Swine Flu and U.S. Border Control

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Public health authorities employ strategies of isolation and quarantine to protect the public from exposure to individuals potentially carrying infectious diseases. Although the terms isolation and quarantine are sometimes used interchangeably, public health authorities increasing distinguish between the strategies, with isolation referring to the "separation of persons who have a specific infectious illness from those who are healthy and the restriction of their movement to stop the spread of that illness."[1]

For example, hospitals isolate patients with tuberculosis from other patients. In contrast, quarantine "refers to the separation and restriction of movement of persons who, while not yet ill, have been exposed to an infectious agent and therefore may become infectious."[2] Both strategies are intended to stop the spread of infectious disease, and both strategies may be employed voluntarily or mandated through legal authority.[3]

By executive order pursuant to statutory authority set forth in 42 U.S.C. 264(b), the President has established a list of communicable diseases for which federal isolation and quarantine are authorized.[4] In April 2005, then-President George Bush added "[i]nfluenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic" to the list. [5] The list already included cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, and severe acute respiratory syndrome (SARS).[6] According to early reports, the current outbreak of swine flu clearly meets the statutory influenza definition. The virus "has components of classic avian, human and swine flu viruses."[7] The outbreak which began in Mexico City has since spread to the U.S., Canada, Spain, and potentially to New Zealand, Britain, France, Italy and Israel.[8]

"While rarely used, detention of arriving individuals, including US citizens, is authorized to prevent the entry of [the above specified] communicable diseases into the United States."[9] The Secretary of the Department of Health and Human Services has statutory responsibility (delegated to the Centers for Disease Control and Prevention) for "preventing the introduction, transmission, and spread of communicable diseases from

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[1] Centers for Disease Control and Prevention, *Fact Sheet: Legal Authorities for Isolation and Quarantine*, (Jan. 2006), http://www.cdc.gov/Ncidod/Dq/sars_facts/isolationquarantine.pdf.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] George W. Bush, Executive Order 13375, *Amendment to Executive Order 13295 Relating to Certain Influenza Viruses and Quarantinable Communicable Diseases* (April 1, 2005), *available at* http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/3CFR13375.pdf.
[6] CDC, *Fact Sheet*, *supra*.
[7] Catherine Bremer, *Mexico Swine Flu Spreads to U.S., Europe*, REUTERS (Apr. 27, 2009), *available at* http://news.yahoo.com/s/nm/20090427/ts_nm/us_flu_63.
[8] *Id*.
[9] Joseph Barbera and Anthony Macintyre, et. al., *Large-Scale Quarantine Following Biological Terrorism in the United States*, 286 JAMA 2711, 2713 (Dec. 5, 2001).

foreign countries into the United States"[10] The CDC operates "Public Health Quarantine Stations" at major international airports which also have responsibility for ports within assigned geographic areas.[11]

In areas where CDC personnel are not available, Department of Homeland Security (DHS) personnel "are trained to recognize travelers with potential illness of public health significance."[12] The CDC advises DHS personnel to observe arriving passengers for signs and symptoms of illness including a fever which may be evidenced by a flushed complexion, shivering or profuse sweating. For purposes of federal quarantine regulations, a person is considered ill if the person has a temperature of 100 degrees Fahrenheit or greater (which has persisted for at least 2 days) or which is accompanied by rash, jaundice, or glandular swelling.[13] A person suffering from diarrhea is also considered "ill" under the regulations.[14] Even where passengers do not exhibit the above signs of illness the CDC may provide additional instructions to DHS to examine the itinerary of arriving passengers "since specific itineraries may be associated with a need for appropriate preventive measures."[15]

The CDC may release or conditionally release a person who is ill, or require the person to undergo a medical examination.[16] The CDC has regulatory authority to "isolate, quarantine or place. . . under surveillance" any arriving person whenever the CDC "has reason to believe that [such] person is infected with or has been exposed to any of the communicable diseases listed in an Executive Order."[17] It may nonetheless be difficult to identify those passengers who may have been exposed to swine flu. Even passengers with a fever may not exhibit visual manifestations and some passengers may not be truthful if they realize the "wrong answer" to a question could result in their isolation.

The CDC did not compel the isolation of anyone during the 2003 SARS outbreak, and the most recent legal decision involving involuntary isolation of a passenger (who was suspected of having smallpox) arriving into the U.S. occurred in 1963.[18] The CDC reports that it routinely uses its authority to monitor passengers arriving in the U.S. for communicable diseases, including the temporary detention of arriving aircraft so that the crew and passengers may be interviewed for health reasons. [19]

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http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

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[10] U.S. Department of Health and Human Services Public Health Service, Centers for Disease Control and Prevention, National Center for Infectious Diseases, Division of Global Migration and Quarantine, *A Guide for Federal Inspectors* (July 2007), http://www.cdc.gov/NCIDOD/dq/pdf/hguide.pdf.
[11] Id. See also 42 U.S.C. 264, 42 CFR Parts 70 and 71 and CDC, *Questions and Answers: Legal Authorities for Isolation and Quarantine*, http://www.cdc.gov/Ncidod/Dq/sars_facts/quarantineqa.pdf.
[12] *See* Joseph Barbera and Anthony Macintyre *supra* at 2713.
[13] CDC, *A Guide for Federal Inspectors*, *supra*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] 42 CFR § 71.32.
[18] CDC, *Legal Authorities for Isolation and Quarantine, supra.*
[19] *Id*.