. Gerberding Statement, *supra* note 7, at 7. XDR TB is a relatively rare form of MDR TB and is resistant to almost all drugs used to treat tuberculosis. Extensively Drug-Resistant Tuberculosis (XDR TB) Factsheet, http://www.cdc.gov/tb/pubs/tbfactsheets/xdrtb.pdf (last visited Nov. 5, 2008). XDR TB has very high mortality rates, with reports indicating that less than thirty percent of infected patients can be cured. Gerberding Statement, *supra* note 7, at 2.

14. Gerberding Statement, *supra* note 7, at 7; McPhee, *supra* note 2.

15. McPhee, *supra* note 2.

16. Flight Itinerary, *supra* note 2.

17. Gerberding Statement, *supra* note 7, at 2.

18. McPhee, *supra* note 2.

19. Gerberding Statement, *supra* note 7, at 4.

20. *Id.*

21. *Id.* At the time of the publication of Gerberding's statement, Speaker was still under the quarantine authority of Denver County. *Id.*

Huitt, stated that Speaker's level of communicability was very low and that his fellow passengers should not be overly concerned about acquiring the disease.[22] The disease, however, was still serious and Speaker received extensive treatment at the facility.[23] Huitt reported that approximately one-sixth of Speaker's lung was infected, that his treatment involved two "strong and toxic" medications that the doctors hoped to increase to five and that, if necessary, a substantial portion of his lung would need to be surgically removed.[24]

Although Speaker was eventually found and isolated, the events surrounding his travel raised concerns about the effectiveness of the United States' communicable disease control. In an age of globalization and with the great availability of international travel, preventing the spread of infectious disease is increasingly difficult and exponentially important.[25] This Comment outlines the strategies currently employed by the United States to prevent the spread of communicable disease, focusing on state and federal isolation and quarantine procedures, and explores possible reforms to the existing rules and regulations, specifically those proposed by the CDC and HHS.

In the wake of the Andrew Speaker incident, federal quarantine and isolation law must be strengthened. More stringent standards concerning interstate and foreign travel are necessary in order to ensure the health and safety of American citizens. The procedures for invoking this authority need to be explicit and detailed in order to effectively control the spread of infectious disease while simultaneously conforming to the basic requirements of due process.

### *B. General Strategies to Control the Spread of Contagious Disease*

When a person has become infected with a communicable disease and the transmission of the disease is possible, restriction of the individual's

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22. McPhee, *supra* note 2.

23. *Id.*

24. *Id.*

25. Gerberding Statement, *supra* note 7, at 16; *see also* ANGIE A. WELBORN, FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY 1 (2005). "In the wake of recent terrorist attacks and increasing fears about the spread of highly contagious diseases, such as severe acute respiratory syndrome (SARS), federal, state and local governments have become increasingly aware of the need for an effective public health response to such events." *Id.*

movement and contact with others can effectively prevent transmission.[26] Although the terms "quarantine" and "isolation" have distinct meanings, they serve to achieve the same goals. These goals include preventing the spread of disease to the general population and ensuring that affected individuals receive the specialized medical treatment they need.[27] Quarantine and isolation can be imposed in varying degrees, ranging from complete confinement to one's home, a hospital, or even a prison, to lesser restrictions designed to prohibit an individual from participating in certain activities like preparing food or attending school.[28]

The CDC defines quarantine as the "restriction of movement of those who have been exposed to or are suspected of being infected with a communicable disease," but who are not yet ill.[29] According to HHS/CDC, "[q]uarantine may be particularly important if a biologic agent has been rendered contagious, drug-resistant, or vaccine-resistant through bioengineering, making other disease control measures less effective."[30] This strategy is very effective in protecting the general public from exposure to and possible infection with communicable diseases.[31] Individual states generally have the authority to declare and enforce quarantine, and the CDC may also invoke federal quarantine authority to detain persons suspected of having been exposed to certain infectious diseases.[32]

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26. CDC Fact Sheet: Isolation and Quarantine, http://www.cdc.gov/ncidod/dq/pdf/legal_authorities_isolation_quarantine.pdf [hereinafter Isolation Fact Sheet] (last visited Nov. 5, 2008).

27. Jason W. Sapsin, *Overview of Federal Quarantine Authority*, Ctr. For Law and the Public's Heath at Georgetown and Johns Hopkins Univs. 2 (Dec. 11, 2002), http://www.publichealthlaw.net/Resources/ResourcesPDFs/4quarantine.pdf [hereinafter Sapsin].

28. WELBORN, *supra* note 25, at 1 (quoting Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441, 460-61 (1988)).

29. Isolation Fact Sheet, *supra* note 26; Proposed Rules, Quarantine, Inspection, and Licensing: Control of Communicable Diseases, 70 Fed. Reg. 229, 71,891, 71,904 (Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70 and 71) [hereinafter Proposed Regulations].

30. Proposed Regulations, *supra* note 29, at 71,892.

31. Isolation Fact Sheet, *supra* note 26.

32. *Id.*; *see also* The Public Health Service Act, 42 U.S.C. § 264(b) (2000).

Isolation is the separation, from the general population, of individuals who are known to be infected with a disease during a stage where transmission is possible[33] and is the standard procedure in hospitals for those who are known or suspected to have TB.[34] Although isolation may invoke thoughts of a person alone in a white walled room in a hospital, individuals in isolation may also receive treatment in their homes or other designated health care facilities.[35]

Generally, patients with communicable diseases voluntarily comply with isolation orders.[36] Self-imposed quarantine, sometimes known as "shelter-in-place," emphasizes actions taken by the affected individual to prevent the spread of disease, including voluntary home curfews and other measures to accomplish public health objectives without the government enforcement.[37] Federal, state, and local governments have the authority to compel isolation when an individual does not voluntarily comply with an isolation or quarantine order.[38]

If government control is required, state agencies are the first line of defense against the spread of communicable disease;[39] local and state governments have primary responsibility for isolation and quarantine within their borders.[40] State quarantine authority is based on the inherent "police power" given to the states under the Tenth Amendment of the Constitution.[41]

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33. Isolation Fact Sheet, *supra* note 26; Proposed Regulations, *supra* note 27, at 71,904.

34. Gerberding Statement, *supra* note 7, at 11; *see also* Isolation Fact Sheet, *supra* note 26.

35. *See* JANE D. SIEGEL ET AL., GUIDELINE FOR ISOLATION PRECAUTIONS: PREVENTING TRANSMISSION OF INFECTIOUS AGENTS IN HEALTHCARE SETTINGS 2007 56-59, *available at* http://www.cdc.gov/ncidod/dhqp/pdf/guidelines/Isolation2007.pdf.

36. Gerberding Statement, *supra* note 7, at 7; Isolation Fact Sheet, *supra* note 26.

37. Sapsin, *supra* note 27, at 7.

38. Gerberding Statement, *supra* note 7, at 4-5.

39. *Id.* at 2.

40. WELBORN, *supra* note 25, at 3.

41. *Id.; see also* Sapsin, *supra* note 27, at 2. The text of the Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited

Because each state has its own statutory scheme and accompanying regulations detailing its policy to control the spread of communicable disease,[42] it is difficult to generalize quarantine laws across the states.[43] Although the laws vary, states typically protect against three categories of disease: traditional killers such as typhus and smallpox, sexually transmitted diseases, and "emerging" or "re-emerging" diseases like tuberculosis.[44] Additionally, most, if not all, states require health care practitioners and laboratories to notify the local and state health departments of any patients diagnosed with an infectious disease.[45] Once the state agencies have been notified, there are several actions they may take, up to and including isolation and quarantine.

The federal government also has the authority to isolate and quarantine individuals diagnosed with contagious diseases.[46] Federal quarantine authority is invoked in response to suspected cases of communicable diseases arriving from outside the United States or between the states, in times of war, or when the quarantine authority of the states is inadequate.[47] The Public Health Service Act charges HHS with preventing the

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by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

42. WELLBORN, *supra* note 25, at 5 (noting that "every state has acknowledged the authority to pass and enforce quarantine laws.").

43. Sapsin, *supra* note 27, at 2. A Model State Emergency Health Powers Act has been proposed in an attempt to provide a "comprehensive framework" for the states to work with, however, each state still has its own scheme. WELBORN, *supra* note 25, at 5.

44. Sapsin, *supra* note 27, at 7.

45. *See, e.g.*, GA. COMP. R. & REGS. 290-5-16-.02 (2003); ALA. CODE § 22-11A-1 (2006); ALASKA STAT. § 18.15.370 (2006); ARIZ. REV. STAT. ANN. § 36-621 (2003).

46. The Public Health Service Act provides that:

> [R]egulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and ... [s]uch regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary.

42 U.S.C. § 264(d) (2000).

47. Sapsin, *supra* note 27, at 7.

introduction, transmission, and spread of communicable diseases from foreign countries into the United States and between the states.[48] Executive order establishes the diseases that are authorized for quarantine or isolation; they include cholera, diphtheria, tuberculosis, plague, smallpox, and yellow fever.[49]

## II. EXISTING STATUTES AND REGULATIONS CONCERNING ISOLATION AND QUARANTINE

### *A. Georgia State Laws and Regulations*[50]

Georgia law authorizes the State Department of Human Resources to promulgate regulations concerning the treatment of tuberculosis and the prevention of further outbreaks.[51] These regulations require physicians to report all cases and suspected cases of active tuberculosis to the Epidemiology and Prevention Branch of the Department of Human Resources through the local county health department (LCHD).[52] Once a case or suspected case of active tuberculosis is reported to the local county health department, LCHDs must institute "proper and reasonable measures" to prevent the spread of the disease.[53] The first step is an order for the patient to submit to a written plan of evaluation.[54] Then, the LCHD will present the patient with a detailed, written plan of treatment and attempt to obtain the patient's written consent to comply with the treatment plan.[55] If

48. Gerberding Statement, *supra* note 7, at 6; 42 U.S.C. § 264(a).

49. Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003); *see also* 42 U.S.C. § 264(b); 42 C.F.R. § 70.6 (2007).

50. For the purposes of this article, the focus will be on Georgia state law, because that is the state in which Andrew Speaker resides.

51. GA. CODE ANN. § 31-2-1(4) (2006); GA. COMP. R. & REGS. 290-5-16-.01(a) (2003).

52. GA. COMP. R. & REGS. 290-5-16-.02(1). "Active" tuberculosis is defined as a "diagnosis demonstrated by clinical, bacteriologic, or diagnostic imaging evidence, or a combination thereof." GA. CODE ANN. § 31-14-1(1) (2006).

53. GA. COMP. R. & REGS. 290-5-16-.03(1).

54. *Id.* at 290-5-16-.03(3).

55. *Id.* at 290-5-16-.03(7)-(8).

the patient fails to follow the treatment plan, the LCHD will issue a written order directing the patient to comply with the plan by a specified date[56] and, if the patient continues to disregard the ordered treatment, the LCHD may issue a quarantine order or petition the court for an order of compliance or commitment.[57]

When a petition for commitment is sought, the petitioning agency must provide specific evidence demonstrating that the named individual has been diagnosed with active tuberculosis and "presents a substantial risk of exposing other persons to an imminent danger of infection."[58] To meet this burden, the petitioning agency must show that the infected individual violated previously issued rules, regulations, or orders.[59] Additionally, the petition must be accompanied by a physician's statement that the named person has active tuberculosis, including the specific evidence forming the basis of this opinion.[60] Notably, the statute explicitly provides that those with active tuberculosis who voluntarily comply with rules, regulations, and orders shall not be committed.[61]

Upon the filing of a commitment petition, the court will set a date for a "full and fair hearing" to be held within twelve days.[62] Notice of this hearing is personally served on the petitioner as well as the named individual.[63] The notice is accompanied by a copy of the petition and the physician's certificate; it must also include the time and place of the hearing, the individual's right to counsel, including court appointed counsel, and notice that the individual may waive his or her rights to the hearing altogether.[64] When sought for in the petition, the court will order that the

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56. *Id.* at 290-5-16-.03(10).

57. *Id.* at 290-5-16-.03(11).

58. GA. CODE ANN. § 31-14-2 (2006).

59. *Id.*

60. *Id.*

61. *Id.* § 31-14-12.

62. *Id.* § 31-14-3(a).

63. *Id.*

64. GA. CODE ANN. § 31-14-3(a) (2006).

named individual undergo a physical examination, the results of which may be admitted as evidence in the commitment hearing.[65] If the court believes that the named person may abscond or act in a way that poses a substantial risk of exposing others to infection, the court may order that the person be taken into custody pending trial.[66]

Georgia law also sets the procedural standards for the hearing. Although the hearing may be formal or informal, certain requirements must be met to satisfy the Georgia statute.[67] First, the proceeding must be held before a qualified hearing examiner or the superior court and must be recorded electronically or by a qualified court reporter.[68] Along with the defendant's right to counsel, the statute explicitly provides that both parties have the "right to confront and cross-examine witnesses, to offer evidence, and to subpoena witnesses."[69] The parties also have the right to require testimony "from any physician upon whose evaluation the decision of the hearing examiner or the court may rest."[70] The overall burden of proof is on the petitioner by a standard of clear and convincing evidence.[71]

If the court finds that the named person has active tuberculosis and presents a substantial risk of exposing others, the court can issue an order committing the individual to a designated hospital or facility.[72] Only when involuntary treatment is the least restrictive method, however, can the court issue a commitment order[73] and these orders are subject to review upon appeal by either party.[74] An individual with active TB can be confined by

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65. *Id.*

66. *Id.* § 31-14-5.

67. *Id.* § 31-14-3(b).

68. *Id.*

69. *Id.*

70. GA. CODE ANN. § 31-14-3(b) (2006).

71. *Id.*

72. *Id.* § 31-14-7(a).

73. *Id.*

74. *Id.* §§ 31-14-7(b), 31-14-8.

court order for a period of up to two years,[75] and Georgia Rules and Regulations set forth standards for the care a patient should receive if he or she is indeed committed.[76] These standards call for a complete physical evaluation upon admission as well as monthly evaluations to assess the need for further confinement.[77]

Once a person has been committed to a treatment facility, there are three basic options for discharge: the patient's physician can make a determination that confinement is no longer necessary, the patient can petition for discharge, or the patient can petition for a writ of habeas corpus.[78] Under the first option, the supervising physician of the confining facility's tuberculosis inpatient unit may shorten the period of confinement if it is determined that the patient no longer has active TB, or that the patient, although still infected, no longer poses a substantial risk of infecting others as evidenced by his or her willingness to comply with the treatment plan.[79] Once this determination has been made, notice of the intent to discharge the committed patient must be given to the LCHD as well as the Department of Human Resources.[80] The second option permits patients to petition for discharge once every six months whereupon they will have the opportunity for a hearing and the right to an examination by a physician of the patient's choice.[81] Third, a confined individual may petition for a writ of habeas corpus, requesting a court to order his or her release.[82] Once a patient has been discharged, the LCHD retains the responsibility of making sure the

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75. *Id.* §§ 31-14-7(a), 31-14-8.

76. *See generally* GA. COMP. R. & REGS. 290-5-16-.04(2) (2003).

77. *Id.* at 290-5-16.-04(2)(e).

78. GA. CODE ANN. §§ 31-14-8, 31-14-9 (2006).

79. *Id.* § 31-14-8.

80. GA. COMP. R. & REGS. 290-5-16-.05(4).

81. GA. CODE ANN. § 31-14-9(a).

82. *Id.* § 31-14-9(b). Habeas corpus, in common usage, is a challenge to the legality of a person's detention or imprisonment; it does not involve the issue of an individual's guilt or innocence. WELBORN, *supra* note 25, at 7 n.52 (quoting BLACK'S LAW DICTIONARY, 6th ed. 1990).

patient complies with treatment and other clinical evaluations.[83] If discharged patients are found to be noncompliant, they can be recommitted.[84]

*B. Federal Laws and Regulations*

Federal regulation of communicable diseases began with the 1796 enactment of a statute that provided the federal government with the authority to assist states in the enforcement of their quarantine laws.[85] Three years later, the 1796 Act was repealed and replaced with another act that established federal authority to inspect maritime quarantines;[86] almost one hundred years later, in 1878, Congress amended the Quarantine Act and assigned enforcement responsibility to the Marine Hospital Service.[87] This Act was very limited, however, and stated that federal quarantine law could not conflict with the laws of the states.[88] Congress remedied this power conflict in 1893, with "An Act Granting Additional Quarantine Powers and Imposing Additional Duties upon the Marine Hospital Service," which gave the Secretary of the Treasury the authority to enact rules and regulations to prevent the spread of communicable disease where state and municipal laws were insufficient or in the event state and local authorities failed to act.[89]

The Public Health Service Act, enacted in 1944, authorizes the Secretary of HHS (Secretary) to issue and enforce regulations preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States and between the states.[90] These

83. GA. COMP. R. & REGS. 290-5-16-.05(3).

84. *Id.*

85. Proposed Regulations, *supra* note 29, at 71,893. *See* An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796).

86. An Act Respecting Quarantines and Health Laws, ch. 12, 1 Stat. 619 (1799).

87. Proposed Regulations, *supra* note 29, at 71,893. The Marine Hospital Service was established in 1798 to provide for the health needs of merchant seamen. *Id.*

88. *Id.*

89. *Id.*

90. Public Health Service Act, 42 U.S.C. § 264 (2000). Originally, the Act gave the power to the Surgeon General; however, pursuant to Reorganization Plan No. 3 of 1966,

regulations authorize the Director of the CDC (Director) to step in when state or local measures are inadequate to prevent the transmission of disease from one state to another[91] and "may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease."[92] This federal statute is applicable to "individuals coming *into* a State or possession from a foreign country or a possession"[93] and to those moving or about to move from state to state or "to be a probable source of infection to individuals" who will be moving from state to state.[94] Under these regulations, the Director is given the power to take whatever measures she or he deems necessary, up to and including detention, isolation, or quarantine of individuals infected with quarantinable communicable diseases.[95] A list of communicable diseases is issued by Executive Order of the President and includes tuberculosis, plague, and smallpox, among others.[96]

Like state disease notification requirements, federal regulations also require the "person in charge of any conveyance engaged in interstate traffic" to notify local health authorities of any suspected cases of communicable disease aboard his or her vessel.[97] An individual suspected of being infected with a communicable disease will then be served with an oral or written provisional quarantine order,[98] which provides the individual with notice regarding the legal and scientific bases for their quarantine, the

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all statutory powers and functions were transferred from the Surgeon General to the Secretary. WELBORN, *supra* note 25, at 2 n.4.

91. 42 C.F.R. § 70.2 (2007).

92. 42 U.S.C. § 264(d).

93. *Id.* § 264(c) (emphasis added).

94. *Id.* § 264(d).

95. 42 C.F.R. § 70.6.

96. Exec. Order 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003).

97. 42 C.F.R. § 70.4.

98. Proposed Regulations, *supra* note 29, at 71,895. Oral orders must be followed with a written order detailing the agency's determination as soon after the provisional quarantine as circumstances permit. *Id.*

location of their detention, and the suspected disease.[99] The regulations also provide limited restrictions on the travel of infected persons; a travel permit is required for interstate travel, but only if the place of destination mandates the permit.[100] Restrictions listed in the regulations are more severe for certain diseases; however, tuberculosis is not mentioned on this short list.[101] If a person is quarantined under federal authority, he or she may seek a procedural review by writ of habeas corpus that affords the petitioner all of the due process rights inherent in a typical court proceeding.[102]

Unlike the tuberculosis control measures outlined in the Georgia State Code and its accompanying regulations, the Public Health Service Act and the regulations promulgated by the Secretary do not detail specific requirements for the prevention of disease. In fact, the existing federal quarantine law is very general and, as evidenced by the Andrew Speaker incident, inadequate to control or prevent the spread of communicable disease in today's global environment. The Act does not detail the requirements or procedures for the issuance of quarantine orders, nor does it mandate that any preventative measures be taken before seeking isolation. Its restrictions on travel, both interstate and international, are severely lacking and need to be updated to be effective in this age of easy travel. Further, the Act does not require a hearing once a person has been confined, and it does not address any of the due process considerations inherent in restricting a person's movement.

## III. PROPOSED REFORMS TO EXISTING FEDERAL QUARANTINE LAW

On November 30, 2005, HHS/CDC published a Notice of Proposed Rulemaking in the Federal Register.[103] This notice, required by section 553 of the Administrative Procedure Act,[104] suggests changes to the existing federal regulations contained in Parts 70 and 71 of the Code of Federal

99. *Id.*

100. 42 C.F.R. § 70.3.

101. *Id.* § 70.5.

102. Proposed Regulations, *supra* note 29, at 71,896. "Under 28 U.S.C. § 2241, an opportunity for judicial review of the agency's decision exists via the filing of a petition for a writ of habeas corpus." *Id.*

103. Proposed Regulation, *supra* note 29, at 71,891 (to be codified at 42 C.F.R. pts. 70 and 71).

104. Administrative Procedure Act, 5 U.S.C. § 553 (2000).

Regulations concerning interstate and foreign isolation and quarantine procedures. The last time these regulations were substantially updated was in 1985.[105] As a response to a study conducted by the Institute of Medicine and National Academy of Sciences, the CDC proposes these rules to "clarify and strengthen existing procedures to enable CDC to respond more effectively to current and potential communicable disease threats."[106]

A substantial portion of the proposed regulations is devoted to notification procedures by airlines engaged in interstate travel.[107] The requirement for travel permits is strengthened for both interstate and foreign travel.[108] The notice also proposes a detailed procedure for invoking quarantine authority, including requirements for screening procedures, provisional quarantine orders, and the process by which a federal quarantine order may be served.[109] Additionally, the proposed rules provide detailed requirements for hearings once a person has been served with a quarantine order.[110]

### *A. Travel Permits*

Existing federal regulations provide that, "[a] person who has a communicable disease in the communicable period shall not travel from one State or possession to another without a permit from the health officer of the State, possession, or locality of destination, if such permit is required under the law applicable to the place of destination."[111] The proposed regulations, however, would require any person who knows he or she has a communicable disease to obtain a travel permit from the Director if he or she intends to travel interstate or internationally.[112] The Director could also require a travel permit for persons "traveling entirely within the boundaries of a state or possession upon the request of a cognizant health authority or in

105. Proposed Regulations, *supra* note 29, at 71,893.

106. *Id.*

107. *Id.* at 71,897-900.

108. *Id.* at 71,900-01.

109. *Id.* at 71,902-05.

110. *Id.* at 71,905-06.

111. 42 C.F.R. § 70.3 (2007).

112. Proposed Regulations, *supra* note 29, at 71,900.

the event of inadequate local control," as long as the Director determines that the person's travel has an effect on interstate commerce.[113] Traveling without a permit would be prohibited.[114] If a permit is issued, the individual would be required to carry the permit at all times and to comply with any conditions therein.[115] If an individual's application for a permit is denied, that individual would be able to submit a written appeal within two business days in accordance with proposed regulation 70.31.[116]

Although the proposed regulations would strengthen the existing requirement for travel permits, they are still limited to those individuals who are in the qualifying stage of a quarantinable disease.[117] Further, HHS/CDC notes that the necessity of travel permits will be infrequent.[118]

### *B. Notification Procedures for Airlines Engaged in Interstate and Foreign Travel*

Under existing regulations the "person in charge of any conveyance engaged in interstate travel, on which a case or suspected case of a communicable disease develops shall . . . notify the local health authority at the next port of call . . . and shall take . . . measures to prevent the spread of the disease as . . . direct[ed]."[119] The proposed rules require reporting directly to the Director the death or illness of a passenger on a flight "as soon as the illness is identified" or, if possible, at least one hour before arrival.[120] The purpose of the reporting requirement is to make sure that CDC can effectively respond to the arrival of an ill passenger with a

113. *Id.* at 71,901.

114. *Id.* at 71,900.

115. *Id.*

116. *Id.*

117. *Id.* "Qualifying stage" means that a disease is (A) in a communicable stage or (B) is not communicable but would be "likely to cause a public health emergency if transmitted to other individuals." 42 U.S.C. § 264(d) (2000).

118. Proposed Regulations, *supra* note 29, at 71,900. "CDC expects that the need to issue a travel permit will arise infrequently." *Id.*

119. 42 C.F.R. § 70.4 (2007).

120. Proposed Regulations, *supra* note 29, at 71,897.

communicable disease. This response may include evaluation of the ill passenger as well as other passengers who may have been exposed during the flight and, if needed, transport to isolation facilities for treatment.[121]

This proposed regulation differs from the existing regulations in that it requires the airline to report directly to the Director of the CDC, rather than the local health authority. The Director would then be responsible for notifying the local health authorities.[122] Additionally, under existing CDC protocol, the CDC is required to notify Federal Aviation Administration (FAA) officials "of the impending arrival of a plane with a sick passenger."[123] According to the CDC, this proposed rule would streamline the reporting process because, instead of having to identify the proper local health authority, airlines would have a single point of contact.[124]

While streamlining the reporting process by establishing one point of contact for airline personnel, the regulations seem incomplete in that they lack a timeline by which the Director must notify the local health authority. Although the CDC may be able to respond effectively to the arrival of a plane with a sick or dead passenger, it is arguable that they may not be able to respond as quickly. By removing the local health agencies from the process, the regulations may prevent a quick response to a potential health emergency. To remedy this, the regulations could require that the Director be notified in addition to the local health authority or, alternatively, that the Director notify the local agency within a certain amount of time.

### *C. Passenger and Crew Contact Information*

In addition to the proposed change to the notification requirement, HHS/CDC has proposed regulations that will allow for the timely and accurate gathering of passenger and crew contact information.[125] This information is required in order to identify those who may have been exposed, allowing public health authorities to offer these people treatment, vaccination, and other preventative measures.[126] Treatment, in turn, helps

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Proposed Regulations, *supra* note 29, at 71,898.

126. *Id.*

prevent secondary cases, which helps prevent the propagation and spread of disease within the community. At the time of the 2002 Severe Acute Respiratory Syndrome (SARS) outbreak, the CDC ran into numerous difficulties when attempting to track down and notify individuals who had potentially been exposed through air travel.[127] The proposed system allows for identification, location, and notification of exposed passengers within the incubation period of the target disease.

In their Notice of Proposed Rulemaking, HHS/CDC advances the requirement that airlines engaged in interstate and international travel from specified airports request certain contact information from crewmembers and passengers and to store this information "in an electronic database for [sixty days] from the end of the flight."[128] The proposed contact information includes the passenger or crew member's full name, current home address, at least one phone number (cell, home, pager, or work – in that order of preference), e-mail address, passport or travel document (including issuing country or organization), traveling companions or group, flight information, returning flight (date, airline, flight number), and emergency contact.[129] Under the proposed regulations, each airline would also be required to designate one representative as a "point of contact for communications related to passenger manifests."[130] The representative must provide this information to the CDC within twelve hours of a request from the Director.[131] Passengers who refuse to provide the requested contact information, however, will not be prevented from traveling.[132]

Although the CDC quotes statistics from an independent study that passengers would be willing to provide this information to airlines and would want to be notified if they had been exposed to an infectious disease,[133] public comment to the proposed regulations suggests that a

127. *Id.* The SARS outbreak in late 2002 "provided a clear example of the rapidity with which an infectious disease may spread through air travel, while exposing clear limitations in the current system of identifying and notifying those who may have been exposed during travel." *Id.*

128. *Id.* at 71,899.

129. *Id.*

130. *Id.* at 71,900.

131. Proposed Regulations, *supra* note 29, at 71,899-900.

132. *Id.* at 71,899.

133. *Id.* at 71,898.

number of American citizens are concerned with privacy violations and a pretextual motive for gathering this information in the wake of 9/11.[134] Although privacy concerns are important considerations, a majority of the contact information that would be collected is already routinely gathered by airlines.[135] Additionally, any information gathered would be maintained and stored in accordance with agency policies and with the United States Privacy Act, which requires that authorized personnel only use the records for authorized purposes.[136] Paper records will be kept in locked storage containers, and electronic records would be accessible only to authorized CDC employees. Records would be destroyed after the legal retention period, which the CDC proposes be one year.[137] Further, the agency asserts, "CDC has a long history of managing sensitive data in a manner that protects the confidentiality and privacy of the public. This positive track record will continue with the management of these records."[138]

When viewed in connection with the Andrew Speaker incident, this portion of the proposed regulations would have been an effective way to identify and notify those passengers who were aboard the same flights. Because these regulations were not effective at the time of his travel, the CDC could not guarantee that all potentially exposed passengers were made aware of the possibility of infection. Instead, the CDC had to rely on passenger manifests that may have been incomplete or illegible, the mass media to spread the word to those persons who could not be identified, and a posting on their own website urging anyone who may have been exposed to seek medical attention for testing.[139] Had these data collection requirements

134. *See generally* Division of Global Migration and Quarantine (DQ) NPRM View Comments, March 2006 Comments, http://www.cdc.gov/ncidod/dq/nprm/viewcomments.htm (organizing public comments by month).

135. A chart included with proposed regulation 70.4 details the information currently collected by airlines. Proposed Regulations, *supra* note 29, at 71,900.

136. 5 U.S.C. § 552(b) (2000).

137. The current standard retention period, however, is ten years and to obtain a new standard, the agencies will need to go through a rulemaking process, which they estimate will require twelve to eighteen months. Proposed Regulations, *supra* note 29, at 71,900.

138. *Id.*

139. Flight Itinerary, *supra* note 2; *see also* Update on CDC Investigation into People Potentially Exposed to Patient With Extensively Drug-Resistant TB, May 30, 2007, http://www.cdc.gov/media/transcripts/2007/t070530.htm.

been in effect, the CDC could easily have identified and informed the passengers of their exposure to tuberculosis.

### *D. Proposed Procedures for Issuance of Quarantine Orders*

Once the CDC has been notified of a case or suspected case of an infectious disease, the proposed regulations include a detailed description of the procedure for invoking quarantine. Because the people responsible for reporting often do not have medical training, the definition of an ill person has been expanded to include the signs or symptoms commonly associated with diseases for which provisional quarantine may be necessary.[140] Upon suspicion that a person is in the qualifying stage of a communicable disease, a provisional quarantine would be instituted.[141] Provisional quarantine lasts as long as necessary to determine whether the individual is infected and can last up to three business days.[142] The regulations further mandate that the Director serve the written order on the person and that the order contain the Director's reasonable belief that the individual is infected with a communicable disease, the belief that the individual is moving or about to move from state to state, and that the person may be provisionally quarantined for up to three days at which time they will either be released or served with a quarantine order.[143]

The basic difference between a provisional quarantine order and a subsequently issued quarantine order is the length of duration.[144] The incubation and communicability of the specific disease generally determines the length of quarantine.[145] For infectious tuberculosis, the incubation period is four to six weeks, and the period of communicability following onset is fourteen to sixty days.[146] This means that a person could be

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140. Proposed Regulations, *supra* note 29, at 71,896-97.

141. *Id.* at 71,902-03.

142. *Id.*

143. *Id.* at 71,902-04.

144. *Id.* at 71,903.

145. *Id.* Incubation is significant for quarantine because during that time, it must be determined whether an infection has occurred; communicability, however, is for isolation because that is the period during which the disease is contagious after the onset of illness. *Id.* at 71,903-04.

146. Proposed Regulations, *supra* note 29, at 71,904.

quarantined for four to six weeks while waiting for the disease to manifest, or isolated for fourteen to sixty days until the disease is no longer communicable.

Like the provisional quarantine order, a quarantine order must be served on the suspected individual.[147] This order must contain, among other things, the location, date and duration of the quarantine, the basis for the Director's belief that the individual is in the qualifying stage of a quarantinable disease, including medical information and laboratory tests, and a statement that the individual can request a hearing to review the quarantine order at any time.[148] Under the proposed regulations, an individual can also seek a writ of habeas corpus, contesting his or her detainment by the government.[149]

*E. Due Process Protections and Administrative Hearings*

Freedom from physical restraint is well recognized as a "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[150] Quarantine and isolation, by their very nature, infringe upon the "liberty" protected by due process. Once an isolation order has been served, a person is no longer permitted to move freely and may even be confined by court order to a hospital or other institution. Thus, whenever quarantine or isolation authority is invoked, due process considerations come to the forefront.[151] These considerations include the notice given to the affected individual, his right to contest the government action, to challenge his confinement, and his right to appeal.[152] The basic elements of due process include reasonable and

147. *Id.* at 71,905.

148. *Id.*

149. *Id.* at 71,904.

150. Proposed Regulations, *supra* note 29, at 71,895; Kansas v. Hendricks, 521 U.S. 346, 356 (1997).

151. When determining whether Due Process considerations apply, courts make a two-part determination. Goldberg v. Kelly, 397 U.S. 254, 260 (1970). First, the court must decide whether an interest protected by the Fifth and Fourteenth Amendments has been infringed upon. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). These interests include the rights to "life, liberty, and property." U.S. CONST. amend. XIV. If one of these protected interests is subject to the administrative rule, the court must then determine what process is due or, in other words, what procedures must be followed to assure that an individual's Due Process rights are satisfied. *Roth*, 408 U.S. at 576.

152. Sapsin, *supra* note 27, at 6.

adequate notice of the government action, an opportunity to be heard and to cross-examine witnesses, the right to counsel, and a review by an impartial decision-maker.[153]

HHS/CDC recognizes that "[t]he opportunity to contest the government's actions in a meaningful time, place, and manner is a fundamental element of due process."[154] The proposed regulations establish a procedure for quarantined individuals to request an administrative hearing to determine whether they have been properly detained.[155] Unlike petitioning for a writ of habeas corpus, the purpose of this hearing would be only to review the factual and scientific evidence concerning the agency's decision to impose the quarantine.[156] Legal or constitutional issues would not be subject to review, only whether there was enough evidence that the individual had been exposed to or infected with a quarantinable disease.[157]

The proposed regulations allow the CDC to provisionally quarantine an individual for up to three business days without affording the individual an administrative hearing.[158] During this provisional quarantine, the Director of the CDC can release the individual or serve the individual with a quarantine order.[159] Once the quarantine order has been served, the individual will have the opportunity for a full administrative hearing.[160] HHS/CDC asserts that a three-day provisional quarantine is reasonable because holding a person for that amount of time is necessary to determine whether the individual has one of the specified quarantinable diseases.[161] Although no federal cases have

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153. *Goldberg*, 397 U.S. at 267-71.

154. Proposed Regulations, *supra* note 29, at 71,905.

155. *Id.* at 71,905-06.

156. *Id.* at 71,906.

157. *Id.*

158. *Id.* at 71,895-96.

159. *Id.* at 71,895.

160. Proposed Regulations, *supra* note 29, at 71,895.

161. *Id.* at 71,896.

dealt specifically with the time frame of provisional quarantine, HHS/CDC likens the holding period to that of drug mule detentions.[162]

In *United States v. Montoya de Hernandez*, the U.S. Supreme Court upheld the detention of a suspected drug smuggler, analogizing the detention to holding someone for suspected tuberculosis.[163] In *Montoya de Hernandez*, the Court noted that "both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country."[164] Because provisional quarantine orders are frequently based on the need to investigate, the three-day holding period will allow time to gather information, take medical samples, and conduct diagnostic testing.[165] In addition, HHS/CDC points out that a provisional quarantine order can only last for three days and allowing a full administrative hearing "almost guarantees that no decision on the provisional quarantine will actually be reached until after the provisional period has ended."[166]

This proposed regulation would do much to strengthen the existing federal quarantine law. Allowing the Director or his agents to provisionally quarantine an individual for up to three days would allow them to determine whether a person is indeed infected with a communicable disease. Once this determination has been made, the necessary precautions can then be instituted to prevent the spread of disease. Although detaining an individual without affording him an opportunity to contest his confinement may violate due process, it is necessary to protect the general public from potential exposure. The provisional quarantine can only last for a maximum of three days at which time the person will either be released or served with a quarantine order which can be challenged either by appeal to the agency or by a petition for a writ of habeas corpus.

## IV. CONCLUSION: POSSIBLE IMPACT OF PROPOSED REFORMS

If the HHS/CDC proposed rules are promulgated, federal quarantine and isolation law will strengthen. Again, most individuals diagnosed with infectious diseases voluntarily comply with isolation orders issued by their

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162. *Id.* at 71,895.

163. *Id.*; United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985).

164. *Montoya de Hernandez*, 473 U.S. at 544.

165. Proposed Regulations, *supra* note 29, at 71,895.

166. *Id.* at 71,896.

physicians.[167] Only when an infected individual is noncompliant or poses a significant risk of exposure to others does forced quarantine or isolation come into play. Thus, the promulgation of standards regarding the quarantine process may not have an immediate impact on most individuals. The heightened standards for travel restrictions, notification of others who may have been exposed, and the detailed procedures for quarantine, including an appeals process, are necessary in the face of globalization to combat the spread of communicable disease.

The proposed regulations concerning travel are also an effective means of controlling the spread of infectious disease. As the regulations are currently written, travel permits are only required when the place of destination so requires.[168] The proposed regulation would require all persons infected with a communicable disease to apply for a travel permit.[169] These permits would apply to interstate as well as foreign travel. This would effectively prevent future travelers from infecting other travelers. Additionally, the imposition of requirements dealing with the transmittal of crew and passenger information would afford the HHS/CDC with an efficient means of notifying individuals who may have been exposed. This early notification would increase the possibility not only for control of the spread of disease but also for increased passenger health and safety.

Affording quarantined or isolated individuals the opportunity to contest their confinement has important implications. First, it allows the government to strengthen the existing quarantine laws because the individual will have a full and fair opportunity to contest the order. Second, an individual will be given the right to request a quick hearing, be able to be represented by counsel, and to confront and cross-examine individuals who have given evidence or opinion leading to the confinement.

In conclusion, the proposed regulations offered by HHS/CDC should be adopted and promulgated into enforceable regulations. The threat of disease is great in our increasingly global environment and more stringent standards are required to prevent its spread.

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167. Gerberding Statement, *supra* note 7, at 7; Isolation Fact Sheet, *supra* note 26.

168. 42 C.F.R. § 70.3 (2007).

169. Proposed Regulations, *supra* note 29, at 71,900.