



**Florida Department of Health
Office of the General Counsel**

White Paper on the Law of Florida Human Quarantine

January 2007

**Richard P. McNelis, Esq.
Assistant General Counsel**

Contents Page

- I. Executive Summary
- II. Introduction
- III. Instructive History of State Public Health Police Powers
- IV. Florida Quarantine History
- V. Legal Support for Quarantine as Disease Control Tool
 - 1. Antiviral Medications and Prioritizations
 - 2. Vaccine and Prioritizations
 - 3. Behavior Modification: Isolation, Quarantine, Travel Restrictions
- VI. Review of Quarantine Orders
 - 1. Administrative Side of DOH Authority
 - 2. Internal Review by DOH, Compared with CDC's Proposed Quarantine Review
 - 3. Judicial Review by external tribunals -- why Article V, Fla. Const., Court Review Is Correct
- VII. Conclusion
- VIII. Acronyms
 - ALJ -- Administrative Law Judge of DOAH (*infra*)
 - APA -- Florida Administrative Procedures Act
 - CDC -- US Centers for Disease Control and Prevention
 - CHD -- County Health Department
 - DACS -- Florida Department of Agriculture and Consumer Services
 - DC -- District of Columbia (Washington DC)
 - DOAH -- Florida Division of Administrative Hearings
 - DOD -- US Department of Defense
 - DOH -- Florida Department of Health
 - HHS -- US Department of Health & Human Services
 - SARS -- Severe Acute Respiratory Syndrome
 - SNS -- Strategic National Stockpile
 - WHO -- World Health Organization

I. Executive Summary:

For purposes of this White Paper, infectious diseases fall in two basic groups: those we know a lot about and those we know little about. Commentators for years have observed that 'emerging disease' is the public health threat of the present and future. Pandemic influenza falls in the category we know little about. Response to pandemic influenza is disease control activity of the Florida Department of Health (DOH).

Where a great deal is known about an infectious disease, for example, tuberculosis, there are often specific practices and procedures calculated to control disease at acceptable risk to the uninfected population. But where little is known, the legal tools available to DOH may be limited to the quarantine statute.

The Legislature gave DOH broad discretion in protecting the public health by preventing spread of disease through quarantine. Those powers and that discretion are consistent with US Supreme Court decisions, from the formation of the country down through present days – the courts decline to impose additional requirements on the health agency's policy decisions in health matters, and they defer to the health agency's expertise in reaching a public health strategy or response.

Judicial participation in Florida quarantine is post-deprivation review. The Florida scheme for quarantine comports with controlling law and decisions applying that law. Suggestions indicating the Florida scheme is 'outdated' are academic in nature and are made despite clear precedent and legal authority. In other words, they appear to be socially motivated and not legally sound.

Quarantine may play a role in panflu disease control, but it likely will be a very small role. In defeating dangerous disease threats DOH needs the voluntary cooperation and assistance of the citizens. DOH cannot defeat the disease unless we work with the people – not against them. Consistent with law and the duty to protect the public health, DOH will meet due process requirements in a way calculated to respect the individual while saving the maximum number of lives.

II. Introduction:

The DOH General Counsel Office understands the exercise of quarantine within the framework of two recent events – the Anthrax cases of 2001 (bio-terror) and SARS (emerging disease), identified in Asia November 2002 and spread to Toronto with a serious second 'wave' in May 2003.

The Anthrax cases, following on the heels of the September 11, 2001 terror attacks, began with a fatality at the AMI Building in Palm Beach County FL, September 19, 2001.¹ The AMI Building was both a crime scene and a public health hazard, and was immediately closed (quarantined)

¹ Date of arrival of first Anthrax letter: September 19, 2001. Date of first death: October 5, 2001.

by order of the Palm Beach County Health Department (CHD). As of January 2007, it remains closed under quarantine, pending verification of cleanup efforts. On September 28, 2001 an assistant to NBC news anchor Tom Brokaw noticed Anthrax lesions on her arm. By October, anthrax was found in DC postal facilities, congressional offices and the White House. The modern era of US bio-terror preparedness and response had begun.

SARS pathology still is not completely understood, although the viral agent was identified and categorized by World Health Organization (WHO) in March 2003 – nearly five months after the syndrome was identified. Between March and July 2003, over 8000 probable cases of SARS were reported from around 30 countries. Due to lack of case definition, an early outbreak in Toronto, Canada, was mistakenly considered over, and SARS resurfaced in May 2003 with widespread governmental response to population movement control. Toronto quarantine measures were cast as non-compulsory, though practitioners candidly admitted, “Well, it was voluntary so long as you complied.” The mythology of public health would lead people to believe that public health defeated SARS, but it is equally plausible that SARS simply evolved into a non-pathogenic organism (lost interest in us).

The current focus of public health quarantine likewise has moved on to preparedness for a potential pandemic influenza, eclipsing bioterrorism concerns of the US except for the law enforcement sector. ‘Pandemic’ is a term of medical art meaning: “a virulent human flu that causes a global outbreak, or pandemic, of serious illness. Because there is little natural immunity, the disease can spread easily from person to person.”² It is difficult to predict how quarantine might be used in Florida, due to the dearth of reliable facts on panflu, which remains hypothetical except for the unquantified likelihood of eventual appearance. Nevertheless, since approximately November 2005 the federal government has strongly promoted panflu preparedness with checklists, guidance documents, and planning dollars.

There is a great deal of loose talk circulating regarding the obligations and limitations of public health authorities in responding to pandemic influenza. As lawyers, we view that loose talk as social agenda or commentary (opinion). It doesn’t matter that many law review articles assert public health laws are now ‘antiquated’ and that new laws must be enacted to state with specificity who will do what, and when, in response to a health crisis. As lawyers, we look to the statutes and the cases applying those statutes. We are not political or management advisers, unless asked. When the Florida and US Supreme Courts take a position, we are professionally obligated to respect that and to view that guidance as binding. We advise our clients to follow the law as it is, not as others wish it to be.

III. Instructive History of State Public Health Police Powers:

State and local governments have had wide-ranging power to respond to diseases since the colonial period.³ Until the advent of antibiotic treatments, infectious diseases such as cholera, yellow fever, and plague worked a severe drain on society and caused the public health

² U.S. Department of Health & Human Services, <http://www.pandemicflu.gov/#>.

³ Novack, *The People’s Welfare: Law and Regulation in Nineteenth Century America*, University of North Carolina Press (1996).

authority to come into existence.⁴ The US Supreme Court recognized state public health powers to regulate steamships on navigable waterways,⁵ to tax passengers (but not foreign passengers) arriving in the U.S.,⁶ and interstate shipments of cattle if narrowly tailored.⁷ States could not consistently use public health powers to regulate milk,⁸ or tobacco labeling.⁹

IV. Florida Quarantine History:

By 1885 county health departments were formed throughout the State of Florida to ensure compliance with local quarantine laws.

The [county] boards [of health] are invested with functions of a public nature, to be exercised for the public benefit, and consequently they are not liable, in an action of tort, for damages sustained by a vessel which was wrongfully ordered into quarantine by them; no such liability being expressly imposed on them by the statute, and the general power to sue and be sued not being sufficient to authorize the action.¹⁰

In 1952, the Florida Supreme Court commented favorably upon a Florida public health statute allowing for compulsory confinement of persons suffering from tuberculosis:

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.¹¹

There is additional historical precedent for the health department closing Florida properties under quarantine. In the New World Tower matter, circa 1988, a downtown Miami skyscraper suffered a major fire resulting in the spread of dangerous PCB chemicals in burnt building materials. The Miami-Dade CHD declared a quarantine of certain building floors until nationally recognized experts established that the building was safe for re-occupancy. The building owner was cooperative due to liability considerations connected with exposure to toxins.

⁴ See 1798 yellow fever epidemic, reported at *Smith v. Turner*, 48 U.S. (7 How.) 283, 340-41 (1849) (argument of counsel), available at http://caselaw.lp.findlaw.com/scripts/prnter_friendly.pl?page=us/48/283.html.

⁵ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁶ *Smith v. Turner*, 48 U.S. (7 How.) 283, 573 (1849).

⁷ *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465 (1877).

⁸ *Miller v. Williams*, 12 F.Supp. 236 (D. Md. 1935); *Otto Milk Co. v. Rose*, 99 A.2d 467 (Pa. 1953); *contrast James v. Todd*, 103 So.2d 19, 24, 267 Ala. 495, 502 (Ala. 1957).

⁹ *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001).

¹⁰ *D.S. Forbes v. Board of Health Escambia County*, 9 So. 862 (Fla. 1891).

¹¹ *Moore v. Draper*, 57 So.2d 648 (Fla. 1952).

On April 4th, 2003, President Bush issued an Executive Order providing for the apprehension, detention or conditional release of individuals to prevent the introduction, transmission, or spread of suspected SARS.¹² On April 9th, a six year old was placed in home isolation for ten days by the Okaloosa CHD under suspicion of having SARS.¹³ That same month, the Miami-Dade CHD persuaded a jewelry salesman (SARS suspect case) to voluntarily sequester himself for 10 days. During that time period, the Miami-Dade CHD persuaded a homeless person suspected of SARS to confine himself to a motel setting for a similar 10 days.

There were no formal, involuntary orders issued in any of these cases. A person would have to go back to the days when HIV was known as Green Monkey Virus to identify other human quarantine cases, and the last certain Florida involuntary order was issued approximately in 1947. There is no one working today in the Florida system who participated in events that far back in history.

V. Legal Support for Quarantine as Disease Control Tool:

In 1943 in the Jacksonville, Florida area, Pauline Varholy was confined to the county jail, awaiting 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 responded with facts indicating venereal disease and a curative plan of the health department. 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.

¹² White House Executive Order, April 11, 2003, sec. 36(b), Public Health Service Act (42 U.S.C. 264(b)).

¹³ Miami Herald, www.herald.com, Wednesday, April 9, 2003, page 3A.

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.¹⁴

This is a long quotation, but the Varholy case teaches several important issues, all germane to this White Paper: Quarantine already has passed constitutional muster in Florida; 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 public health police power; the proper constitutional test is rational relationship; the courts generally will not entertain challenges to the discretion of public health officers; quarantine is not a criminal matter, therefore bail is not available. The Varholy opinion comports with opinions of the US Supreme Court.

As 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."¹⁵ The business of setting the proper standard for judicial review is controversial, "since agency deference prevents opponents of public actions from being able to contest these actions."¹⁶ So what is the correct form of judicial review? Most commentators agree the seminal public health case is Jacobson v. Massachusetts,¹⁷ a mandatory smallpox vaccination case from 1904. With language that some lawyers describe as 'sweeping,' the 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 Court restated its deference standard, saying,

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.¹⁸

The Florida Legislature has directed DOH to exercise quarantine authority, stating, "It is the duty of the Department of Health to declare, enforce, modify, and abolish quarantine of persons, animals, and premises as the circumstances indicate for controlling communicable diseases or providing protection from unsafe conditions that pose a threat to public health."¹⁹ Authority to

¹⁴ Varholy v. Sweat, 153 Fla. 571; 15 So.2d 267; 1943 Fla. LEXIS 700 (1943).

¹⁵ Richards, Public Health Law as Administrative Law, <http://biotech.law.lsu.edu/map/Page8.html>.

¹⁶ Id.

¹⁷ Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).

¹⁸ Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

¹⁹ Sec. 381.0011(6), F.S. Note, DOH General Counsel Office does not consider sec. 381.00315, F.S. as general quarantine authority because the statute powers take effect only "upon declaration of a public health emergency."

give notice of quarantine is delegated to the CHD Directors and Administrators.²⁰ Quarantine presently is routinely used to respond to rabies problems in counties around the state.

The legislature criminalized violation of quarantine orders,²¹ and requires certain officials connected with the criminal justice system to assist DOH in enforcement.²² It even described DOH public health actions as “prima facie just and legal,”²³ and as judicial in nature – though no one is certain exactly what that means other than a legislative pronouncement that public health action is very, very important.²⁴

It is well-settled that courts should defer to an agency’s interpretation of its enacting statutes and rules in determining how to implement them.²⁵ Interested persons are encouraged to read the DOH statewide pandemic influenza plan for further practical-level information about how quarantine might be a useful tool to mitigate a pandemic event.²⁶

1. Antiviral Medications and Prioritizations

Handling and distribution of antivirals (Tamiflu, Relenza) falls within the domain of DOH Pharmacy Services.²⁷ Florida has a minimal stockpile of antivirals, though more may be made available through the federal Strategic National Stockpile (SNS) in the future. Under the current HHS and CDC protocols, Florida has been allocated part of the SNS held by the federal government. In any event, antivirals would have to pass through many hands before arriving in Florida – WHO, HHS, CDC, perhaps DOD and others – with multiple opportunities for diversion of Florida’s allotment. Of course there is a complex and vigorous regulated-but-private market for pharmaceuticals, mostly through private medical services.²⁸

HHS has promulgated a prioritization scheme for dispensing antivirals. As lawyers, we can expect to defend our government clients from lawsuits scheming to improve some persons’ priority position at the expense of other persons’ positions.

²⁰ Rule 64D-3.005(1), F.A.C.

²¹ Sec. 381.0025(1), F.S.

²² Sec. 381.0012(5), F.S.

²³ Sec. 381.0015, F.S.

²⁴ See, e.g., “[A statute providing] 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 part of the courts.” *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. Washington State Code, sec. 5546 Rem. Code 1915.

²⁵ *Chevron U. S. A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (where statutory grant of authority is broad or general, courts defer to agency regulation that reasonably implements legislative intent); *Agrico Chemical Co. v. State Dept. of Environmental Protection*, 365 So.2d 759 (Fla. 1st DCA 1979) *cert. den.* 376 So.2d 74 (‘substantial interests’ for purposes of APA); *Pershing Industries, Inc. v. Dept. of Banking & Finance*, 591 So.2d 991, 993 (Fla. 1st DCA 1991) (where agency interpretation is one of several permissible, it must be upheld despite existence of reasonable alternatives).

²⁶ FL DOH Pandemic Influenza Annex ver. 10.4 (Oct 06), Appx 7 Rapid Response & Containment, http://www.doh.state.fl.us/rw_Bulletins/FIPanFluv104Final.pdf.

²⁷ See, e.g., sec. 381.0203, F.S., DOH Central Pharmacy.

²⁸ See Ch. 465, F.S. (pharmacies generally).

2. Vaccine and Prioritizations

It is not possible to create a vaccine to counter a lifeform that has not appeared on our planet yet. Since the current annual world-wide vaccine production capacity is 900 Million doses, and that capacity already is in use, there is significant lag time from strain identification to useful, administrable vaccine. When there is, the vaccine like antivirals will be a source of some litigation, for identical reasons. Vaccines are regulated by DOH²⁹ as well as the Food & Drug Administration and other federal entities.

3. Behavior Modification: Isolation, Quarantine, Travel Restrictions

Florida law speaks of quarantine authority only. Federal actors routinely speak of quarantine and isolation. As a legal matter, Florida quarantine includes isolation, testing, treatment and preventive treatment, destruction, vaccination and inoculation, closure of premises and disinfection.³⁰ Isolation or quarantine of an individual constitutes a seizure,³¹ but the US Supreme Court has approved state detention of persons for health purposes without the level of due process found in criminal proceedings.³² Criminal law concepts and analysis, while informative, are not controlling in the setting of public health matters.³³ Also, DOH has overlapping jurisdiction with the Florida Department of Agriculture and Consumer Services (DACS),³⁴ particularly as to animals and premises. Similar jurisdictional overlap certainly exists with Florida Fish and Wildlife Conservation Commission and other Florida state agencies as to wildlife, waterfowl, aquaculture, commercial animal venues, and so forth. DOH defers to sister agencies that clearly are lead in subject matter areas, and will cooperate and support those other-agency actions.

The lesson of history about community quarantine (self-quarantine), based on the 1918 pandemic influenza experience, is that large-scale quarantine is ineffective. Certain islands effectively maintained their quarantine; others failed despite efforts.³⁵ The subject matter collectively referred to as 'social distancing' attempts to capture efforts at minimizing disease transmission without involuntary orders and other forms of governmental coercion.³⁶ Social distancing may be loosely defined as keeping your distance from your neighbor, or alternatively, as maintenance of a three-to-six foot space between people. There is no specific law on social

²⁹ See, e.g., sec. 381.003(3), F.S.

³⁰ Sec. 381.0011(6), F.S.; Rule 64D-3.007-.010, F.A.C.

³¹ *Michigan v. Summers*, 452 U.S. 692, 696 (1981).

³² *Addington v. Texas*, 441 U.S. 418 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979).

³³ *Chezem*, Public Health Law Bench Book for Indiana Courts, sec. 3, pg. 24 ("The application of criminal procedure principles to public health action is . . . often complicated by numerous factors, including the differing philosophies underlying the two bodies of law and the lack of societal condemnation attached to many persons deemed threats to public health.")

³⁴ Sec. 570.07(2), (15), (19), (21); 570.36(2); 585.002(1); 585.003(1)(a)-(b); 585.007(2); 585.01(10), (13), (18); 585.08(1), (2)(b), (3)-(5); 585.145; 585.147; 585.15; 585.16; 585.22; 585.23; 585.40, F.S.

³⁵ Markel, US Naval Training Station, Yerba Buena Island, San Francisco CA,
<http://www.iom.edu/Object.File/Master/37/379/Markel%20IOM%20Lecture.pdf>.

³⁶ FL DOH Pandemic Influenza Annex ver. 10.4 (Oct 06), Appx 8 Community-Based Control and Mitigation Interventions, http://www.doh.state.fl.us/rw_Bulletins/FIPanFluv104Final.pdf.

distancing, although the general police powers may provide authority.³⁷ Quarantined persons may apply for a travel or transportation permit.³⁸

VI. Review of Quarantine Orders:

Influential commentators have written about the 'revolutionary shift' in judicial review of governmental (public health) matters³⁹ beginning approximately in the 1960s. In particular, there is a suggestion that due process rights have somehow obsoleted the existing law on quarantine. This is not the case.

1. Administrative Side of DOH Authority

Florida DOH is an executive branch agency created by the Florida Legislature.⁴⁰ Like all executive branch agencies, many of its actions are subject to Florida's Administrative Procedures Act (APA).⁴¹ DOH has a specific mandate to enact quarantine rules on certain topics⁴² and a general mandate for rulemaking on any provision of law conferring duties upon it,⁴³ and has enacted such rules.⁴⁴ DOH already has statutory authority to quarantine, therefore enactment of further rules is not a predicate to exercise of its quarantine authority to protect the public health from known and emerging threats.

2. Internal Review by DOH, Compared with CDC's Proposed Quarantine Review

The federal scheme (proposed): On Nov. 22, 2005 CDC released its draft quarantine rule (crafted for Quarantine Stations, international travel via airlines and ship lines, and potential interstate movements). The CDC proposed rule still is not finalized as of January 2007, pending consideration and response to critical comments during the federal rulemaking process.⁴⁵ CDC's quarantine rule contemplates 1) a 3-day provisional quarantine with no review, 2) a subsequent (also could be stand-alone) formal quarantine order with internal administrative review, and 3) judicial review via petition for writ of habeas corpus.⁴⁶

The federal 3-day provisional quarantine is intended to 'freeze' movements of persons with suspected communicable disease. The provisional quarantine must be based on objective scientific evidence (e.g. high fever, respiratory distress, chills) and epidemiologic criteria (e.g.

³⁷ See, e.g., sec. 870.04; 870.043; 870.045, F.S.

³⁸ Rule 64D-3.008, F.A.C.

³⁹ Gostin, *Public Health Theory and Practice in the Constitutional Design*, p. 43, <http://papers.ssrn.com/abstract=293348>.

⁴⁰ Sec. 20.43, F.S.; Ch. 381, F.S., generally.

⁴¹ Freund, *Administrative Powers Under Health Legislation, Administrative Powers Over Persons and Property, A Comparative Survey*, Ch. 25 (University of Chicago Press, 1928).

⁴² Sec. 381.0011(6), F.S.

⁴³ Sec. 381.0011(13), F.S.

⁴⁴ Rules 64D-3.007 et seq., F.A.C.

⁴⁵ Proposed rule pending; comments period closed March 1, 2006. <http://www.cdc.gov/ncidod/dq/nprm/viewcomments.htm>.

⁴⁶ 42 U.S.C. Parts 70, 71. http://www.cdc.gov/ncidod/dq/nprm/docs/42CFR70_71.pdf. Comment period extended through March 2006.

travel to or from an affected area and/or contact with known cases). Therefore three days is needed to investigate and gather further scientific evidence. The formal quarantine must be “an additional order based on scientific principles such as clinical manifestations, diagnostic or other medical tests, epidemiologic information, laboratory tests, physical examination, or other available evidence of exposure or infection.”⁴⁷ Persons subject to provisional and formal quarantine orders may refuse treatment, prophylaxis or vaccination, but must otherwise cooperate with the orders.

The administrative review of the CDC formal quarantine order must be conducted by a knowledgeable person appointed by the CDC Director, and the scope of the review hearing would be limited to the factual and scientific evidence concerning the CDC decision to quarantine – not to review legal or constitutional issues.⁴⁸ Those issues are properly argued and tested as part of a habeas proceeding before a judicial officer.

The Florida scheme (proposed): Review of quarantine orders may be internal, external, or both. DOH proposes its own internal review process patterned on the federal proposal, specifically, a review of the factual basis for an individual’s quarantine order. That review should be performed by the Deputy State Health Officer or designee, within 48 hours of the request for review, and written decision back to the individual and the CHD within a total of 72 hours. The internal review would not consider or entertain any legal issues, but would consider the factual basis for quarantine. Such a review would satisfy the minimum constitutional due process rights set out in *Matthews v. Eldridge*⁴⁹ and would be consistent with the nature and duration of a health emergency – at least one such as pandemic influenza, the only known scenario where DOH might impose quarantines more widely than it has in the past, such as for specific incidents of rabies or anthrax exposure.

DOH does not intend to ‘manage’ or in any way restrict the relief sought by persons subject to a quarantine order. And although DOH is an executive branch agency subject to Florida’s APA, there is a valid argument that liberty restrictions are beyond the scope (outside the jurisdiction) of APA proceedings generally and the Division of Administrative Hearings specifically, absent a specific grant of legislative authority.

Review of quarantine orders through Ch. 120 proceedings is inappropriate because quarantined petitioners cannot meet the ‘substantial interests’ prong of the standing test.⁵⁰ Specifically, petitioners cannot show an injury of a nature which the proceeding is designed to protect. A quarantine controls movement to slow or stop the spread of disease, is designed to protect the health of the public rather than the individual, and is action outside DOH’s ordinary regulatory jurisdiction. Quarantine declarations, predicated on objective scientific criteria, are not agency action designed to protect an individual’s liberty interests, but instead are designed to protect the public health. Moreover, APA proceedings are lengthy in comparison to a quarantine which may last only days; that is, there will be no resolution of material facts in dispute before the quarantine expires or is modified; neither DOH nor DOAH have jurisdiction to determine

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (due process requires consideration of 1) private interest, 2) risk of error from procedure, and 3) governmental interest).

⁵⁰ *Agrico Chemical Co. v. DER*, 406 So.2d 478 (Fla. 2d DCA 1981), *rev. den.* 415 So.2d 1359, cited *supra* FN 25.

Constitutional issues; and DOH has exclusive authority among executive branch agencies to modify or lift its quarantines.

3. Judicial Review by external tribunals -- why Article V, Fla. Const., Court Review Is Correct

We agree with the federal government position in that every person in the US is entitled to petition for writ of habeas corpus⁵¹ to test whether he or she is wrongly held, regardless of any state or federal agency administrative reviews. Petitioners are not entitled to counsel at public expense,⁵² though the public defender may be appointed for indigent petitioners.⁵³

Consistent with the Varholy opinion, habeas actions should be heard by Florida Constitution, Article V courts. Florida circuit judges are more likely familiar with the many considerations that surround restrictions of liberty, and their courts are the correct forum for such extraordinary writ proceedings.⁵⁴ Administrative law judges of the Division of Administrative Hearings (DOAH) lack jurisdiction to consider constitutional issues⁵⁵ and to entertain extraordinary writs.

Even if review of DOH quarantine orders fell within APA, the failure to exhaust administrative remedies would be a waivable defense to a petition for writ of habeas corpus. It is the opinion of the DOH General Counsel office that in habeas proceedings, the Department would routinely waive the defense of failure to exhaust administrative proceedings as part of its effort to get to the merits of the petition. Either way, the fundamental point is that decisions of administrative courts are binding on reviewing courts only as to the factual determinations, not as to the conclusions of law. An administrative hearing officer, including DOAH judges, has no general jurisdictional authority to grant liberty to a detained person matter how they got there, no matter what the facts are.⁵⁶

VII. Conclusion:

The commentary and objections raised about Florida quarantine authority have been raised and answered in the past, by the Florida Supreme Court and the US Supreme Court. There is no law controverting or overturning the Florida Department of Health's general authority in that

⁵¹ Art. 1, Sec. 9, US Const. habeas proceedings are civil in nature, not criminal. *Hilton v. Braunskill*, 481 US 770, 107 S.Ct. 2113, 2118 (1987); Art. I, sec. 13, Fla.Const.

⁵² *Keegan v. State*, 293 So.2d 351 (Fla. 1974).

⁵³ *State ex rel. Smith v. Jorandby*, 498 So.2d 948 (Fla. 1984).

⁵⁴ *Varholy v. Sweat*, 153 Fla. 571; 15 So.2d 267; 1943 Fla. LEXIS 700 (1943).

⁵⁵ *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).

⁵⁶ *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. Sec. 394.467(7)(b), F.S. The DOAH ALJ may order continued commitment for up to 6 months. Sec. 394.467(7)(d), F.S.

regard, indeed the opposite is true. DOH has a lawful obligation to use its discretion and expertise to protect the public health to the maximum extent possible within the broad bounds of its statutory authority and constitutional limitations.

VIII. Acronyms:

ALJ	--	Administrative Law Judge of DOAH (<i>infra</i>)
APA	--	Florida Administrative Procedures Act
CDC	--	US Centers for Disease Control and Prevention
CHD	--	County Health Department
DACS	--	Florida Department of Agriculture and Consumer Services
DC	--	District of Columbia (Washington DC)
DOAH	--	Florida Division of Administrative Hearings
DOD	--	US Department of Defense
DOH	--	Florida Department of Health
HHS	--	US Department of Health & Human Services
SARS	--	Severe Acute Respiratory Syndrome
SNS	--	Strategic National Stockpile
WHO	--	World Health Organization