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Before the Memory Fades: Evaluating the Need for a National Quarantine Strategy as Part of a Modernized Public Health Response to the Next Pandemic

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BEFORE THE MEMORY FADES: EVALUATING THE NEED FOR A NATIONAL QUARANTINE STRATEGY AS PART OF A MODERNIZED PUBLIC HEALTH RESPONSE TO THE NEXT PANDEMIC

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"It is indeed not well for Congress to wait with the passage of a national quarantine law until anarchy again, as it did last summer, threatens the commercial relations of the states."[1]

W.E. Waltz's commentary on national quarantines comes from an article written following the 1905 yellow fever outbreak and not the COVID-19 pandemic. However, its sentiment is relevant for two reasons. First, it serves as a reminder that history tends to repeat itself. More importantly, the statement makes clear the fact that this country's inability to institute a national quarantine to effectively respond to a deadly pandemic is historical.

The ending of the COVID-19 pandemic creates an opportunity and responsibility for the United States federal government to evaluate its response to "the defining global health crisis of our time."[2] As Rochelle P. Walensky, the Director of the Centers for Disease Control, opined in a guest essay written for the New York Times on June 27, 2023,"[t]he question is not if there will be another public health threat, but when."[3]

To put this pandemic in focus, more than 1.1 million deaths and 6 million hospitalizations have been attributed to the COVID-19 virus since January 1, 2020.[4] Despite substantial advances in our understanding of virology and healthcare protocols over the last century, the United States lost 400,000 more lives to COVID-19 than it did during the 1918 Spanish Flu epidemic, which was long considered the deadliest pandemic in history prior to 2020. These results are not acceptable. Another pandemic is surely coming and the U.S. must examine how it can improve its public health response to a contagion so that the nation is not left with these statistics again.

During the pandemic, many countries recovered or saw an infection rate from COVID-19 that was so low that they recovered in short order. These short recovery periods were largely due to strict, large-scale quarantines and other related public health measures imposed by the

1. W. E. Walz, *Federal Regulation of Quarantine*, 4 MICH. L. REV. 189, 198 (1906).

2. Laura Bohantova, *COVID-19 Pandemic Humanity Needs Leadership and Solidarity to Defeat Covid- 19,* U.N. MOLDOVA (Mar. 26, 2020), https://moldova.un.org/en/39064-covid-19-pandemic-humanity-needs-leadership-and-solidarity-defeat-covid-19 [https://perma.cc/EZ8Y-YPFV].

3. Rochelle P. Walensky, *What I Need to Tell America Before I Leave the C.D.C.,* N.Y. TIMES (June 27, 2023), https://www.nytimes.com/2023/06/27/opinion/rochelle-walensky-cdc-pandemic-despair.html [https://perma.cc/LW2F-FM8U].

4. *COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#maps_deaths-total [https://perma.cc/W5VH-L8J3].

government.[5] For example, New Zealand was able to lift its strict quarantine and aggressive contact tracing orders imposed in early 2020 by mid-July 2020 and kept the country largely COVID-free until the end of 2021.[6] Similarly, in mid-March 2020, Denmark was the first country in the EU to shut down its borders, schools, and other businesses.[7] By late April of that same year, Denmark was also the first country to reopen its schools, restaurants, and other public institutions.[8]

What went wrong in the United States? At first blush, it may be presumed that the United States had little experience in establishing a successful public health response to a pandemic. However, a review of the history of pandemics and contagious diseases in the United States reveals that the federal government had the statutory ability to impose a national quarantine. Further, the federal government had been advised, both before and during the pandemic, that a quarantine would be an effective tool in preventing the spread of COVID-19. This Article explores the power of quarantine as a public health response to contagious disease. It also examines whether the federal government could effectively utilize a national quarantine strategy as part of a modernized public health response to the next pandemic that is surely coming.[9] Part I presents the basic history of quarantine as a tool to control the spread of a contagion. Part II examines the development and the ebb and flow of federal quarantine power in the United States. Part III examines the federal public health preparation for and in response to the COVID-19 pandemic. Finally, Part IV evaluates the predicted challenges of enforcement and individual compliance with public health mandates involving quarantine. It also explores how the

5. *Some Are Winning – Some Are Not, Which Countries Do Best in Beating COVID-19?*, ENDCOROVAVIRUS, https://www.endcoronavirus.org/countries#faq [https://perma.cc/27HQ-9M9V].

6. Alice Klein, *Why New Zealand Decided to Go for Full Elimination of the Coronavirus*, NEW SCIENTIST (June 23, 2020), https://www.newscientist.com/article/2246858-why-new-zealand-decided-to-go-for-full-elimination-of-the-coronavirus/ [https://perma.cc/LJ4D-6VJN]; Lucy Cramer, *New Zealand Announces Review of Its Handling of COVID-19 Pandemic,* REUTERS, (Dec. 4, 2022, 10:47PM), https://www.reuters.com/world/asia-pacific/new-zealand-announces-review-its-handling-covid-19-pandemic-2022-12-05/ [https://perma.cc/8MB3-8PS4] ("A one-time poster child for tackling the coronavirus, New Zealand's swift response to the pandemic and its geographic isolation kept the country largely COVID-19 free until the end of 2021 . . . .").

7. Cécile Marin, *Europe Versus Coronavirus – Putting the Danish Model to the Test,* INSTITUT MONTAIGNE (Dec. 5, 2020), https://www.institutmontaigne.org/en/expressions/europe-versus-coronavirus-putting-danish-model-test [https://perma.cc/CW6S-LBHZ].

8. *Id.*

9. Walensky, *supra* note 3.

use of a national quarantine protocol can be modernized to respond to the next contagious disease threat and avoid the dramatic infection and death rates seen in the United States during the COVID-19 pandemic more effectively.

I. A BASIC HISTORY OF THE DEVELOPMENT OF QUARANTINE IN RESPONSE TO A PUBLIC HEALTH CRISIS

A review of infectious disease history reveals that measures to prevent the spread of dangerous and communicable diseases were, in large part, a function of legal rules requiring those who were infected to isolate and segregate from the population. As noted by those attending the National Quarantine and Sanitary Convention in 1859, "the history of pestilence is the history of quarantine."[10] The proceedings record notes that both pestilence and quarantine can be "traced to the earliest ages," "far back in the world's history, prior to the Christian Era, and before the existence of any freedom of intercourse between nations by means of commerce."[11] For example, as far back as the age of Plato, "[a]rrangements for the protection of healthy against contagious diseases were regarded by the ancients as useful, and by many were carried into effect in their households."[12] In fact, some of the earliest legislation with respect to contagion and attempts to control the spread can be found in the Bible in which Moses, referred to as a "legislator", "inculcated sanitary precepts and instituted quarantine regulations" that included separating sick from those in health, purification of clothing and infected persons, burning of disease-carrying garments, and determinations of the time in which diseased individuals must live alone.[13]

The word "quarantine" dates back to 1377 and comes from the Italian word "*quarantino,*" a 40-day period of lockdown imposed by Italian doctors when a plague broke out.[14] In response to the spread of disease, Dubrovnik, Croatia, formerly known as Ragusa in the medieval period and located in what is now known as Croatia, instituted one of the first official quarantines. The Dubrovnik quarantine prevented

10. CHARLES COLLAR & WILLIAM ANDERSON, PROCEEDINGS AND DEBATES OF THE THIRD NATIONAL QUARANTINE AND SANITARY CONVENTION 249 (Doc. No. 9, 1859).

11. *Id.*

12. *Id.* at 250.

13. *Id.* at 249.

14. Sarah K. Douglas, *Quarantino: Plague and the Origins of Social Distancing,* ORIGINS CURRENT EVENTS IN HIST. PERSP. (Jan. 2021), https://origins.osu.edu/connecting-history/quarantine-plague-covid-social-distancing?language_content_entity=en [https://perma.cc/6NLM-D2VW].

anyone traveling from plague-infected cities from entering its city limits before first self-isolating in nearby towns.[15]

The 14th century reflected some newer uses of the law and regulatory bodies for enforcement of quarantine efforts enacted to respond to contagious disease and/or a contagion. For example, one of the earliest legal enactments was a January 1374 order of injunction by Viscount Bernabo of Reggio in Italy. This injunctive order required "every plague patient [to] be taken out of the city into the fields, there to die or to recover." The same order also provided that "[t]hose who attended upon a plague-patient, were to remain apart for ten days before they again associated with anybody. The priests were to examine the diseased, and point out to special commissioners the persons infected; under punishment of the confiscation of their goods, and of being burned alive. Whoever imported the plague, the state condemned his goods to confiscation. Finally, none except those who were appointed for that purpose were to attend plague-patients, under penalty of death and confiscation."[16]

Furthermore, in 1448, the Venice Senate instituted a Code of Quarantine, as well as established the first board of health. The senate charged this board with investigating the best means for preserving health and preventing the introduction of contagious diseases from abroad.[17] By 1504, the board of health had "the power of life and death over those who violated the regulations for health" and its sentences could not be subject to appeal. [18] Finally, in 1665, during the plague in London, magistrates reinstated a 1603 Parliamentary Act employing various methods of quarantine, such as marking every house containing an infected person with a foot-long red cross in the middle of the door for all to see.[19]

Over the next 200 years, quarantines, in the form of both isolation orders and the use of *cordon sanitaires*, were predominately used as measures to control the potential spread of contagious diseases transmitted because of trade between countries.[20] *Cordon sanitaires* were the creation of "zones" with guarded barriers to stop the spread

15. *Id.*

16. J. F. C. HECKER, THE EPIDEMICS OF THE MIDDLE AGES 62, 63 (B. G. Babington. trans., 1844).

17. North American Review No. XXVII, *Reviewed Work(s): The Epidemics of the Middle Ages by J. F. C. Hecker and B. G. Babington: Proceedings and Debates of the Third National Quarantine and Sanitary Convention*, 91 N. AM. REV. 438, 442 (1860) (review).

18. *Id.*

19. Rocky v. Carney, 216 Mich. 285, 297, 298 (1921) (Wiest J., concurring) (citing 22 LITTELL'S LIVING AGE 267).

20. Polly J. Price, *Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine*, 67 EMORY L. J. 491, 503 (2018).

of disease by limiting persons from entering or exiting a particular zone. For example, in Mediterranean trade routes, port cities closed themselves to ships arriving from plague-infected areas.[21] What began as a system of maritime *cordons* developed into the use of quarantine stations to isolate passengers and crew if there was suspicion of disease on the ship. Further, the quarantine mandated the vessel to be fumigated and retained for 40 days.[22]

II. THE HISTORICAL DEVELOPMENT, EXPANSION, & CONTRACTION OF FEDERAL QUARANTINE POWER IN THE UNITED STATES.

In the United States, a "quarantine" is defined as "a means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease."[23] More simply, a quarantine is the "separation of persons (or communities) who have been exposed to an infectious disease."[24] The term "quarantine" is used to refer to traditional quarantine interventions, as well as isolation/separation of individuals known to be infected, and travel bans.[25] Quarantine protocols are often the first response to an infectious disease and are used to protect the public by preventing exposure to people who may be infected with a contagious disease.[26]

Since the time of colonization, the United States has used quarantine protocols as responses to threats of communicable diseases. Although today's quarantines can vary in length, the basic idea of controlling the movement of potential carriers remains consistent with the term as used centuries ago[27] Like in 14th Century Venice, the original

21. Eugenia Tognotti, *Lessons From the History of Quarantine, From Plague to Influenza A,* 19 EMERGING INFECTIOUS DISEASES 254, 255 (2013).

22. *Id.*

23. 42 C.F.R. § 70.1.

24. Wendy E. Parmet & Michael S. Sinha, *Covid-19 — The Law and Limits of Quarantine*, 382 NEW ENG. J. MED. e28(1), e28(1) (2020).

25. *Id.*

26. *See generally* Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future,* 80 TEMP. L. REV. 53, 58 (2007); Alfred J. Sciarrino, *The Grapes of Wrath & the Speckled Monster (Epidemics, Biological Terrorism and the Early Legal History of Two Major Defenses – Quarantine and Vaccination)*, 7 J. MED. L. 117, 121 (2003).

27. Robert Cheney, *The Quarantine Power: A Primer in Light of the Coronavirus Situation*, LAWFARE (Feb. 7, 2020, 9:22 AM), https://www.lawfareblog.com/quarantine-power-primer-light-coronavirus-situation [https://perma.cc/PCN8-UVLU].

American colonies began to impose quarantines under the belief that disease could be prevented by prohibitions against the entry of a foreign source.[28] In fact, the earliest law providing for quarantine was enacted by the Massachusetts Bay Colony in 1647 to quarantine ships from the West Indies due to the threat of plague.[29] From that time and as the country began to develop, the use of quarantine power was necessary in port cities like New York and Boston to protect people from the threat of yellow fever and cholera.[30] Most importantly, the state and local quarantine laws, utilized by the colonies and port cities, predated the United States Constitution. However, these laws worked to establish "the legal tradition of local and state jurisdiction over matters of public health" that is ultimately reflected in the Constitution's reservation of power to the states to regulate public health, safety, and morals.[31]

A. The ebb and flow of the establishment and exercise of federal quarantine power in the United States in the 18th, 19th & 20th Centuries.

The federal government began using quarantines in the 1790s.[32] For example, in 1793, the yellow fever epidemic, a virus so pervasive and widespread in the then capital of Philadelphia that it "threatened the survival of the nation," became an issue for the federal government [33] In response, the entire city of Philadelphia was placed under quarantine and a travel ban was instituted that prohibited residents from traveling to other cities.[34] In 1794, Congress passed the first federal law relative to quarantine and granted the state of Maryland permission to impose a duty tax on foreign vessels coming into Baltimore to pay for the

28. *Origins of Federal Quarantine and Inspection Laws*, https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html [https://perma.cc/67ET-H3NR] (citing RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE, 1798-1950 65 (1951)).

29. Batlan, s*upra* note 26, at 63–64.

30. Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine,* 12 IND. HEALTH L. REV. 227, 230 (2015).

31. *Id.* at 230.

32. Thomas Apel, *American Fevers, American Plagues: How Yellow Fever Outbreaks in the Early United States Anticipated Much of What We Lament About the COVID-19 Era,* SCI. HIST. INST. (Oct. 18, 2022), https://www.sciencehistory.org/stories/magazine/american-fevers-american-plagues/ [https://perma.cc/LNS8-G3RT].

33. Rothstein, *supra* note 30, at 230 (citing JIM MURPHY, AN AMERICAN PLAGUE: THE TRUE AND TERRIFYING STORY OF THE YELLOW FEVER EPIDEMIC OF 1793 (2003)).

34. *Id.*

services of a health officer.[35] Two years later, Congress passed its first piece of quarantine legislation entitled "An Act Relative to Quarantine."[36] This Act gave the president authority to direct federal assistance towards state quarantine laws and "would cast the federal government in the role of providing requested assistance, but not directing action" in this area.[37]

In 1799, just after the creation of the Marine Hospital Service, the agency that served as the predecessor to the Public Health Service, Congress passed "An Act Respecting Quarantine and Health Laws" to replace the 1796 Act.[38] The Act gave the federal government the exclusive authority to regulate interstate and foreign commerce through quarantines of vessels and the removal of individuals suspected of carrying a dangerous disease.[39] The Act also gave power to the Secretary of the Treasury to assist the states in enforcing their own quarantine laws.[40] The Supreme Court of the United States resolved any confusion over the extent of the Act's authority in 1824 with their decision in *Gibbons v. Ogden.*[41] *Gibbons* "firmly established that, although federal powers would be used to help enforce state laws regarding maritime travel, it would neither negate the commerce power nor federalize state quarantine laws."[42] A unanimous Supreme Court held that the ability to impose isolation and quarantine conditions "form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government."[43] In

35. Katherine L. Vanderhook, *A History of Federal Control of Communicable Diseases: Section 361 of the Public Health Service Act*, 1, 5 (Harv. Libr. Off. for Scholarly Commc'n, Third Year Paper, 2002).

36. An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796) (repealed 1799).

37. Vanderhook, *supra* note 35, at 5.

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

39. *Id.*

40. *Id.* ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the quarantines and other restraints, which shall be required and established by the health laws of any state, or pursuant thereto, respecting any vessels arriving in, or bound to, any port or district thereof, whether from a foreign port or place, or from another district of the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States, . . . and all such officers of the United States shall be, and they hereby are, authorized and required, faithfully to aid in the execution of such quarantines and health laws, according to their respective powers and precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury of the United States.").

41. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

42. Vanderhook, *supra* note 35, at 8.

43. *Gibbons*, 22 U.S. at 203.

fact, the Court has reiterated their position from *Gibbons* in several constitutional challenges to the ability of states to issue quarantine orders from as early as 1866:

> [T]he health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution.[44]

As a response to the catastrophic yellow fever epidemic that pervaded the country and killed thousands in 1877, public and political support for quarantine reform led to the passage of the "Act to Prevent the Introduction of Contagious or Infectious Diseases into the United States." The 1877 Act shifted quarantine powers from state to federal government in several ways.[45] First, it officially assigned federal quarantine responsibility to a federal agency.[46] Further, in addressing the problems caused by the inconsistency of state quarantine regulations, the 1877 Act empowered the federal government to create regulations of its own, as long as those rules did not "conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities."[47] However, it took another 20 years, an increase in immigration, and the numerous epidemics, including yellow fever and cholera, that were spreading from state to state for Congress to take further steps toward quarantine federalization. In 1893, Congress passed "An Act Granting Additional Quarantine Powers and Imposing Additional Duties upon the Marine-Hospital Service."[48]

By the end of the nineteenth century, the federal government's ability to exercise quarantine power struggled against the strong tradition of state autonomy relative to health regulations. As the source of federal power to quarantine was the Commerce Clause, many believed that the federal government should not and could not impose quarantines independent of commerce concerns like the transmission of

44. *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380, 391 (1902) (citing *Morgan's S.S. Co. v. Bd. of Health*, 118 U.S. 455, 458, 464 (1886) and *Louisiana v. Texas*, 176 U.S. 1, 21–22 (1900)).

45. An Act to Prevent the Introduction of Contagious or Infectious Diseases Into the United States, ch. 66, 20 Stat. 37 (1878).

46. *Id.*

47. *Id.*

48. An Act Granting Additional Quarantine Powers and Imposing Additional Duties Upon the Marine-Hospital Service, ch. 114, 27 Stat. 449.

contagions from foreign shipments or through immigration.[49] Regardless, in 1900, the ability of the federal government to quarantine proved to be very important when it was called upon to assist with resolving an attempted quarantine by the San Francisco Board of Health to combat a suspected bubonic plague outbreak. This quarantine has been described as "highly unusual" because it did not apply to individual ships coming into a harbor or even to single houses, but rather was a police-enforced cordon sanitaire of a whole district of a large city.[50] Although the presence of the plague was confirmed by both state and federal health officials, many citizens, the Governor of California included, denied the presence of the plague.[51] In fact, as noted by some scholars, "almost every newspaper in the city vilified" the state and federal health officials as well as San Francisco's mayor for implementing the quarantine, "one terming them the 'perpetrators of the greatest crime that has ever been committed against the city'".[52]

In response to the pushback, the federal government took a six-month hiatus from its involvement with the San Francisco plague.[53] In that time, more than 122 people died of the disease.[54] In an attempt to prove that the plague was indeed present in San Francisco, the Surgeon General used an independent commission of "prestigious university medical professors" to substantiate the initial findings of plague.[55] This creative approach proved to be successful and ultimately led state health officials, neighboring states, and even the Governor of California to request that the federal government "re-initiate comprehensive fumigation and sterilization programs."[56]

In part because of the success of the federal response to the San Francisco plague, In the early twentieth century, federal quarantine power grew stronger. First, in 1901, Congress amended its 1893 Marine Hospital legislation and enabled federal officers to enforce quarantines without deference to state health laws, including marking quarantine

49. *To Amend an Act Entitled "An Act Granting Additional Quarantine Powers and Imposing Additional Duties Upon the Marine Hospital Service:" Hearing on H.R. 4363 and S. 2689 Before the H. Comm. on Interstate & Foreign Com.,* 31 CONG. REC. 1884 (1898).

50. Charles McClain, *Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900*, 13 L. & SOC. INQUIRY 447, 453 (1988).

51. *Id.* at 462, 505–06.

52. Vanderhook, *supra* note 35, at 37 (citing RALPH CHESTER WILLIAMS, THE UNITED STATES PUBLIC HEALTH SERVICE 1789–1950, 121–22 (1951)).

53. Vanderhook, *supra* note 35, at 37.

54. *Id.*

55. *Id.* at 37–38.

56. *Id.* at 38.

boundaries and penalizing vessels that disregarded those boundaries.[57] Further, after a 1905 outbreak of yellow fever in New Orleans, Congress strengthened federal quarantine power in the Act of 1906 by authorizing the Secretary of the Treasure to create, acquire, and control all quarantine sites and stations as he deemed necessary, including those that were handed over by local authorities.[58] By 1921, the federal government controlled every quarantine station in the United States.[59]

Perhaps in response to the openings left by the Supreme Court in *Gibbons* and its progeny to acknowledge a federal quarantine power enacted by Congress, in 1904, President Roosevelt stated:

> It is desirable to enact a proper national quarantine law. It is most undesirable that a state should, on its own initiative, enforce quarantine regulations which are in effect a restriction upon interstate and international commerce. The question should properly be assumed by the government alone. The Surgeon-General of the National Public Health and Marine-Hospital Service has repeatedly and convincingly set forth the need for such legislation.[60]

Approximately 40 years later, the enactment of the Public Health Services Act ("PHSA") did just that by expanding the focus of federal quarantine powers to address interstate transmission of diseases.[61] In fact, although the PHSA created little new law, its most significant change filled the gap noted by the Supreme Court for almost 100 years and, allowed the Surgeon General to promulgate regulations over both foreign and interstate transmission of disease regardless of whether a state or locality had also enacted regulations.[62] Under this provision, the Surgeon General of the United States, with the approval of the Secretary of State, is empowered to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmissions, or spread of communicable diseases" between states.[63]

Within the PHSA, Congress qualified the standard for quarantining individuals. More specifically, the statute provides for the apprehension and testing of a person if they are "reasonably believed to be infected

57. Act of March 3, 1901, ch. 836, 58 Stat. 1087.

58. Act of June 19, 1906, ch. 3433, 34 Stat. 300.

59. Vanderhook, *supra* note 35, at 39 n.169 ("The gradual trend away from city and state control of quarantine stations toward federal control may have, in part, been encouraged by a ruling making cities financially liable for the costs of wrongful detention of ships.").

60. President Theodore Roosevelt, Fourth Annual Message to Congress (Dec. 6, 1904) (transcript available at the Miller Center).

61. 42 U.S.C. § 264(a).

62. 42 U.S.C. § 264; Vanderhook, *supra* note 35, at 56.

63. 42 U.S.C. §264(a).

with a communicable disease in a qualifying stage" and will either "be moving from a State to another State" or could infect others who may be moving from one State to another.[64] A "qualifying stage" is defined as either when a disease is "in a communicable state," or "is in a pre-communicable stage, if the disease would be likely to cause a public health emergency if transmitted to individuals."[65] Finally, the statute specifically indicates it is not meant to preempt state laws.[66] As noted by some scholars, there is "some pragmatic logic" to this statute which seems to only provide for federal interstate isolation of infected individuals, as opposed to interstate quarantine.[67] Rather, the statutory language both presumes and encourages coordination between federal and state governments in responding to communicable diseases.

Despite the significant expansion and use of federal power to manage communicable diseases within the country's borders that began in the late 1800s, the exercise of this federal power began to ebb toward the end of World War I. At this time, a new public health problem struck the nation: sexually transmitted disease. Sexually transmitted disease became the most common diagnosis made at many quarantine stations.[68] To control the spread of venereal disease, federal and state governments used quarantine laws to detain prostitutes who worked near military bases.[69] Shortly thereafter, the Social Security Act of 1935 authorized health grants to the states "on the principle that the most effective way to prevent the interstate spread of disease is to improve state and local public health programs. With this legislation, the PHS became adviser and practical assistant to state and local health services."[70] As noted by some scholars, "[t]hough this change met with little fanfare, it began a transfer of disease control powers from the federal government to state governments that has been occurring, with few exceptions, ever since."[71]

64. *Id.* at § 264(d).

65. *Id.* at § 264(d)(2).

66. *Id.* at § 264(e).

67. Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 400 (2018).

68. Howard Markel, *A Gate to the City: The Baltimore Quarantine Station, 1918–28*, 110 PUB. HEALTH REP. 218, 219 (1995).

69. Vanderhook, *supra* note 52, at 50 ("Strikingly, no actual diagnosis of a venereal disease was required as a prerequisite for detention. Rather, a reasonable belief that a woman was a prostitute sufficed as grounds for quarantine detention, effectively lengthening the sentences for prostitution without trial.").

70. *Id.* at 51 (citing *Legislative Chronology*, NIH, P.L. 74-271, 49 Stat. L. 634 (Sept. 7, 2023) https://www.nih.gov/about-nih/what-we-do/nih-almanac/legislative-chronology [https://perma.cc/Y24C-GT2W]).

71. *Id.*

The United States entered a period of decline in communicable disease vigilance from the mid-1950s forward. In fact, by the 1980s, most of the management of public health systems relative to controlling the spread of communicable diseases had transferred away from the federal government and became largely a responsibility of the states.[72] More concerning, as recently as 1999, several studies reported that "a state-based public health system to be 'inadequate' to protect the public health," and that the United States had "let down [its] public health guard as a nation, and the health of the public is unnecessarily threatened as a result."[73] Despite these conclusions and the states' responsibility to monitor and report outbreaks of communicable disease to the CDC, "state and local funding for communicable disease monitoring decreased during the 1990s, with less than $75 million allotted to this function in an average year."[74]

B. Modern Contagious Disease and Federal Quarantine Power in the 21st Century

Notwithstanding the relative decline of federal involvement in the management of communicable diseases between 1950 and 2000, the federal government's interest in exercising its power peaked once again with the potential for a public health emergency caused by a pandemic shortly after the 2012 H1N1 influenza pandemic and the 2014 SARS & MERS pandemics. In fact, in the summer of 2005, after becoming aware that there was no national strategy to deal with a pandemic that experts had indicated would come every 100 years, President George Bush led his administration to generate a comprehensive pandemic plan. This plan was "a playbook that included diagrams for a global early warning system, funding to develop new, rapid vaccine technology, and a robust national stockpile of critical supplies, such as face masks and ventilators." [75] Although much of this plan was ultimately shelved in favor of other priorities, the work of the Bush administration would ultimately form the foundation for the national response to the COVID-19 pandemic.[76]

Of the coronaviruses that preceded COVID-19, only two have caused global outbreaks, the SARS coronavirus that primarily affected the populations of mainland China and Hong Kong from 2002-2003 and

72. *Id.* at 76–77.

73. Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM L. REV. 59, 95 (1999).

74. *Id.* at 96.

75. Matthew Mosk, *George W. Bush in 2005: 'If We Wait for a Pandemic to Appear, It Will Be Too Late to Prepare'*, ABC NEWS (Apr. 5, 2020, 4:08 AM), https://abcnews.go.com/Politics/george-bush-2005-wait-pandemic-late-prepare/story?id=69979013 [https://perma.cc/H5HV-DDNP].

76. *Id.*

the MERS coronavirus that emerged in 2012 in Saudi Arabia.[77] Although the SARS coronavirus infected less than 10,000 people worldwide, and only 8 people in the United States, it was considered the first infectious disease threat of the 21st century from a public health law perspective.[78] According to the CDC, MERS represented a very low risk to the general public in the United States, as only two patients in the U.S. have ever tested positive for MERS-CoV infection. Both positive results occurred in May of 2014, while more than 1,300 tested negative.[79]

Although both SARS and MERS were considered global pandemics, neither disease had a great presence in the United States. Regardless, the SARS and MERS pandemics caused some significant expansion to the federal quarantine powers in the United States, allowing for quarantines of individuals within the nation, as opposed to just those who were attempting to enter the country from foreign nations. More specifically, in 2014, President Barack Obama issued an Executive Order revising the list of quarantinable communicable diseases to include severe acute respiratory syndromes.[80] In this order, "severe acute respiratory syndromes" are defined as "diseases that are associated with fever and signs and symptoms of pneumonia or other respiratory illness, are capable of being transmitted from person to person, and that either are causing, or have the potential to cause, a pandemic, or, upon infection, are highly likely to cause mortality or serious morbidity if not properly controlled."[81] Notably, the Executive Order specifically "does not apply to influenza."[82]

The second expansion of federal quarantine power followed the 2014 outbreak of the Ebola virus. The Ebola virus first appeared in 1976 in the Democratic Republic of Congo and became a global epidemic that spread from West Africa.[83] According to the CDC, Ebola Virus Disease

77. Adam Felman, *What to Know About Coronavirus*, MEDICAL NEWS TODAY (Feb. 1, 2021), https://www.medicalnewstoday.com/articles/novel-coronavirus-your-questions-answered#1.-What-is-the-new-virus? [https://perma.cc/S4GJ-3SWK].

78. *SARS Basic Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 6, 2017), https://www.cdc.gov/sars/about/fs-sars.html [https://perma.cc/XY27-KGPN].

79. *MERS in the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 9, 2019), https://www.cdc.gov/coronavirus/mers/us.html [https://perma.cc/YG2Z-QQVK].

80. Exec. Order No. 13,674, 79 Fed. Reg. 45671 (July 31, 2014).

81. *Id.*

82. *Id.*

83. *What is Ebola Disease?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 31, 2023), https://www.cdc.gov/vhf/ebola/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvhf%2Febola%2Fhistory%2Fsummaries.html [https://perma.cc/W96X-S3KB].

("EVD") is a rare but severe and often deadly disease.[84] EVD spreads through direct contact with an infected person's bodily fluids and can persist in certain bodily fluids even after a person's recovery from the illness.[85] Infected persons suffer fever, aches and pains, weakness and fatigue, gastrointestinal symptoms, abdominal pain, and unexplained hemorrhaging, bleeding, or bruising.[86] By 2016, the total number of EVD cases approached 30,000 with more than 11,000 fatalities.[87] The World Health Organization (WHO) declared a "public health emergency of international concern," in part because the EVD outbreak was very difficult to bring under control in light of "high infectivity, weak health systems, rampant fear and mistrust among the affected population, and fluid cross-border movement of peoples."[88]

Despite the WHO's pandemic declaration, the virus never really spread to any level of concern beyond the countries of Liberia, Guinea, and Sierra Leone. In fact, only eleven people were treated for EVD in the United States during the 2014 Ebola epidemic. The CDC confirmed the first travel-associated case of EVD in the United States in a man diagnosed who traveled from West Africa to Dallas, Texas.[89] To this day, there are no vaccines or therapeutics available for prevention or treatment of EVD anywhere in the world.[90] However, because the spread of EVD can occur through direct contact with bodily fluids of an infected person, the Centers for Disease Control and Prevention recommended self-monitoring for the 21-day incubation period.[91]

84. *Ebola Disease*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 21, 2023), https://www.cdc.gov/vhf/ebola/index.html#print [https://perma.cc/BU68-NUV2].

85. *Ebola Disease: Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 31, 2023), https://www.cdc.gov/vhf/ebola/transmission/index.html [https://perma.cc/HW9B-JU72].

86. *Ebola Disease: Signs and Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2023), https://www.cdc.gov/vhf/ebola/symptoms/index.html [https://perma.cc/R6JK-2UTT].

87. Emily Largent, *EBOLA and FDA: Reviewing the Response to the 2014 Outbreak, to Find Lessons for the Future*, 3 J. L. & BIOSCIENCES 489, 490 (2016) (citing *Ebola Situation Report*, WHO (Jan. 6, 2016), http://apps.who.int/ebola/current-situation/ebola-situation-report-6-january-2016 [https://perma.cc/LH4X-Z76C]).

88. *Id.* (citing Mit Philips & Aine Markham, *Ebola: A Failure of International Collective Action*, 384 LANCET 637 (2014)); Margaret Chan, *Ebola Virus Disease in West Africa—No Early End to the Outbreak*, 371 NEW ENG. J. MED. 1183, 1183–84 (2014).

89. Largent, *supra* note 87, at 496.

90. *Id.* at 496–97.

91. Neil MacFarquhar, *What the Ebola Crisis Can Teach Us About Quarantines*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/03/19/us/coronavirus-quarantines-ebola.html#:~:text=Quarantines%20were%20far%20more%20

Regardless of the limited presence of EVD in the United States and the CDC's recommendation of monitoring, quarantine protocols played a significant role in addressing the virus. After the first Ebola diagnosis in the United States, entry screening was implemented in five airports to "identify travelers from countries with widespread Ebola transmission who might have been exposed to Ebola during the days before arrival or who had signs or symptoms of Ebola at the time of arrival."[92] However, several weeks later, both New York and New Jersey announced a mandatory quarantine order to monitor those who may have come into contact with the virus as a result of travel, regardless of whether they came into direct contact with an infected person or not.[93] Since that time, every state has enacted some requirement to quarantine, monitoring, and/or certain travel restrictions as precautions to prevent further spread of the virus within the United States.[94]

Finally, the most recent expansion of federal quarantine power came in early 2017, approximately one day before Donald Trump began his Presidency. On that day, the Obama administration issued new regulations through the CDC, giving them the independent power to quarantine, isolate, and examine individuals, and preclude the travel of an individual from one state to another.[95] These regulations also provided for the ability to prohibit entry into the country of anyone believed to be bringing a communicable disease.[96] Further, any public health emergency, as dictated by the Secretary of Health and Human Services, could include the use of the federal quarantine powers of the federal government.[97] Finally, under 42 CFR § 70.2, if the CDC Director determines that the measures taken by the authorities of any State or territory "are insufficient to prevent the spread of any of the communicable diseases" from State/Territory to any other State/Territory, he/she "may take such measures to prevent such spread of the diseases as deemed reasonably necessary."[98]

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common,and%20the%20personal%20frustrations%20involved [https://perma.cc/CK7R-2E4C].

92. Gregory Sunshine et al., *Morbidity and Mortality Weekly Report (MMWR): State and Territorial Ebola Screening, Monitoring, and Moving Policy Statements – United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 16, 2015), https://www.cdc.gov/MMWR/preview/mmwrhtml/mm6440a4.htm [https://perma.cc/P8F3-UBL3].

93. *Id.*

94. *Id.*

95. 42 C.F.R. § 70.5.

96. 42 C.F.R. § 71.1.

97. 42 C.F.R. § 70.2; *see also* 42 U.S.C. § 264.

98. 42 C.F.R. § 70.2.

III. A CLOSER LOOK AT COVID-19 AND THE FAILED IMPLEMENTATION OF A COORDINATED FEDERAL/STATE PUBLIC HEALTH QUARANTINE PROTOCOL.

The United States has had the ability, through the development of a myriad of laws and regulations, to engage in quarantine and public health strategies to address pandemics like COVID-19. In fact, many experts acknowledged that even though quarantining anyone is a "draconian public health measure," quarantines could also be "a key to stopping an outbreak."[99]

However, the federal government never implemented a national quarantine, leaving states to make decisions for themselves as to what public health protocols to implement, if any, in response to the COVID-19 pandemic. Even as COVID-19 ravaged the United States, other countries saw significant reductions in transmission because of strict quarantine and/or isolation mandates imposed on the general population.[100] In mid-2021, the United States was among the nearly 75 countries that saw an increase in transmission rates as a result of considerable transmission of the disease within the community as opposed to "imported travelers."[101] By the end of 2021, the number of cases in the United States, approached 3.5 million with approximately 70,000 new cases a day and was nearly triple the number of any other country listed.[102]

The conclusion of the COVID-19 pandemic provides a unique and necessary opportunity to look back and evaluate how the United States handled the pandemic at a federal level and whether a quarantine by the federal government could have been properly implemented as a part of a public health response to the contagion. As the Director of the CDC has warned regarding the post-COVID-19 pandemic and the myriad of other significant public health challenges the agency has faced over the last two and a half years, including Ebola, paralytic polio, and avian influenza, "[p]ublic health work with continue to be critically important, and the challenges just as complex. Yet I fear the despair from the pandemic is fading too quickly from our memories, perhaps

99. Rob Stein, *CDC Seeks Controversial New Quarantine Powers to Stop Outbreaks*, NPR (Feb. 2, 2017, 4:47 AM), https://www.npr.org/sections/health-shots/2017/02/02/512678115/cdc-seeks-controversial-new-quarantine-powers-to-stop-outbreaks [https://perma.cc/D8BY-23QG].

100. *See, e.g.*, Peter Collignon, *COVID-19 and Future Pandemics: Is Isolation and Social Distancing the New Norm?*, 51 INTERNAL MED. J. 647 (2021) (comparing Australia's COVID-19 transmission rate based on its isolation policy to those of other countries, including the US).

101. *Some Are Winning – Some Are Not, Which Countries Do Best in Beating COVID-19?*, *supra* note 5.

102. *Id.*

because it is too painful to recall a ravaged nation brought to its knees."[103]

Several years before the COVID-19 pandemic, the federal government and public health experts explored the implementation of a national quarantine in response to a pandemic. Those exercises made it clear federal and state governments must coordinate to effectuate a quarantine response to a contagious disease pandemic.[104] In fact, during a pandemic tabletop exercise conducted in May 2018 by the Johns Hopkins Center for Health Security, public health experts noted that "[a] specific priority for pandemic preparedness is the need for the federal government — together with state and local governments, public stakeholder groups, and scientific experts — to develop clear, effective plans regard whether and how quarantine would be used."[105] Although some suggested that a national quarantine would be "politically treacherous" and "turn the federal law on its head,"[106] it was nonetheless possible. To that end, experts concluded that the implementation of a national quarantine should be explored as a manner of responding to a contagious disease pandemic.

At the start of the COVID-19 pandemic in January of 2020, the U.S. Secretary of Health and Human Services, Alex Azar, declared a public health emergency under Section 319 of the PHSA.[107] In time of public health emergency, Section 319 grants the Secretary the power to "take such action as may be appropriate to respond to the public health emergency . . . ."[108] Under the Public Health Services Act, "such action" includes the power to employ quarantine protocols to restrict the transmission of disease from state-to-state.[109] Further, under 42 U.S.C. §264, "such action" included the power of the Surgeon General to "make and enforce regulations . . . necessary to prevent the introduction, transmission or spread of communicable diseases . . . from one state or possession into any other state or possession."[110]

103. Walensky, *supra* note 3.

104. *Implications of Clade X for National Policy*, JOHNS HOPKINS CTR. FOR HEALTH SEC., https://centerforhealthsecurity.org/sites/default/files/2022-12/clade-x-policy-statements.pdf [https://perma.cc/6X7W-M5U2].

105. *Id.*

106. Brian Naylor, *Fact Check: A Blanket National Quarantine is Likely Not Legal*, NPR (Apr. 2, 2020, 5:00 AM), https://www.npr.org/2020/04/02/825293201/a-president-is-not-able-to-order-a-national-quarantine-experts-say [https://perma.cc/FZH5-6LNU].

107. HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR STRATEGIC PREPAREDNESS, DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Jan. 31, 2020).

108. 42 U.S.C. § 247d(a)(2) (emphasis added).

109. 42 U.S.C. § 247d(a).

110. 42 U.S.C. § 264(a) (emphasis added).

Additionally, as noted above, CDC regulations allow the federal government to take reasonably necessary measures to prevent the spread of disease when State action proves to be insufficient.[111]

Consistent with this body of federal law, the federal government explored the possibility of enacting a national quarantine or lockdown to combat the transmission of the COVID-19 virus. First, in early 2020, in considering whether to utilize this executive power against the entire country or even a geographic region, some believed the President would have had to "either personally determine, or get the CDC director to state in writing, that the entire country is reasonably believed to have been exposed to the coronavirus."[112] This was predicated on the fact that federal law "is clearly aimed at individuals or specifically identified groups, not the entire country writ large."[113] In fact, federal regulations relating to the issuance of a federal order for quarantine, isolation, or conditional release refer to an "individual" in multiple places including that the "identity of the individual or group subject" to such order be identified and an explanation of the factual basis for the belief that "the individual is in a communicable stage" of a quarantinable disease."[114] The question became whether the imposition of a national quarantine in response to COVID-19 would be worth the challenges that would surely come from a more expansive reading of those provisions. Although some agreed that a "centralized federal response would be more effective and needed," some also believed that the use of this executive power would "likely lead" to a constitutional challenge.[115]

In March of 2020, over 700 public health, human rights, and legal experts and organizations advised on how to best and most effectively respond to COVID-19 in an Open Letter addressed to Vice President Mike Pence.[116] This letter was an effort to compel the federal government to act in response to the alarming spread of the COVID-19 contagion and save lives.[117] In the Open Letter, public health and

111. 42 C.F.R. § 70.2.

112. Naylor, *supra* note 106.

113. *Id.*

114. 42 C.F.R. § 71.37.

115. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, ABA (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/ [https://perma.cc/8WSC-57XP].

116. *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice President Mike Pence, and other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, YALE SCH. OF PUB. HEALTH AND YALE L. SCH. (Mar. 2, 2020), https://law.Yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf [https://perma.cc/S6Z3-2MET].

117. *Id.* at 4.

legal experts tracked the requirements of 42 U.S.C. §264 and the 2017 CDC regulations and agreed that,

> "[f]or mandatory quarantines to be effective and therefore scientifically and legally justified, three main criteria must be satisfied: 1) the disease has to be transmissible in its pre-symptomatic or early symptomatic stages; 2) those who may have been exposed to COVID-19 must be able to be efficiently and effectively-identified; and 3) those people must comply with the conditions of quarantine."[118]

In the first of the criteria , the Open Letter acknowledged that "there is evidence that COVID-19 is transmitted in its pre-symptomatic or early symptomatic stage."[119] It also acknowledged that COVID-19 primarily affects the respiratory system, although other organ systems are also involved.[120] Moreover, as "severe acute respiratory syndromes" are among the "quarantinable diseases" set forth by Executive Order, COVID-19 would have satisfied as one of those diseases.[121]

The second of the criteria in the Open Letter addressed the ability to identify individuals once exposed to a contagion like COVID-19. As noted in the Open Letter, because so little was known about COVID-19 in early 2020, "the contribution of infected individuals in their pre-symptomatic or early symptomatic stages to overall transmission is unknown."[122] Therefore, experts cautioned that, "[e]fficiently identifying those exposed will be increasingly difficult as community transmission of the virus becomes more widespread, making quarantine a less plausible measure as community spread proceeds."[123] A robust national testing and contact tracing program with state and local cooperation and participation, would have generated the ability to identify infected individuals. However, by May of 2020 the federal government's failure to implement such a program early in the pandemic likely doomed this endeavor.[124]

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118. *Id.*

119. *Id.*

120. Uday Jain, *Effect of COVID-19 on the Organs*, 12 CUREUS 1, 1 (2020).

121. Exec. Order No. 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003).

122. *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice President Mike Pence, and other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, *supra* note 116, at 4.

123. *Id.*

124. *See* Kimberly Wehle, *Yes, A National Quarantine is Constitutional . . . and Necessary*, POLITICO (May 15, 2020, 6:45 PM), https://www.politico.com/news/magazine/2020/05/15/national-quarantine-constitutional-261165 [https://perma.cc/9RTZ-MUT9].

Finally, the Open Letter acknowledged that the final consideration for a successful national quarantine is either willing compliance by the population or the ability to enforce the terms of the coordinated federal/state quarantine order. [125] As recent as 2018, scholars emphasized the necessity of a uniform, official response to achieve compliance with public health mandates, noting "[t]here is no evidence that the public is reluctant to cooperate with public health officials, especially in the midst of an outbreak, as long as the public has confidence in official recommendations."[126] Moreover, in the wake of "inadequate local control" of communicable disease transmission from state to state, the federal government can preempt state power.[127]

However, during the COVID-19 pandemic, the country witnessed the consequences of the lack of a uniform federal approach to the pandemic. As one legal expert notes, "[i]t is beyond reasonable debate that the current hodge-podge of state and local rules do not go far enough to protect overall public health, and have not been uniformly enforced—to the extent they exist at all."[128] With no federal quarantine plan in place, States made independent decisions as to how to respond to the virus with varied and inconsistent executive orders and public health mandates. For example, some states limited social gatherings to a certain number of people, required face masks, and closed most businesses, while others reopened all businesses, allowed groups of more than 100 to gather, and had no face mask policies.[129] As a result, states with more stringent restrictions saw them easily evaded or avoided for various reasons including, for example, local law enforcement who declared their unwillingness to enforce those mandates [130] and cohorts of individuals who, for political or personal reasons, openly refused to follow the rules.[131]

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125. *See Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice President Mike Pence, and other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, *supra* note 116, at 4.

126. Ulrich & Mariner, *supra* note 67, at 429 (citing George J. Annas, *Bioterrorism, Public Health, and Civil Liberties,* 346 NEW ENG. J. MED. 1337, 1339 (2002)).

127. 42 CFR § 70.2.

128. Wehle, *supra* note 124.

129. Alaa Elassar, *This is Where Each State is During its Phased Reopening*, CNN (May 27, 2020), https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/ [https://perma.cc/7AFH-7Z98].

130. Brooke Wolford, *Sheriffs Across US Are Not Enforcing Coronavirus Stay-At-Home Orders. Is that Legal?*, MIAMI HERALD (Apr. 21, 2020, 4:22 PM), https://www.miamiherald.com/news/coronavirus/article242178781.html [https://perma.cc/A9QZ-76NR].

131. Shana Kushner Gadarian et al., *A Look Inside Pandemic Politics*, PRINCETON UNIVERSITY PRESS (October 11, 2022),

Moreover, the manner in which states self-regulated their population relative to COVID-19 were guided, in many instances, by politics as opposed to public health and welfare concerns.[132] As a result of inconsistent policies between states, the inability to garner the cooperation of a population, and the lack of ability to enforce the mandates, allowed wave after wave of the virus to be transmitted both intrastate as well as interstate.[133]

It bears noting that in March 2020, several days after Pence presumably received the Open Letter, it was reported that President Trump discussed a "national lockdown" with his advisers. Even though the intent of this lockdown was to minimize the spread of COVID-19, Trump dismissed the idea three days later.[134]

IV. COULD A NATIONAL QUARANTINE EVER BE IMPLEMENTED AS A PUBLIC HEALTH RESPONSE TO A CONTAGIOUS DISEASE PANDEMIC LIKE COVID-19?

Quarantines can, and should, be a part of an effective public health response to contagious disease. Although the federal government possesses the statutory power to implement a large-scale federal quarantine to respond to a public health crisis, there are constitutional implications and practical challenges of compliance and enforcement to consider. Though it is likely that the exercise of quarantine power by the federal government will pass constitutional muster under the Commerce Clause, special attention must be given to the substantive due process protections guaranteed by the Constitution.

Moreover, there are also more practical problems, like public cooperation, enforcement, and allocation of resources that will surely follow a national quarantine event. Prior to the COVID-19 pandemic, experts believed there was a problem with imposing a large-scale quarantine:

> In the midst of an epidemic, the public will tend to overestimate the degree of risk, leading to poor policy results, including

https://press.princeton.edu/ideas/a-look-inside-pandemic-politics [https://perma.cc/N4ZE-YTXK].

132. Christopher Adolph et al, *Pandemic Politics: Timing State-Level Social Distancing Responses to COVID-19*, 46 J. HEALTH POL. POL'Y AND L. 211, 212 (2021).

133. *See Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice President Mike Pence, and other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, *supra* note 116, at 2–4.

134. Aamer Madhani, *Trump Resists National Shutdown, Leaving It Up to States*, AP NEWS (Apr. 2, 2020, 6:11 AM), https://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-politics-united-states-c90b24e60a4853cebe96ec995b626f9b [https://perma.cc/BC7W-S546].

> inequitable allocation of medical resources, ineffective and economically harmful prevention measures, and deep suspicion of government's ability to control the spread of disease. Public fear also leads to easy scapegoating of minority groups.[135]

However, the overall infection and death rates due to the COVID-19 pandemic in the United States as compared to similar federalist countries like Canada, Germany, and Australia, speaks volumes. These rates demonstrate that the approach in which individual states made their own decisions about how to manage the transmission of a deadly virus was insufficient due to disunity and political polarization amongst states.[136] In truth, enforcement and public distrust are the problems that will prove to be the biggest obstacles to an effective use of large-scale federal quarantine and may ultimately prove to be unresolvable.

A. Quarantine power as a valid exercise of modern Commerce Clause authority.

Historically, the Supreme Court has considered the ability to quarantine, by both the states and the federal government, as constitutionally proper.[137] However, before it can be determined

135. Price, *supra* note 20, at 496.

136. *See* Kevin Donovan, *Infecting Constitutional Precedent: An Analysis of Federal Intrastate Quarantine Power Through the Lens of the COVID-19 Pandemic*, 59 HOUS. L. REV. 431, 451 (2021) (quoting Shana Kushner Gadarian et al., *Partisanship, Health Behavior, and Policy Attitudes in the Early Stages of the COVID-19 Pandemic*, at 8 (Mar. 27, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562796 [https://perma.cc/Y7ZT-L9B2]) ("A recent study found that 'Republicans are less likely than Democrats to report responding with CDC-recommended behavior,"' and that Democrats are more likely to change their personal health behaviors and support policies towards testing and treatment.").

137. Simpson v. Shepard (*Minnesota Rate Cases*), 230 U.S. 352, 406–07 (1913) ("Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States, and has repeatedly acquiesced in the enforcement of state laws." (citations omitted). "Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health; but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question."); Morgan's S.S. Co. v. Bd. of Health, 118 U.S. 455 (1886); Missouri, K. & T. R. Co. v. Haber, 169 U.S. 613 (1898); Louisiana v. Texas, 176 U.S. 1 1900); Rasmussen v. Idaho, 181 U.S. 198 (1901); Compagnie Francaise de Navigation á Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380

whether a national quarantine could ever be effectively implemented, the question of whether quarantine power as provided within the PHSA is a legitimate exercise of power under modern Commerce Clause jurisprudence must be answered.

The first of the modern era Commerce Clause cases is *Wickard v. Filburn,* in which the Secretary of Agriculture fined Filburn under the Agricultural Adjustment Act of 1938 for harvesting about 12 acres more wheat than the Act permitted. [138] Because the Act was "designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices," the Court found that Congress can regulate purely local activity so long as it has a "substantial economic effect on interstate commerce."[139]

More than 50 years later, in *United States v. Lopez,* the Court examined Congress's authority under the Commerce Clause in enacting the Gun-Free School Zones Act, which made possession of a firearm within 1,000 feet of a school a federal crime.[140] Here, the Court identified three broad categories that could be regulated under the Commerce Clause as: (1) "the use of the channels of interstate commerce"; (2) activity relating to "the instrumentalities of interstate commerce, or persons and things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce."[141] The Court recognized the *Wickard* case as "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity." [142] However, it ultimately refused to extend that reach to the regulation at issue, rejecting the inferences by which the government attempted to qualify firearm possession as an economic activity such that it would come under the purview of the Commerce Clause.[143]

Just five years later, in *U.S. v. Morrison,* a case involving a federal civil remedy for the victims of gender-motivated violence, the Court again declined to further expand Commerce Clause authority in regulating noneconomic activities.[144] Like *Lopez*, the Court rejected as insufficient any attempt to use inferences of effects on interstate

(1902); Reid v. Colorado, 187 U.S. 137 (1902); Asbell v. Kansas, 209 U.S. 251 (1908).

138. Wickard v. Filburn, 317 U.S. 111, 114 (1942).

139. United States v. Lopez, 514 U.S. 549, 560 (1995) (describing Wickard v. Filburn, 317 U.S. 111, 129 (1942)).

140. *Lopez*, 514 U.S. at 551.

141. *Id.* at 549, 558–59.

142. *Id.* at 560.

143. *Id.* at 559–60.

144. United States v. Morrison, 529 U.S. 598, 601 (2000).

commerce to permit federal regulation of intrastate, noneconomic activities under the Commerce Clause:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[145]

The Court also acknowledged that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[146] However, it notably left open the possibility of sanctioning the regulation of aggregated, intrastate noneconomic activity in certain circumstances.[147]

In 2005, Court returned to discussing Congress' Commerce Clause authority to regulate the intrastate activity of growing medicinal marijuana for personal consumption.[148] In *Gonzales,* the Court held that because this activity was the "production, distribution, and consumption of commodities," it qualified as "economic."[149] Further, the Court reasoned that even if the grower's activity was permissible under state law and the product was not placed in commerce, the difficulties in "distinguishing between marijuana cultivated locally and marijuana grown elsewhere" and concerns about "diversion [of that product] into illicit channels" amounted to a rational basis for Congress to believe such activity would substantially affect interstate commerce.[150]

In light of this modern Commerce Clause jurisprudence, a national quarantine in response to a serious public health crisis is likely a constitutional exercise of Commerce Clause power over activities that "substantially affect interstate commerce" as well as an "instrumentality" of commerce.[151] In fact, the Congressional Research Service has noted that, the "authority of the federal government to

145. *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564).

146. *Id.* at 613.

147. *Id.* ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

148. *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

149. *Id.* at 25.

150. *Id.* at 22.

151. United States v. Lopez, 514 U.S. 549, 558–59 (1995)

prescribe quarantine and other health measures is based on the Commerce Clause."[152]

Because a serious infectious disease crisis can generate both a substantial effect on interstate commerce, as well as the need to protect the instrumentalities of commerce, the use of large-scale quarantine under federal law is permissible under *Lopez* and its progeny.[153] The quarantine provisions of the PHSA apply to individuals "reasonably believed to be infected with a communicable disease in a qualifying stage who are "moving or about to move" between states,[154] as well as individuals "believed 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."[155] Thus, according to leading public health law authorities, "because virtually any infected person could be a source of infection to others who might be traveling from state to state, jurisdiction over quarantine and isolation is effectively concurrent between state and federal governments."[156]

It is without question that quarantine authority is proper under the Commerce Clause as the movement of those infected individuals over state lines OR the ability of individuals to infect those who will be moving would necessarily and practically impact commerce or an instrumentality of commerce in a myriad of ways regardless of the level of active engagement in commerce.[157] Some have even noted that the effectiveness of a federal response to a public health crisis under the

152. JARED P. COLE, CONG. RSCH. SERV., RL33201, FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY (2014).

153. *Id.*; Arjun K. Jaikumar, *Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine After NFIB v. Sebelius*, 114 COLUM. L. REV. 677, 705, n.160 (2014) (citing John Thomas Clarkson, Note, *Phase Six Pandemic: A Call to Re-Evaluate Federal Quarantine Authority Before the Next Catastrophic Outbreak*, 44 GA. L. REV. 803, 820–24 & n.129 (2010)) (quoting 42 U.S.C. § 264(d)(1)) (arguing third prong of *Lopez* test, permitting Congress to regulate activities having substantial effect on interstate commerce, justifies large-scale federal quarantine authority).

154. 42 U.S.C. §264(d)(1) (2006).

155. *Id.*

156. Mark A. Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, 75 L. & CONTEMP. PROBS. 107, 108 (2012).

157. Jaikumar, *supra* note 153, at 705 ("Quarantine's connection to interstate commerce is based on the *effects* of disease upon interstate commerce – upon the labor market, the consumer class, the availability of goods, and so forth – not upon any pretense that potentially quarantined or isolated individuals were active in their participation in interstate commerce."). "A genuine pandemic might easily affect the instrumentalities of interstate commerce by making airports or rail stations sufficiently dangerous to adversely affect travel or interstate commerce or impede interstate traffic by infecting drivers, pilots, and passengers." *Id.* at 713.

Commerce Clause "must include authority to mandate citizen behavior, regardless of engagement in commerce."[158] In short, finding a connection between the regulation of individual behavior through quarantine protocols and commerce will not require the Court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"[159] such that regulation is rendered unconstitutional.

A number of commentators have suggested that the Court's decision in in *National Federation of Independent Business v. Sebelius*[160] could have an adverse impact on Congress's ability to institute public health mandates, like quarantines, as a function of its Commerce Clause power.[161] In that 2011 case, the Court considered the constitutionality of the individual mandate under the Patient Protection and Affordable Care Act (ACA).[162] The Court ultimately determined that the individual mandate to purchase insurance was constitutional under Congress's tax and spend power, rather than the Commerce Clause.[163] In a portion of the opinion in which no member of the majority joined, Chief Justice Roberts Court reasoned that Congress's Commerce Clause powers were limited to regulation of economic activity and could not be extended to regulate inactivity:

> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.[164]

158. Hall, *supra* note 156, at 110.

159. United States v. Lopez, 514 U.S. 549, 567 (1995).

160. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

161. *See* Wendy E. Parmet, *The Individual Mandate: Implications for Public Health Law*, 39 J. L. MED. & ETHICS 401, 403 (2011); *see also* Hall, *supra* note 156, at 110.

162. *Sebelius*, 567 U.S. at 530.

163. *Id.* at 588.

164. *Id.* at 552.

Critics of the individual mandate, as well as Chief Justice Roberts, took the position that a law compelling an individual to engage in commerce (purchase insurance) or suffer a penalty, is the equivalent of punishing inaction and cannot be used to justify Congressional regulation under the Commerce Clause.[165] However, as noted by one public health law expert, Wendy Parmet, "[p]ublic health law's propensity to regulate in the absence of any voluntary action is evident in many traditional public health laws."[166]

Finally, although the Court has never ruled on the constitutionality of the PHSA under the Commerce Clause, during oral arguments in *United States v. Comstock,*[167] the Court discussed whether the power to quarantine would fall within the federal government's Commerce Clause authority. In fact, then-Solicitor General, now Supreme Court Justice Elena Kagan posed the following question:

> I mean, suppose that there was some very contagious form of drug-resistant tuberculosis that had--had become prevalent in the prison system, and States were not able to deal with . . . quarantining these people . . . and Congress said: You know, the best thing to do is to have the Federal Government act as the appropriate quarantining authority because we don't think that States are able to step up and deal with this problem. Would anybody say that the Federal Government would not have Article I power to effect that kind of public safety measure?[168]

Justice Anthony Kennedy responded that the Commerce Clause would provide the authority for such a program, stating "[w]ell, when I was thinking about your hypothetical, I thought, well, that's a pretty easy commerce power argument."[169] Later in the argument, Justice Antonin Scalia went one step further, declaring that "if anything relates to interstate commerce, it's communicable diseases, it seems to me."[170]In the wake of *NFIB*, there some basis for concern relative to Congress's ability to regulate in public health under its Commerce

165. Parmet, *supra* note 161, at 401 n.10, 403 n.36 (citing P. J. Smith, *Federalism, Lochner and the Individual Mandate* (Geo. Wash. U. L. Sch. Pub. L. & Legal Theory, Working Paper No. 534, 2011) and P. M. Brennan, *The Individual Mandate, Sovereignty, and the Ends of Good Government: A Reply to Professor Randy Barnett* (Vill. Pub. L. & Legal Theory, Working Paper Series No. 1769921, 2011).

166. *Id.* at 405. ("[Q]uarantine laws historically authorized the confinement of people thought to have a contagious disease, such as smallpox or leprosy, even if they had not committed any prohibited voluntary action.").

167. United States v. Comstock, 560 U.S. 126 (2010).

168. Oral Argument at 20:43, United States v. Comstock, 560 U.S. 126 (2010) (No. 08-1244), https://www.oyez.org/cases/2009/08-1224.

169. *Id.* at 21:29.

170. *Id.* at 31:05.

Clause power. However, with no clear majority rule on the use of Commerce Clause authority to regulate noneconomic activity, it is more likely that public health laws including quarantines and other mandates, though not economic in nature, will be considered constitutionally sound under *Lopez* and its progeny under the theory that the behavior these public health laws regulate either substantially affect commerce in the aggregate or threaten the instrumentalities, people, and things of commerce such that the regulation is necessary.

B. Quarantine as the least restrictive means to protect public health.

Simply put, because a mandatory quarantine mandate constitutes a limitation on an individual's liberty interest, any regulation of that inherent constitutional right is subject to strict scrutiny. Further, as a federal quarantine would supplant insufficient State action taken to prevent the spread of communicable disease,[171] a "'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[172] In light of this principle, consideration must be given to how the courts may address the due process concerns that may arise with the implementation of a federal coordinated quarantine. In short, both courts and scholars have found that constitutional challenges to public health orders, most especially quarantines, are appropriate unless the government can show by clear and convincing evidence that they are the least restrictive means of protecting the public's health.[173]

For any quarantine to satisfy substantive due process concerns, the government must show (1) a public health necessity, (2) an intervention that is both effective and demonstrates a reasonable connection between means and ends, (3) proportionality (i.e., that the intervention is neither too broadly nor too narrowly tailored), and (4) that the quarantine or isolation is in the least restrictive setting while accomplishing its purpose.[174] Even prior to the COVID-19 pandemic,

171. 42 CFR § 70.2.

172. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

173. *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice President Mike Pence, and other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, *supra* note 116, at 4 (citing Alexander Abdo et al., *Fear, Politics, and Ebola: How Quarantines Hurt the Fight Against Ebola and Violate the Constitution*, ACLU (Dec. 2015), https://www.aclu.org/wp-content/uploads/legal-documents/aclu-ebolareport.pdf [https://perma.cc/J83S-3N4S].

174. *See* Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights,* 54 BUFF. L. REV. 1299, 1299, 1310 (2007) ("Both isolation and quarantine severely curtail the freedom of individuals to whom they are applied. Thus, they are often tools of last resort because they require the

quarantine as a public health response to a contagious disease was considered valid and justified even before the presence of infection can be determined.[175] However, experts noted that "the gravity and circumstances of the outbreak, the disease characteristics, the availability of control measures, and the characteristics of the individual in question affect the strength of the government's justification for limiting a right."[176]

The PHSA quarantine provisions apply to individuals who are "reasonably believed to be infected with a communicable disease," as opposed to "conclusively identified as infected."[177] As such, the more transmittable and virulent the contagion, it is more plausible to "reasonably believe" that many or all individuals in a particular region were infected such that a national or large-scale quarantine is appropriate and legal under the PSHA and relevant CDC regulations. Provided that a large-scale quarantine protocol is justified by nature of the contagion and limited to those who pose a reasonable and sufficient risk of spreading the disease to necessitate the deprivation of liberty, the risk of a violation of individual rights is significantly diminished.

Federal power, under the PHSA and the CDC regulations, coupled with the case of *Jacobson v. Massachusetts,*[178] further justifies a national pandemic response program that includes large-scale quarantines. Although *Jacobson* dealt with the constitutionality of a state mandatory vaccination order, the Court's reasoning is not inapposite to the modern issue of a national quarantine in response to a contagion.[179] The Court ultimately held that a state may require vaccinations, provided state mandate is reasonable, not arbitrary, and tailored to the government's interest in preserving public safety.[180] In rejecting defendant's argument that the state order was a restraint of his personal liberties, the Court reasoned that,

> [i]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such

separation of infected and potentially infected persons from the public through confinement to treatment facilities, residences, and other locations.").

175. Ulrich & Mariner, *supra* note 67, at 403–07.

176. *Id.* at 404.

177. 42 CFR § 70.2.

178. *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905).

179. *Id.*

180. *Id.* at 11, 27–28.

> restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.[181]

Although an individual who reasonably believes they are infected might object to the imposition of a quarantine protocol during a serious contagious disease event, "[n]arcissim is not a constitutionally protected value, let alone a right."[182]

C. Enforcement of a federal quarantine mandate in the post-COVID-19 era.

One of the biggest challenges of imposing a quarantine and other necessary and related public health mandates is enforcement. First, under Title 42 of U.S. Code, violation of federal quarantine orders can result in fines and imprisonment.[183] Additionally, all three branches of federal government have the Constitutional power to enforce federal laws, including the quarantine and public health mandates within the PHSA and CDC regulations.[184] Congress and the President have the respective legislative and executive powers to either use the military to "execute the laws of the union"[185] or "take care that the laws are faithfully executed."[186] Additionally, under the John Warner National Defense Authorization Act, the President has the power to employ the

181. *Id.* at 29, 37–38 ("We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the Supreme Law of the Land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law.").

182. Wehle, *supra* note 124.

183. 42 U.S.C. §271.

184. *See generally* Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 MISS. COLL. L. REV. 107 (2006).

185. U.S. CONST. art. I, § 8.

186. *Id.* art. II, § 3.

armed forces to "restore public order and enforce the laws of the United States" in the face of an "epidemic, or other serious public health emergency."[187] Generally speaking, however, the Reconstruction-era Posse Comitatus Act (PCA) generally bars the military from conducting law enforcement operations inside the United States.[188] Although enforcement of public health mandates would not exactly be law enforcement in the most traditional sense, at least one expert has predicted that it would be hard to overcome the "strong presumption" against domestic military deployment.[189]

In the event of a federal quarantine, the ideal method of enforcement in the post-COVID-19 era involves the coordination and collaboration of State and local governments. Even before the most recent pandemic, federal quarantine orders were enforced by state health authorities, not federal officials, and those states provided labor, set rules, and were responsible for monitoring exposure and contact tracing.[190] The declaration of a Public Health Emergency during the COVID-19 pandemic provided the federal government with the ability to deploy federal funds and make policy decisions to support the nation's economic and health systems.[191] In addition to those provisions, any future federal pandemic plans must also fund and allocate resources to the States as a part of a modern pandemic plan to allow States and local authorities to implement and enforce a uniform and effective quarantine strategy.

187. John Warner National Defense Authorization Act, Pub. L. No. 109-364, §1076, 120 Stat. 2083, 2404 (2006).

188. 18 U.S.C. §1385 (1878) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.")

189. Maryam Jamshidi, *The Federal Government Probably Can't Order Statewide Quarantines*, UNIV. CHI. L. REV. ONLINE ARCHIVE (Apr. 2020), https://lawreviewblog.uchicago.edu/2020/04/20/statewide-quarantines-jamshidi/ [https://perma.cc/V9LP-FJHW].

190. Polly J. Price, *A Coronavirus Quarantine in American Could Be a Giant Legal Mess*, ATLANTIC (Feb. 16, 2020), https://www.theatlantic.com/ideas/archive/2020/02/coronavirus-quarantine-america-could-be-giant-legal-mess/606595/ [https://perma.cc/6QVB-5U8T].

191. Juliette Cubanski et al., *What Happens When COVID-19 Emergency Declarations End? Implications for Coverage, Costs, and Access,* KFF (Jan. 31, 2023), https://www.kff.org/coronavirus-covid-19/issue-brief/what-happens-when-covid-19-emergency-declarations-end-implications-for-coverage-costs-and-access/ [https://perma.cc/KBY9-RED2].

D. Politics and the ability to effectuate compliance with modern quarantine protocols.

Because "health is not an inherently polarizing issue - everyone wants to be healthy and for their families to be safe,"[192] prior to the COVID-19 pandemic, most experts believed that Americans would comply with public health recommendations in the face of a serious contagious disease.[193] It was also believed that earning the public's trust in the recommendations of public health officials is critical to this compliance, especially in the context of quarantine mandates. [194] To earn that trust, public health officials were expected to "obtain accurate information, communicate honestly with the public, and ensure that the public has the resources necessary to cooperate with reasonable recommendations."[195]

However, in an article written in 2018 during the Ebola epidemic and almost two years before the COVID-19 pandemic, one scholar noted that "[a]ny intervention by the federal government over the objections of a state or territory can be highly politically charged. Environmental, scientific, and medical recommendations can be hijacked for political purposes at any level of government. Perhaps the most pressing problem is a crisis of trust in governmental institutions."[196] Foreshadowing what ultimately proved to be true, the author concluded that "[t]he political conflict we saw over Ebola does not bode well for "the big one" that scientists widely expect to strike eventually—a fast-spreading, airborne virus such as SARS or swine flu.[197]

192. Gadarian et al., *supra* note 131.

193. *See* Ulrich & Mariner, *supra* note 67, at 427.

194. *Id.* at 426.

195. *Id.* at 429, 429 n.210 ("(describing the speed at which New Yorkers were vaccinated, with thousands lining up and waiting patiently to receive their inoculation). Cultural norms in the United States may appear to conflict with public cooperation from government orders during an outbreak. Mark A. Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMP. L. REV. 175, 177, 188–92 (2004). However, the desire to avoid contagious diseases and to be treated for infection are strong as well, and government assistance could be seen as beneficial in these circumstances. Moreover, providing assistance to those in quarantine and isolation, such as finances for lost wages and treatment, would help reduce the resistance that these cultural norms may generate.").

196. Price, *supra* note 20, at 542.

197. *Id.* (citing Sanjay Gupta, *The Big One Is Coming, and It's Going to Be a Flu Pandemic*, CNN, http://www.cnn.com/2017/04/07/health/flu-pandemic-sanjay-gupta/index.html [https://perma.cc/4C6T-ZJXL] (last updated Nov. 7, 2018, 10:57 AM)).

The way individuals viewed the COVID-19 pandemic and how they responded to its risks was largely driven by polarization attributable to partisan politics. As noted in one of the first studies examining the role of politics in the COVID-19 pandemic,

> Deep partisan polarization created two pandemic realities in America: one where the pandemic was taken seriously and one where the pandemic was an inconvenience. For many Americans the pandemic meant washing hands, wearing masks, avoiding contact with loved ones, canceling travel, and waiting for a safe vaccine or a proven treatment. For others the pandemic was overblown, mostly a problem for the old and infirm similar to the seasonal flu and certainly not a virus that would require major changes to how Americans lived. Many among this group were skeptical of science and vulnerable to misinformation about the virus and vaccines. The consequences have been tragic, as those who ignore public health guidance have become particularly vulnerable to falling victim to the coronavirus themselves, thus prolonging the pandemic.[198]

Moving forward, there must be some recognition of the role that political polarization played in the disastrous public health response of the United States during the COVID-19 pandemic and a willingness of governmental entities and individuals alike to meet in the center and work collaboratively to address future risks to public health. The how-to involved in reducing that polarization or even eliminating it goes beyond the reach and scope of this article. However, the federal government cannot effectively enact and enforce a quarantine strategy in the future, without the cooperation of State and local authorities and the willingness of individuals to discuss health independent of partisan politics.

Finally, any federal quarantine policy must include monetary resources and provisions for individuals as well as the affected community during the period in which the quarantine occurs.[199] Experts

198. Gadarian et al., *supra* note 131.

199. KAVYA SEKAR, CONG. RSCH. SERV., R47207, CENTERS FOR DISEASE CONTROL & PREVENTION FUNDING OVERVIEW 12–16 (2023). According to Centers for Disease Control and Prevention Funding Overview, Congressional Research Service, with the fiscal year 2023, President Biden proposed appropriations to the CDC under the Consolidated Appropriations included a specific line item of $28 billion for new mandatory pandemic preparedness funding, available over 5 years. Despite the fact that the country was still recovering from the COVID-19 pandemic, Congress rejected that appropriation in its entirety and the overall enacted core public health program appropriation made to the CDC was $1.49 billion, representing only a 9.3% increase in funding from 2022 to 2023. "For FY2024, President Biden's budget proposes $6.1 billion in public health preparedness funding as a transfer to CDC from $20 billion total appropriated to the Public Health and Social Services

agree that because financial concerns often lead Americans to avoid cooperating with public health recommendations, compensation programs are critical to effective infectious disease prevention.[200] Further, providing people with resources they need to remain comfortable and survive during the period of quarantine may encourage voluntary cooperation with public health mandates and decrease the need for enforcement.

CONCLUSION

Public health law generally accepts that "it is appropriate for *any* government, even a state that possesses a police power, to compel an individual to undertake an affirmative action to promote the greater good."[201] Looking toward the next pandemic or public health emergency, the United States, in collaboration with every state, must be prepared to utilize its federal quarantine power as a part of its public health response to identify individuals or communities of individuals who present a risk of transmitting the virus in a manner consistent with constitutional due process. An effective and constitutional quarantine program should also include significant efforts to present reliable and transparent scientific data supporting public health mandates like quarantine, the provision of resources to support and manage individuals during the period of quarantine, and collaboration with States and local authorities to aid in enforcement and management of quarantine protocols and locations. Additionally, critical to the success of instituting a public health response to the next pandemic is acknowledging the damage partisan politics has done to our ability to effectively navigate and resolve a public health crisis.

The next pandemic or public health crisis is "all but inevitable" and an "immediate, nationwide program of contact tracing and mandatory quarantine for infected people" would allow the country to avoid the catastrophic death toll suffered during the COVID-19 pandemic.[202]

Emergency Fund, to be available for five years. Unlike in the FY2023 proposal, the FY2024 proposed public health preparedness funding is presented as a non-add, and therefore not included within the FY2024 total program level for CDC. The CDC core public health program level in addition to proposed new mandatory public health preparedness funding totals to $17.767 billion."

200. Benjamin A. Barsky, *Addressing the Constitutionality of Federal Quarantine Rules*, REGULATORY REV. (Apr. 16, 2019), https://www.theregreview.org/2019/04/16/barsky-constitutionality-federal-quarantine-rules/ [https://perma.cc/8L3F-JBU4] (citing Michael L. Ulrich and Wendy A. Mariner).

201. Parmet, *supra* note 161, at 403.

202. Wehle, *supra* note 124.