Submitted by Electronic Mail

March 1, 2006

Centers for Disease Control and Prevention
Division of Global Migration and Quarantine
1600 Clifton Road NE
Atlanta, GA 30333

Re: RIN 0920-AA03

Attention:

The American Civil Liberties Union hereby comments on and formally opposes the Center for Disease Controls' proposed rule establishing new rules for quarantining travelers. The proposed rule is outlined at 70 Fed. Reg. 71892-71948, "Control of Communicable Diseases," RIN 0920-AA03.

The threat of bio-terrorism or a pandemic caused by the emergence of a new is of serious concern to each and every one of us. No one disputes that the government is responsible for responding to threats that could have serious and deadly consequences. However even during times of crisis governments cannot discard their commitment to core values such as civil liberties.

Emergency authority must not go unchecked. Public health authorities make mistakes. And, these mistakes could have serious consequences for individuals' freedom, privacy, and equality. For example, there is a history of the discriminatory use of quarantine against particular groups of people based on race and national origin.[1]

Our laws, as well as are medicine need to live in the 21st Century. We agree with the CDC and policymakers like the drafters of the model Emergency Public Health

[1] For example according to Joan B. Trauner, "The Chinese as Medical Scapegoats in San Francisco, 1870-1905," *California History*, Vol. LVII, No. 1 (Spring 1978):

> San Francisco's Chinatown was quarantined because the body of a Chinese laborer was found, and it was suspected that he had died of bubonic plague. While the cause of death was still undetermined, a cordon was placed around Chinatown, and no Chinese American was allowed to leave the area bounded by California, Kearny, Broadway, and Stockton streets. This restricted the freedom of movement of people, some of whom were American citizens. It caused them many hardships, for they had difficulty in obtaining goods and services from people outside Chinatown. There was a shortage of food, and prices increased sharply. Chinese American businessmen faced a loss of income, and workers a loss of wages. Finally, after three and a half months, it was found that there were no cases of bubonic plague within Chinatown. This lengthy quarantine of Chinatown was motivated more by racist images of Chinese as carriers of disease than by actual evidence of the presence of bubonic plague.

Legislation that the law must be modernized in the face of today's threats and that the law should be clear about the powers and the limits of the government in times of crisis. We cannot afford to go back to a time before the legal system recognized basic protections for fairness; before public health strategies were rooted in voluntary compliance; and before the information age dictated the need for privacy protections of individuals' personal information.

We must include basic checks and balances when granting extraordinary government powers. Before such power is granted, the public must insist upon provision of adequate due process procedures for quarantine and other emergency authorities to prevent deprivations of rights, and limit forced treatment and vaccination. Governments should take the most extreme measures – such as quarantine – only as a matter of last resort and with adequate review by independent judicial authority.

Coercive public health strategies should be limited. These measures should only be taken when no other less restrictive or coercive measure is available and public health should emphasizing voluntary compliance. Historically, mass quarantines of healthy people who may have been exposed to a pathogen have never worked to control a pandemic. They have all too often been premised on discrimination against classes of people (like immigrants or Asians) who are seen as "diseased" and dangerous.

Force can and frequently does backfire. Even in extremes like the anthrax attacks, people seek out treatment. Sending in soldiers or police to quarantine large numbers of people will most likely create panic, and cause people to flee (and spread disease), as it did in China where a rumor during the SARS epidemic that Beijing would be quarantined led to 250,000 people fleeing the city that night.

The real public health challenge will be shortages of health care personnel, hospital beds, and medicine. Plans to militarize quarantine miss the point in a pandemic. The enemy is not sick or exposed Americans -- it is the virus itself. And effective action against any flu virus demands its early identification, and the quick development, manufacture, and distribution of a vaccine and medical treatments.

We believe that these basic principals should guide all of the CDC's policies toward quarantine. Two areas demand specific comment.

Provisional Quarantine

We believe that the regulation regarding provisional quarantine violates the Fourth and Fifth Amendments to the United States Constitution for the reasons enumerated in comments by the New England Coalition for Law and Public Health. We endorse this constitutional analysis and believe that the 'Legal Authority' section of the proposed rulemaking substantially misinterprets the relevant legal precedents in the area and would violate an individual's right to privacy and due process.

Specifically, current regulations authorize travel restrictions (§70.5) and quarantine (§70.6) only for a person "in the communicable period of cholera [which is not communicable], plague, smallpox, typhus or yellow fever, or who, having been exposed to any such disease, is in the incubation period thereof" or any disease listed in the Executive Order. Current regulations contain no explanations of how to quarantine.

The proposed regulations call for a new concept called "provisional quarantine," which is actually just involuntary detention for up to three business days—without probable cause, a warrant, or a hearing. The purpose of such detention appears to be to allow the CDC time to figure out whether a person actually has a disease and could be lawfully subjected to quarantine. Thus, the provisional quarantine provisions appear to be simply avoidance of meeting constitutional standards for the civil commitment of a person with a contagious disease who is likely to transmit that disease to other people.

This conclusion is supported by the text of the legal explanation which states:

> "A provisional quarantine order is likely to be premised on the need to investigate based on reasonable suspicion of exposure or infection, whereas a quarantine order is more likely to be premised on a medical determination that the individual actually has one of the quarantinable diseases."

There is no reference to any standard of dangerousness, i.e., that the person is likely to transmit the disease to others unless forcibly detained. The legal analysis then argues that:

> "Under 28 U.S.C. § 2241, an opportunity for judicial review of the agency's decision exists via the filing of a petition for a writ of habeas corpus. This judicial review mechanism affords individuals under quarantine with the full panoply of due process rights typical of a court hearing."

This statement of rights is meaningless. The legal analysis concedes the time needed for a hearing would use up the provisional three days, so the full panoply of rights are rendered irrelevant here. A provisional quarantine would result in a certain compulsory detention without evidence of contagious disease for at least three days and perhaps five or six if the detention occurred over a weekend or holiday.

Another troubling provision is that the proposed regulations authorize the CDC to impose this "provisional quarantine," which is actual quarantine (or more correctly, compulsory detention), not merely on someone with a dangerous contagious disease, but on anyone who might possibly have the disease. This decision appears standard-less. How is this decided? The proposed regulations (§§70.14, 70.15) authorize the involuntary quarantine of any person in the, "qualifying stage of a quarantinable disease" and either (i) in or about to be in interstate travel or (ii) a probable source of infection to others in interstate travel." Qualifying stage is defined as follows:

> "(i) A communicable stage of the disease; or

> "(ii) A precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other persons.

Thus, anyone who is returning from a country that has reported cases of yellow fever or SARS, for example, might qualify.

In effect, this definition changes the concept of "communicable disease" to the possibility that someone has a disease that is not yet communicable. "Precommunicable is not defined. This definition makes little sense. How will policymakers know whether a disease is likely to create an emergency? If the concern is a known disease, like smallpox, the regulations already permit action and there is no need for new regulations. If the concern is really a new disease about which little is known, like a new virulent influenza, then it will be impossible to know whether such a flu is likely to cause an emergency. Therefore, either policy- and decision-makers can do nothing or they take action against everyone with a cold or flu.

Ultimately the legal analysis offers a telling analogy that compares people with contagious diseases to drug smugglers ("alimentary canal" smugglers)(who are governed by other law in any event). However, ill people are not criminals and in fact it would not be acceptable to hold smugglers for three businesses days without any due process. The ill certainly should not be subject to a less protective standard.

Surveillance of Travelers

Under the proposed regulations the CDC and the airlines will collection massive amounts of personal information about every traveler and their travel habits. Travelers will have to share with airlines, passenger reservation systems and the government the following:

- First, last and middle names, in addition to suffixes;
- Current home address, including street, apartment number, city, state/province and ZIP code;
- Mobile, home or pager phone numbers;
- E-mail address;
- Passport or travel document, including the issuing country or organization;
- Traveling companions or group;
- Flight information, including date, airline, flight number and return flight details; and
- Name, address and phone number of an emergency contact.

The same rules would also apply to passengers on international cruise lines and international ferry companies at U.S. ports. All of this information would be collected by airlines and travel agents and then shared with the CDC at its request. Passengers would have only limited assurances as to how this information would be used by the government and especially by private third parties. In short, this proposal constitutes the unregulated surveillance of more than 600 million U.S. airline passengers a year traveling

on more than seven million flights through 67 hub airports.

This massive collection of personal information vastly exceeds both the quantity of information the CDC currently collects and that which the Transportation Security Administration has proposed they collect under the proposed "Secure Flight" passenger pre-screening system. This system, and its predecessor CAPPS II, has been severely criticized by Congress, privacy advocates and the public and is still under development. However, it is unlikely that TSA intends to expand Secure Flight's information collection provisions and may in fact reduce them. The CDC's information collection provisions have the potential to be much worse.

Anyone with access to this data will not only know where you live they will also have a list of some of your closest friends, family and business associates. Telemarketers, spammers and corporations could obtain your home address, most useful phone number and e-mail address if they are permitted to access the data collected. This information is a marketer's dream. Worse, over time this information will create a detailed travel dossier which allows private industry and possibly the government to track your movements.

The proposed limitations on the use of this information are inadequate and in at least one case actively misleading. In spite of the declaration in the summary for the proposed regulations, there are no restrictions on how domestic airlines and other third parties can uses this information (use limitations are solely for <u>international</u> flights). While the CDC is required to destroy its records after a limited time, this is scant comfort because the government can easily retrieve the information later from 3rd parties using a variety of legal instruments.

Additionally, collection of this information will be expensive – a cost that will ultimately be borne by the consumer. The regulations estimate the cost of this data collection to the airlines – the majority of whom are currently in bankruptcy – at over $100 million. The government seldom underestimates such costs. Specifically the CDC estimated that it would cost the airline industry $108.2 million to collect and retain the passenger manifest data. It would cost global reservation systems $2.97 million under the preferred CDC POS plan and travel agents $50.8 million. While the CDC said in its rule that data collection can be streamlined by tapping into passenger data collected by DHS and TSA, this seems unlikely because those agencies collection different information from different sources and use it for the limited purpose of counterterrorism.

In summary, the CDC information collection program is a coercive data grab that will allow the unregulated data surveillance of hundreds of millions of Americans. Even the laudable purpose of preventing the outbreak of disease cannot justify the wholesale invasion of Americans' privacy.

Conclusion

For all the following reasons we oppose the CDC's proposed regulations regarding "Control of Communicable Diseases" and urge that they be withdrawn.

Sincerely,

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