

Problematic Application of Florida Administrative Law to Police Power Public Health Actions

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There has always been government, however distant and predatory. But in the long ago ages of Europe, when paintings and statuary all bore the same un-individualized face with the same blank expression, there was always Power. However they came into authority, the rulers keenly followed the precepts of Power, which for them was both a tool and the end purpose. The art of government was identical with the uses of Power.¹ Is it efficient to hunt down and punish one transgressor after another? Or is it prudent to make examples of offenders, to restrain and intimidate a coarse citizenry and its princes, to thereby prevent bad acts from ever occurring? Is it legal to protect the rest of society from bad actors by segregating them? How about protecting society by making people stay home for a few days if they've possibly been exposed to dangerous disease? Where would a society get this authority? From the police power, which pre-dated the first organized colonies in North America, which existed before the first "government" here.

What is Police Power?

What, exactly, is police power? A reading of police power decisions of the courts is confusing, and reading the commentators is worse. Many are expressing the values of their times, traveling on their credentials as lawyers and experts. But, according to Barros, the common thread among all commentators, from Burgess to Professor Freund to Judge Epstein is a political theory approach to examination of police power.² Burgess, for example, described the police power as "the dark continent of our jurisprudence."³ The theorists after him have given the term a theoretical meaning rather than a legal meaning.⁴ Fortunately, there is a handy alternative to the confusions of the political theorists: In 1847 the US Supreme Court defined the police powers of a state, saying they are neither more nor less than "the powers of government inherent in every sovereignty to the extent of its dominions," and whenever a state exercises those powers, it exercises "the power of sovereignty, the power to govern men and things within the limits of its dominion."⁵ This legal definition is much easier for practitioners to follow than the political theory definitions.

Justice Taney's definition binds us today. His definition has a sweeping feel to it, and includes, as examples, state adoption of a quarantine law, laws to punish offenses, or to establish courts of justice, or recording of instruments, or regulating commerce within its borders. This simplifies things from the outset.

¹ Nicolò Machiavelli, *The Prince* (1515), Ch. 9, Concerning A Civil Principality

² Police Power and the Takings Clause, Barros, 58 U.Mia.L.Rev. 471, 491-97.

³ *Id.* at 497.

⁴ *Id.* at 492.

⁵ The License Cases, 46 U.S. (5 How.) 504, 583 (1847), op. of Ch. J. Taney.

'What police power is' became a practical legal issue for the Florida Department of Health when after Hurricane Katrina the federal government shifted its focus slightly from Bio-terror preparedness to pandemic influenza preparedness.⁶ In the Bio-terror arena, Florida's experience with anthrax indicated a clear bifurcation between the law enforcement aspect and the public health aspect of handling the AMI Building and the people who worked there. Although the health department immediately posted a health closure order on the facility – a form of state quarantine order – the facility essentially was closed also to the health department as a crime scene under investigation. In essence, the law enforcement exercise of police power crime scene control delayed the health department exercise of police power health investigation and response. Both law enforcement and the health department were drawing from the same well of authority. Realistically, the health department was not injured because it already was fully engaged with testing and treatment of the workers and their families, and the casual contacts of the workers and their families. No one wanted to contract anthrax, and those directly and tangentially exposed were fully cooperative with the health department's heroic response to public concerns. In other words, there were no legal challenges to the health department actions.

Only a few years later, panflu planning, driven by requirements of the National Response Plan and the National Strategy for Pandemic Influenza,⁷ and awards of federal planning grant dollars, caused the Florida Department of Health to engage many sectors of society, especially non-governmental sectors, in an attempt to capitalize on our practical emergency response knowledge gained through hurricane seasons, and leverage that knowledge to respond to a natural health calamity that theoretically put everyone at serious risk.⁸

Mandatory Quarantine

The moment came when panflu planning tackled mandatory quarantine.⁹ The term "quarantine" now goes, in federal parlance, under the innocuous-sounding category of "non-pharmaceutical interventions."¹⁰ Prior to formal planning efforts, the Department had politely declined offers from various quarters to 'help' with quarantine planning. The legal office took the position that a decision to quarantine was a medical decision, "let's see what the doctors say." Through that simple technique, the legal office bought two years time for formal panflu planning efforts. As it turned out, in contrast to prevailing views of extravagant quarantine processes, mandatory quarantine had only a minimal role in the public health doctors' ideas of how to effectively protect the maximum number of people who might be exposed to the pathogen.¹¹ Although the planning group published its first pretty-good plan on the internet, the Department still fielded many wild statements from commenters; people demanded to know why the Department was going

⁶ White House Executive Order Amending EO 13295, Apr. 1, 2005;

<http://www.whitehouse.gov/news/releases/2005/04/20050401-6.html>

⁷ see generally, <http://www.pandemicflu.gov/plan/federal/index.html#implementation>

⁸ See generally, Panflu Plan, ver. 10.4 <http://www.doh.state.fl.us/demo/PandFluPlanGuide.pdf>, and CDC Interim pre-pandemic planning guidance,

http://www.pandemicflu.gov/plan/community/community_mitigation.pdf.

⁹ 381.0011(6), F.S.

¹⁰ CDC Influenza Pandemic OPLAN, Jan 2008, Annex F Community Intervention (non-pharmaceutical interventions), <http://www.cdc.gov/flu/pandemic/OPLAN/Annex-F.pdf>

¹¹ See, Panflu plan ver 10.4, Rapid Response & Containment (discussion of quarantine in context of medical response), http://www.doh.state.fl.us/rw_Bulletins/flpanfluv104final.pdf.

to shut down the Tri-Rail System in the West Palm Beach-to-Miami corridor (it wasn't; it said so on page 2 of the plan – no closure of transport systems or highways) and why the Department was going to quarantine entire communities (it wasn't; same page – no mass quarantines).¹²

Department's legal office viewed quarantine authority as an exercise of police power, even admitting that there are administrative characteristics to the process of ordering quarantine, such as government forms. Florida's Administrative Procedures Act,¹³ defines forms as a species of rule,¹⁴ requiring that forms must undergo review by the Legislature's Joint Administrative Procedures Committee, which has a forms committee. The Department didn't do that. The Department maintains that proposed model quarantine forms are an administrative convenience for internal use of the Department and county health departments, and are not a vehicle for regulating the public – at least not yet – and if panflu manifests, the Department can adopt forms via emergency rule.¹⁵

The Florida Bar's Health Law Section published a lengthy chapter in its Health Law Handbook about the Department's general health authority including mandatory quarantine authority.¹⁶ That publication drew no comment although there was vigorous discussion when the paper was presented at a meeting of the section. And this writer posted a White Paper on the Florida Law of Human Quarantine, January 2007, along with a companion FAQ for Florida judges, lawyers and law enforcement, on several internet sites. There was little response to those documents although there was a steady stream of questions indicating that during a quarantine event the health department should provide for all needs of the citizenry. There are blanket assumptions that health departments should compensate citizens for lost wages (unemployment benefits), for food, for medications, for legal representation to challenge the health order, for transportation, for alternate residence sites for family members when another member has been quarantined. There was at least tacit acknowledgement that Department's legal office staff attorneys and county health department attorneys are ethically prohibited from simultaneously representing both the Department and a quarantined citizen,¹⁷ although the participation of private counsel would be welcomed by the government's counsel and probably by any judicial officer hearing the challenge.

But when panflu became the danger of the moment, discussion quickly moved to the very authority of the Department to issue ex parte health orders – orders absent a hearing. And, immediately connected to the same, the topic of challenges to quarantine orders. But what would be the point of suspending quarantine orders on Due Process grounds? Is there a workable hearing system we could apply to a planeload of passengers, unfortunate enough to have shared a trip with a person seriously ill with a dangerous communicable disease, now waiting in an airport terminal concourse? Would review after the order issues be through an administrative action under APA procedures

¹² Panflu plan, ver 10.4, intro., http://www.doh.state.fl.us/rw_Bulletins/flpanfluv104final.pdf

¹³ Ch. 120, F.S., http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=Ch0120/titl0120.htm&StatuteYear=2007&Title=%2D%3E2007%2D%3EChapter%20120

¹⁴ Sec. 120.52(15), F.S.

¹⁵ Sec. 120.54(4), F.S.

¹⁶ The Florida Bar, *Florida Practitioner's Health Law Handbook 2007*, Ch.14, Public Health - Legal Basics, Rodney Johnson, Esq., and Richard McNelis, Esq.

¹⁷ Rule 4-1.7(a)(1), RuleRegTheFlaBar, <http://www.floridabar.org/divexe/rrtfb.nsf/FV/2E30A65D3638C6B485257171004B3C67>

or a petition for writ of habeas corpus under the Florida Constitution?¹⁸ Ultimately, debate soon was framed by the Supreme Court of Florida, during the compilation of its Pandemic Influenza Benchguide, 2007 (the Bench Book).¹⁹ It's a common experience in the practice of law to read court assessments of important matters, but there were some genuine surprises for the Department of Health in the Bench Book.

Express Powers of the Health Department

Florida's statutory quarantine scheme is a classic, old-fashioned, sweeping public health general grant of broad power to respond to unspecified communicable diseases.²⁰ Enacted in 1991 and amended slightly nearly every year since, it gives the Department quarantine authority to basically tell people to go to places or not go,²¹ and to destroy domestic animals.²² The Department can order medical testing and medical treatment, including vaccination as part of quarantine.²³ Isolation orders are a subset of quarantine orders.²⁴ Only the Department of Health can restrict travel or trade within the state for public health reasons, no other government agency can.²⁵

Consistent with the probable understanding of the Florida Legislature that quarantine is a police power exercise, it did not require the official issuing the order to identify himself/herself. There is no express legal requirement, for example, that the order bear a signature at all, in the manner of a court order. The County Health Department Director (M.D.) or Administrator (layperson) may issue quarantine orders, or their delegates.²⁶ The rule actually says "give public notice of quarantine," obliquely acknowledging that this is an exercise of state police power. For that reason, the name of the official giving such notice is irrelevant because the state has ordered quarantine. The health department has no law enforcement-type jurisdiction, but can enforce its orders simply by requesting assistance from other agencies of government. The statutory enforcement vehicle says, "It shall be the duty of every state and county attorney, sheriff, police officer, and other appropriate city and county officials upon request to assist the department or any of its agents in enforcing the state health laws and the rules."²⁷ And, "[a]ny person who violates any of the provisions of this chapter, any quarantine, or any rule adopted by the department under the provisions of this

¹⁸ Sec. 120.57, F.S.,
http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0120/SEC57.HTM&Title=->2007->Ch0120->Section%2057#0120.57; Art. I, sec. 13, Fla.Const.,

<http://www.leg.state.fl.us/Statutes/index.cfm?Mode=Constitution&Submenu=3&Tab=statutes&CFID=40126186&CFTOKEN=22873041>.

¹⁹ FlaSct 2007 PANDEMIC INFLUENZA BENCHGUIDE,
http://www.flcourts.org/gen_public/courted/bin/pandemic_benchguide.pdf

²⁰ Sec. 381.0011(6), F.S.
http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0381/SEC0011.HTM&Title=->2007->Ch0381->Section%200011#0381.0011.

²¹ Sec. 381.0011(6)(a)2, F.S. (movement of persons, and animals)

²² Sec. 381.0011(6)(a)6, F.S. (testing or destruction)

²³ Sec. 381.0011(6)(a)3, F.S.; Rule 64D-3.007(2), F.A.C.

²⁴ Rule 64D-3.007(2), F.A.C.

²⁵ Sec. 381.0011(6)(b), F.S.

²⁶ Rule 64D-3.005(1), F.A.C.

²⁷ Sec. 381.0012(5), F.S.

chapter is guilty of a misdemeanor of the second degree.²⁸ Violation of a quarantine order is a second degree misdemeanor, with a maximum penalty of 60 days incarceration.²⁹

People today are accustomed to orders that have a fixed lifespan, and less comfortable with orders that remain in force until a problem is resolved or cured. Quarantine in theory could last a long time, as in situations where disease lingers in a community. “The quarantine shall remain in effect until the situation no longer represents a public health hazard as determined by the county health department director or administrator or their designated representative.”³⁰ Even where a health rule seems to require a termination date, it’s just an option: “Quarantine orders shall be issued by the State Health Officer, or the county health department director or administrator, or their designee in writing; include an expiration date or specify condition(s) for ending of quarantine.”³¹

Divining Intent of the Legislature

This is the kind of power that makes people uneasy if they think about it, but it didn’t slow our grandfathers, who grew up in the age before antibiotics, before people thought the war against infectious disease was won. Those people, in 1955, enacted a health statute, still in effect, that states, “The authority, action, and proceedings of the department in enforcing the rules adopted by it under the provisions of this chapter shall be regarded as judicial in nature and treated as prima facie just and legal.”³² This language was puzzling to the Department until other research brought to light a 1918 opinion of the Supreme Court of Washington. The statute under the Washington court’s view was sec. 5546, Rem.Code. (1903) which said, “In the case of the question arising as to whether or not any person is affected or is sick with a dangerous, contagious or infectious disease . . . the opinion of the executive officer of the state board of health, or any member or physician he may appoint to examine such case, shall be final.” The ultimate question presented to the Washington Supreme Court was whether the legislature had the power to create a board of health and make its rulings final and conclusive, such as when called into question in a court of general jurisdiction. The court stated, “The power to detain one who is suspected of having a contagious disease rests in the police power . . . [which is] to the public what the law of necessity is to the individual.”³³

Dealing primarily with challenges to the factual basis for health detention in a habeas corpus proceeding, the court declined to review the fact determinations of the board of health medical officers, saying to do so “would make the exercise of the police power a judicial function.”³⁴ The court asked, if the record in the case were framed as a test for credit, with questions, answers, and credit for each question, “who would determine whether or not a particular answer was sufficient? Not a jury, for they are not competent

²⁸ Sec. 381.0025(1), F.S.

²⁹ Sec. 381.0025(1); 775.082(4)(b), F.S.

³⁰ Rules 64D-3.037(3)-(4); and 64D-3.038(3), F.A.C.

³¹ Rule 64D-3.038(1), F.A.C. (emphasis added).

³² Sec. 381.0015, F.S.

³³ State ex rel. McBride v. Superior Court for King County, 103 Wash. 409 at 417, 174 P. 973 (Wa. 1918).

³⁴ Id. at 425.

to pass judgment on health topics. Not a judge, for this qualifications do not embrace or even require expert scientific knowledge of medical matters. Not expert witnesses, because the state already had designated and retained those very experts.³⁵ The court ultimately held that the legislature had the power in public health matters to make a medically determined fact final and binding on the public and the courts.³⁶ It said a statutory provision “that the finding of the health officers shall be final is a sufficient evidence of legislative intent to leave the whole matter to the health officers without restraint on the part of the courts.”³⁷

In light of the Washington explanation, it seems the 1955 Florida Legislature intended that medical judgments should be made by the doctors of the health department, and not by courts. The statute, then, is consistent with the health department’s current approach, viewing decision to quarantine as a medical decision. And it further appears the Florida Legislature intended such a medical decision to possess at least prima facie validity. The statute stops short of saying the medical decision is actually judicial.

There is a companion statute dating from the same Florida legislative session, from the same bill, apparently with similar rationale, which says, “The rules adopted by the department under the provisions of this chapter shall, as to matters of public health, supersede all rules enacted by other state departments, boards or commissions, or ordinances and regulations enacted by municipalities,” with some exceptions.³⁸ This statutory language seems to be an affirmation of the trust the legislature has in the medical practitioners it employs, and that all agencies of government should defer to that expertise. Both these statutes pre-date Florida’s general quarantine authority statute by many years (from 1955 to 1991).

Emergency Management

Consequently, in light of all that, it is probably unsurprising that there is no role in the statutory scheme for the courts in the designation, preparation, text, service, or enforcement of health department quarantine orders. This is consistent with the Legislature’s structure of emergency management generally.³⁹ As to mandatory quarantines, the function of the Florida courts is review following governmental action; there is no participatory role. Florida’s governor has authority to issue executive orders with a renewable 60-day lifespan, proclamations, and rules, and to amend or rescind them. The governor’s orders have “the force and effect of law.”⁴⁰ Those orders typically correspond to requirements of the federal Stafford Act.⁴¹ He/she can suspend any statute or state program that impedes response to an emergency.⁴² The Florida governor in respect to his Ch. 252 powers is subject to Florida’s Administrative

³⁵ *Id.* at 426-427.

³⁶ *Id.* at 429.

³⁷ *State ex rel. McBride v. Superior Court for King County*, 103 Wash. 409, 174 P. 973 (Wa. 1918), citing with approval *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 P. 818.

³⁸ Sec. 381.0014, F.S.

³⁹ See Ch. 252, F.S.

http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=Ch0252/part01.htm&StatuteYear=2007&Title=%2D%3E2007%2D%3EChapter%20252%2D%3EPart%20I.

⁴⁰ Sec. 252.36(1)(b), F.S.

⁴¹ P.L. 93-88, as amended.

⁴² Sec. 252.36(5)(a), F.S.

Procedures Act⁴³ -- the Florida Legislature has exempted only itself and the Florida courts from the Administrative Procedures Act⁴⁴ -- but no one suggests that during an emergency the governor's orders should be reviewed by the administrative courts.

Nature of Orders

Pivotal to the entire business of orders is the individualized nature of the order and service on a person. The governor's executive and supplemental orders of emergency are issued to the entire state of Florida, not to any individual person. Quarantine orders, by contrast, are purposely crafted to inform an identified person exactly how to follow health department directions. But the governor's orders are immediately enforceable by law enforcement officers. Indeed, the emergency management statute says, "The law enforcement authorities of the state and the political subdivisions thereof shall enforce" those emergency orders and rules issued under Ch. 252, F.S.⁴⁵ Violation of such orders and rules is, once again, a second degree misdemeanor.⁴⁶ Standard provisions of emergency orders allow the governor to control ingress and egress of an emergency area, and control movement of persons therein, and occupancy of premises within the emergency area. The governor may also control the conduct of civilians, and movement (and cessation of movement) of pedestrian and vehicular traffic.⁴⁷ These controls are restrictions of citizens' liberty, yet the governor is under no duty in promulgation of his emergency orders to advise citizens of their legal rights to challenge these measures, nor to assure them he has taken steps to ensure their Due Process rights and access to justice. On the contrary, the emergency management statute states that those measures shall be liberally construed so as to effect their purposes.⁴⁸ In actual practice, Florida's governor delegates sweeping authority to the Director of the Division of Emergency Management and other persons "as he may deem prudent."⁴⁹

Curfew and Rabies Control

Although it is a common thing for people to express questions, reservations, and objections about quarantine, evidently all people intrinsically understand curfew. Interestingly, there is scarcely a mention of curfew in the Florida Statutes, yet the parallels with quarantine are obvious. Both are obvious liberty restrictions, often requiring persons to remain at home or at least off the public streets; both often involve area closures and prohibit public assembly; both are associated with emergency situations, and invoked locally. The specific legal elements are "substantial defiance of, or resistance to, a lawful exercise of public authority and reasonable belief in a danger of general public disorder."⁵⁰ On those elements, a sheriff or local official may declare a state of emergency within the jurisdiction. If the situation qualifies as a "riotous assembly," officials "shall in the name of the state command all the persons so assembled immediately and peaceably to disperse."⁵¹ Whenever such a declaration

⁴³ Sec. 120.52(1)(a), F.S.

⁴⁴ Sec. 120.50, F.S.

⁴⁵ Sec. 252.47, F.S.

⁴⁶ Sec. 252.50, F.S.

⁴⁷ Sec. 252.36(5)(g) and (k), F.S.

⁴⁸ Sec. 252.52, F.S.

⁴⁹ Sec. 252.36(1)(a), F.S.

⁵⁰ Sec. 870.043, F.S.

⁵¹ Sec. 870.04, F.S.

issues, the official may establish curfew.⁵² Florida citizens commonly encounter curfew in storm and hurricane-ravaged areas, and other emergency settings. Violation of curfew is a first degree misdemeanor, punishable by maximum of one year incarceration.⁵³

As in the case of the governor's emergency orders, the local emergency orders are public notice orders not served on individual persons yet fully and immediately enforceable. There are no reported cases of judicial review of emergency curfew orders, nor any judicial opinions requiring officials to advise the public of Due Process rights or the procedures to challenge the curfew.

People also seem to accept governmental action in the form of rabies control, whether that action is aimed at pets, domestic animals or wild animals. Being informed of a bite or exposure to a rabid animal, a Florida CHD Director or Administrator is required to capture, confine, or seized suspected rabid animals and isolate and quarantine or humanely euthanize them.⁵⁴ When information indicates epizootic⁵⁵ rabies, the health officer is required to declare an area-wide quarantine⁵⁶ to protect public health and bring an end to the outbreak. The health department procedures for controlling rabies outbreaks are set out in a guidebook, adopted by rule,⁵⁷ entitled Rabies Prevention and Control in Florida⁵⁸. Most Florida counties have adopted animal control ordinances⁵⁹ and work closely with the health department in rabies actions, which often include hearings before administrative boards composed of county animal control employees to determine whether animals should be euthanized, observed (quarantined) in a veterinary clinical setting, or otherwise handled. Those procedures have never been brought within the domain of Florida's APA, although those procedures determine property rights of the citizens. Animals, of course, are chattels and themselves possess no rights under our legal system, therefore have no Due Process rights, but their owners do, and areas closed under a rabies quarantine order of the health department are closed to humans just as they are closed to humans' animals.

Liberty Restriction by Quarantine

The least controversial thing in all the discussions about mandatory quarantine was the idea that it is another liberty restriction, inviting Constitutional issues of freedom of movement, right of free association, possibly impinging freedom of religion, almost surely restricting freedom of assembly, and so forth. The health department had powerful support for the notion of habeas corpus review in a decision of the Supreme Court of Florida, Varholy v. Sweat. In 1943 in the Jacksonville, Florida area, Pauline Varholy was confined to the county jail under a health department order, awaiting

⁵² Sec. 870.045(1), F.S.

⁵³ Sec. 870.048; 775.082, F.S.

⁵⁴ Rule 64D-3.013(2)(c), F.A.C.

⁵⁵ Epizootic (def.) Affecting a large number of animals at the same time within a particular region or geographic area. Used of a disease. American Heritage Dictionary.

<http://www.ask.com/web?q=define+epizootic&search=&qsrc=0&o=0&l=dir>

⁵⁶ Rule 64D-3.013(2)(d), F.A.C.

⁵⁷ Rule 64D-3.013(2)(c), F.A.C.

⁵⁸ http://www.doh.state.fl.us/disease_ctrl/epi/htopics/popups/rabies.htm

⁵⁹ See, e.g., Leon County animal control ordinance 05-02, http://www.leoncountyfl.gov/Animal/pdfs/Animal_Control_Ordinance2.pdf

transfer to a health department hospital. She petitioned the circuit (trial) court of Duval County for a Writ of Habeas Corpus, and, together with the Sheriff, health officials appeared in court and testified to facts indicating Ms. Varholy had venereal disease and the health department had a curative plan. The trial court denied the petition for writ, and Ms. Varholy appealed directly to the Supreme Court of Florida, protesting detention and excessive bail. The Supreme Court said:

Generally speaking, rules and regulations necessary to protect the public health are legislative questions, and appropriate methods intended and calculated to accomplish these ends will not be disturbed by the courts. All reasonable presumptions should be indulged in favor of the validity of the action of the Legislature and the duly constituted health authorities. But the constitutional guarantees of personal liberty and private property cannot be unreasonably and arbitrarily invaded. The courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the Legislature, or of the health authorities in the enactment of statutes or regulations, or the abuse or misuse by the Boards of Health or their officers and agents of such authority as may be lawfully vested in them by such statutes or regulations.

However, the preservation of the public health is one of the prime duties resting upon the sovereign power of the State. The health of the people has long been recognized as one of the greatest social and economic blessings. The enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exercise of the police power which is inherent in the State and which it cannot surrender. The Federal government also possesses similar powers with respect to subjects within its jurisdiction. The constitutional guarantees of life, liberty and property, of which a person cannot be deprived without due process of law do not limit the exercise of the police power of the State to preserve the public health so long as that power is reasonably and fairly exercised and not abused.

The legislative authority in this legitimate field of the police power, like as in other fields, is fenced about by constitutional limitations, and it cannot properly be exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health. It has been said that the test, when such regulations are called in question, is whether they have some actual and reasonable relation to the maintenance and promotion of the public health and welfare, and whether such is in fact the end sought to be attained. Not only must every reasonable presumption be indulged in favor of the validity of legislative action in this important field, but also in favor of the validity of the regulations and actions of the health authorities.⁶⁰

This is a long quotation, but the Varholy opinion teaches several important lessons, all germane today: Quarantine already has passed constitutional muster with the Supreme Court of Florida; the quarantine power is a legitimate exercise of the police power of the state; habeas is the proper remedy to challenge it; circuit court is the right place to bring the challenge; constitutional rights to liberty are not absolute and may have to bend to the police power in public health matters; the proper constitutional test is rational relationship; the courts generally will not entertain challenges to the discretion of public health officers; and because quarantine is not a criminal matter, bail is not available.

⁶⁰ Varholy v. Sweat, 153 Fla. 571; 15 So.2d 267; 1943 Fla. LEXIS 700 (1943).

Subsequent to the Varholy opinion, the Florida Supreme Court approved a Florida statute that allowed compulsory confinement of people with tuberculosis, and opined,

The health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance...That the preservation of the public health is one of the duties devolving upon the state as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health... The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be asserted in this any more than in any other connection.⁶¹

Legislative Override

The Florida Supreme Court in 1943 declared in Varholy “the courts have the right to inquire into any alleged unconstitutional exercise or abuse of the police powers of the Legislature or of the health authorities,” and in 1952 said the constitutional guarantees of Due Process and Equal Protection were not intended to limit the subjects of state police power actions. Shortly thereafter, the 1955 Florida Legislature adopted a statute saying the authority, action, and proceedings of the health department “shall be regarded as judicial in nature and treated as prima facie just and legal.”⁶² That statute may have been (and may be) a legislative override of the court’s power to review health department actions.

In the setting of administrative law, the Florida courts respected a 1999 legislative override regarding the scope of executive branch agency rulemaking authority. Until 1998, the legislative restriction on administrative agency rulemaking powers was codified at sec. 120.52(8), F.S., which stated,

An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.⁶³

The appellate court in St. Johns River Water Management District v. Consolidated Tomoka Land Co.⁶⁴ had ruled that the “class of powers and duties” of agencies formed the legal basis to support rule criteria adopted by the St. Johns River Water Management District. The Consolidated Tomoka decision was flatly rejected by the

⁶¹ Moore v. Draper, 57 So.2d 648 (Fla. 1952).

⁶² 381.0015, F.S.

⁶³ Sec. 120.52(8), F.S. (1998 Supp.) (emphasis added).

⁶⁴ St. Johns River Water Management District v. Consolidated Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998)

legislature in its next session, which amended section 120.52(8) to bar the “class of powers and duties” standard set out by the court. The amended language stated:

An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency’s class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.⁶⁵

Shortly thereafter, the same court in Southwest Florida Water Management District v. Save Manatee Club and South Shores Properties Partners, Ltd.⁶⁶ accepted the legislature’s statutory mandate and read sec. 120.52(8) narrowly, stating that rulemaking is a function “within the exclusive authority of the legislature.”⁶⁷ Nor have subsequent courts disturbed this override by the Florida Legislature of their earlier opinions.

The 1999 Florida Legislature offered no explanation for its change of wording in the amending legislation, and the members publicly denied any attempt to overrule a court, but their actions appear not to support those denials. From the above, we may conclude – at least in Florida – that legislative override of the judiciary is a reality we must include in our assessment of the meaning of statutes, even when no legislative intent is expressed in the enacting legislation.

Deference to Agency Expertise

In any event, the scope of judicial review of agency decisions remains a difficult and pivotal policy choice. Professor Edward Richards has observed, “If the courts review all agency decisions de novo, thus rehearing the experts and substituting their decisions for the agency, then the government will lose the value of agency expertise and flexibility.”⁶⁸ The business of setting the proper standard for judicial review is controversial because judicial deference to agency decisions prevents opponents of public actions from being able to contest these actions.⁶⁹ So what is the correct form of judicial review? Most commentators agree the seminal public health case is Jacobson v. Massachusetts,⁷⁰ a mandatory smallpox vaccination case from 1904. With language that some describe as ‘sweeping,’ the US Supreme Court pronounced that the price of civilized society was the surrender of some individual autonomy, that Jacobson was not entitled to rely on the protection provided by vaccination of his neighbors (no free ride on ‘herd immunity’), and that Jacobson could not challenge the legislative policy decision with evidence of risks inherent in the vaccine – no collateral attack on the legislative decision. In a later decision, the US Supreme Court restated its deference standard, saying,

⁶⁵ Sec. 120.52(8), F.S. (1999) (emphasis added).

⁶⁶ Southwest Florida Water Management District v. Save Manatee Club and South Shores Properties Partners, Ltd., 773 So. 2d 594 (Fla. 1st DCA 2000)

⁶⁷ 773 So. 2d at 598.

⁶⁸ Richards, Public Health Law as Administrative Law, <http://biotech.law.lsu.edu/map/Page8.html>.

⁶⁹ Id.

⁷⁰ Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretence. Within the field where men of reason may reasonably differ, the legislature must have its way.⁷¹

Implicit Extinction of Police Power?

While developing its Bench Book, the Florida Supreme Court's legal adviser took the position that enactment of Florida's APA subjected all existing executive branch powers to administrative status, reviewable by the central panel of professional administrative law judges of the Division of Administrative Hearings (DOAH).⁷² In other words, the administrative procedures act extinguished the police power. Presumably, this position was based on sec. 120.50, F.S. (legislature and courts exempted from Florida's administrative procedures act). No other legal authority was cited in support of the court's position.

The Court stated,

If an agency order were entered with no right to a hearing, either before or after the rendition of the order, it would be subject to summary reversal on appeal. The appellate court would not even have to reach the constitutional issue. Pursuant to section 120.68(7), Florida Statutes, the court shall remand a case to the agency for further proceedings... or set aside agency action... when it finds that:

- (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts; or
- (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57.⁷³

Where a state agency engaged in licensing finds an immediate serious danger to the public health, safety, or welfare it may order the emergency suspension, restriction, or limitation of a license, but only if the agency files a companion administrative complaint which will give the respondent licensee an opportunity for a hearing. Sec. 120.60(6), F.S. But that post-deprivation hearing provision exists under the APA only in a licensing setting. The Court quoted,

If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoined from the date rendered.⁷⁴

The Court observed,

Taken at face value, this provision makes no provision for any administrative hearing before or after an "immediate final order" and it would thus make any such order vulnerable to reversal on appeal, as mentioned above. Needless to

⁷¹ *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933).

⁷² <http://www.doah.state.fl.us/internet/>.

⁷³ FlaSct 2007 PANDEMIC INFLUENZA BENCHGUIDE, http://www.flcourts.org/gen_public/courted/bin/pandemic_benchguide.pdf

⁷⁴ Sec. 120.569(2)(n), F.S.

say, it could have a strongly adverse effect on the executive branch's efforts to control a pandemic if the appellate courts summarily vacated the executive branch's quarantine orders. The remedies suggested in this subdivision are not perfect procedural vehicles, and they have not been extensively tested on appeal, but they could serve to provide sufficient procedural due process to allow the system to function during a pandemic.⁷⁵

Even if the Florida Legislature intended to abandon its police power authority over public health matters, that abandonment would have to be express in law. Yet there is no supporting statement of legislative intention anywhere in Florida's Administrative Procedures Act, revisited many times since its enactment in 1974. It is preposterous to assume that the power defined by Justice Taney could be implicitly extinguished, if that were even possible, by the unintentional consequence of enactment of the APA. Exercise of sovereignty cannot be so casually cast aside.

Difficult Problems Surrounding Administrative Court Review

But review of quarantine orders through administrative law proceedings fails for several reasons. First, quarantined petitioners do not have standing to litigate in administrative courts because they cannot meet the 'substantial interests' prong of the standing test.⁷⁶ They cannot show an injury of a nature which the proceeding is designed to protect. Second, a quarantine controls behaviors to slow or stop the spread of disease, is designed to protect the health of the general public rather than protect the individual, and is not action similar to the health department's regulatory jurisdiction over licensing and discipline of licenseholders. Quarantine declarations, predicated on objective scientific criteria, are not agency action designed to protect an individual's liberty or property interests, but instead are crafted to protect the public health. Moreover, because quarantine time periods appear to last only days, there likely will be insufficient time for hearing disputed material facts before the quarantine expires or is modified. See below. Third, neither health department personnel sitting as hearing officers nor the DOAH administrative law judges possess jurisdiction to rule on constitutional issues⁷⁷ nor to entertain extraordinary writs. Therefore they have no authority to grant liberty to a detained person regardless of what the facts are.⁷⁸ Fourth, the health department has exclusive statutory authority among executive branch agencies to modify or lift its quarantines.⁷⁹

⁷⁵ FlaSCt 2007 PANDEMIC INFLUENZA BENCHGUIDE (Bench Book), pp 39-41

http://www.flcourts.org/gen_public/courted/bin/pandemic_benchguide.pdf

⁷⁶ Agrico Chemical Co. v. DER, 406 So.2d 478 (Fla. 2d DCA 1981), *rev. den.* 415 So.2d 1359, cited *supra* FN 25.

⁷⁷ Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695, 699 (Fla. 1978) *reh. den.* Sept. 11, 1978, *citing: Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1st DCA 1976). Shinholster, et al. v. Graham, 527 F.Supp. 1318, 1322 (N.D. Fla. 1981).

⁷⁸ *But see*, Florida Baker Act (mental health commitments), sec. 394.451-394.4789, F.S. Under the Baker act, the patient litigates through habeas while the institution litigates through an administrative path. The patient may question the cause and legality of detention ("placement") via habeas corpus at any time. Sec. 394.459(8)(a), F.S. After initial placement, the institution may petition in administrative court for continued commitment on a factual basis. Sec. 394.467(7)(b), F.S. The DOAH ALJ may recognize those facts and order continued commitment for up to 6 months. Sec. 394.467(7)(d), F.S.

⁷⁹ Sec. 381.0011(6)(a), F.S

Even if the Department ultimately was forced to defend its quarantine orders in the administrative courts, the timelines for those proceedings would work against speedy resolution. Upon receipt of a request for hearing, the Department is statutorily entitled to consider for 15 days before referring the case to the DOAH panel of administrative law judges.⁸⁰ And the Administrative Procedures Act itself requires a minimum of 14 days following a notice of hearing before the hearing may take place.⁸¹ Assuming an adverse outcome, the Department may take 15 days from receipt of the Proposed Recommended Order to file its exceptions (objections).⁸² Once those objections are ruled on, the agency head may take up to 90 days from the date of hearing to issue a Final Order.⁸³ Those time periods, to which the health department is entitled, total 119 days to litigate an objection to quarantine. Assuming a bad public health result and zero motion practice, the Department probably will have an additional 180 days to act on the appellate case. And the latest CDC guidance doesn't support involuntary personal quarantine, so perhaps the whole thing will prove moot.

Social Distancing Orders

No discussion of quarantine orders is complete without mention of that other variety of Non Pharmaceutical Intervention – the social distancing order. Because social distancing – keep your distance – exhorts the general public to avoid close contact with no punishment expressed for violation, and because the orders are not compulsory but advisory only, the current health department thinking assumes the orders are not enforceable at all, unless perhaps asserted by the governor or local officials in response to emergency declarations. The health department views social distancing orders as exercises of authority under its public health advisory power.⁸⁴

Summary

It has become something of a legal fad in Florida to insist upon identification of specific statutory authority in order to support executive agency action. This notion probably is traceable to the Florida experience with scope of agency authority and legislative override, described above. The influential language is in the Florida APA definition of “invalid exercise of delegated legislative authority”⁸⁵ and cautions agencies that their rulemaking authority is limited to “the specific powers and duties granted by the enabling statute.”⁸⁶ A US Supreme Court opinion is often cited in support of the same limitation.⁸⁷ But the insistence on specific statutory authority, while prudent and consoling, does not represent the scope of power possessed by state governments – it leaves out the police

⁸⁰ Sec. 120.569(2)(a), F.S.

⁸¹ Sec. 120.569(2)(b), F.S.

⁸² Sec. 120.57(1)(k), F.S.

⁸³ Sec. 120.569(2)(l), F.S.

⁸⁴ Sec. 381.00315(1)(a), F.S.

⁸⁵ Sec. 120.52(8), F.S.

⁸⁶ Sec. 120.52(8)(f), F.S.

⁸⁷ No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop; e.g., United States v. Article of Drug . . . Bacto-Unidisk, 394 U.S. 784, 800, 22 L. Ed. 2d 726, 89 S. Ct. 1410, 1440. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

power. The FDA could not expand its jurisdictional reach over the tobacco industry precisely because, as a federal government agency, it was a government of limited powers and could not go further than Congress and the federal courts would allow. Even so, the state governments have sweeping power, only occasionally written down at all, to protect public health and safety. It is the same power that allows a fire chief to order people to leave their homes because a chlorine gas cloud is coming their way. That power cannot be found in the Florida Statutes, yet it exists. We all know it.

Enforceable public health orders stand with their feet in the police power of government, which power is synonymous with sovereignty itself. The US Supreme Court long ago defined quarantine as an express example of state police power, equal in standing with adoption of criminal codes, creation of court systems, creation of systems of public records for transactions in lands, and commercial regulation – in essence, the very “power to govern men.”⁸⁸ It is not a mere administrative process. The fact that a legislature creates a judiciary of limited jurisdiction to review regulatory decisions does not vitiate the police power assigned to health departments. Police power has not breathed its last under such petty slights, because every agency of government with emergency responsibilities has an independent duty to compel behavior in the public interest. That is the essence of good government, which will always be worth having – to serve the public interest.

⁸⁸ The License Cases, 46 U.S. (5 How.) 504, 583 (1847), op. of Ch. J. Taney.