

**Public Health Law as Administrative Law
Annotated Slides and Case Lists**

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The Public Health Law Practice Project

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What is Administrative Law?¹

Administrative law is the law of government

Public health is the classic government service, and it is a key administrative law practice area

Contrast with courtroom law

The basic practice of administrative law is by government agencies and individuals or corporations who are regulated by governmental agencies or who want to influence governmental agencies. While some administrative law is practiced in the courtroom, most is outside the courtroom. The key difference is that the courtroom depends on two adversaries to present the case.

The flaws in adversary law

The first flaw in the courtroom adversary system is that cases are often decided on the skills or monetary resources of the adversaries, not the facts. The second is that no one is representing society, so that cases are often decided in ways that benefit one party but hurt society.

¹ Richards, EP and Rathbun KC, "Public Health Law," in Public Health and Preventive Medicine, edited by Robert B. Wallace (Maxey, Roseneau, and Last), Appleton and Lange (1998) 1147-1154.

Understanding administrative law principles makes public health stronger

All courts, from the local district court in your community to the United States Supreme Court, recognize administrative law principles and the importance of letting public agencies do their job. In many cases, seeming weaknesses in public health laws, especially those dealing with emergencies, are really failures by counsel to understand how to make the laws work for the agency. This a special problem of legislatures which often weaken public health laws because they have mistaken ideas of what is necessary to sustain public health actions when and if the actions are challenged in court.

Public Health in the Colonies

Most of the population lived in poorly drained coastal areas

People lived near rivers or ocean ports because goods traveled by water

Terrible epidemics

There were mosquito borne illness - malaria and yellow fever, waterborne diseases - cholera, typhoid, and the other diseases of the pre-vaccination, pre-sanitation world, including smallpox. Yellow fever nearly wiped out the Constitutional Convention. Philadelphia lost 10% of the population in one summer.²

Average Life Expectancy was 25 years

The Shattuck Report³ was the first demographic study of disease and life expectancy in the US and showed that the average life expectancy was 25 in the cities.

Public Health Law Actions in Colonial America

Quarantines, areas of non-intercourse

Inspection of ships and sailors

Nuisance abatement

Colonial governments had and used Draconian powers

Blackstone, the definitive source of historical common law discussed death as the penalty for breaking quarantine.

² John H. Powell, Bring Out Your Dead (1949)

³ <http://biotech.law.lsu.edu/cphl/history/books/sr/index.htm>

Actions in the 1789 Yellow Fever Epidemic

For ten years prior, the yellow fever had raged almost annually in the city, and annual laws were passed to resist it. The wit of man was exhausted, but in vain. Never did the pestilence rage more violently than in the summer of 1798. The State was in despair. The rising hopes of the metropolis began to fade. The opinion was gaining ground, that the cause of this annual disease was indigenous, and that all precautions against its importation were useless. But the leading spirits of that day were unwilling to give up the city without a final desperate effort. The havoc in the summer of 1798 is represented as terrific. The whole country was roused. A cordon sanitaire was thrown around the city. Governor Mifflin of Pennsylvania proclaimed a non-intercourse between New York and Philadelphia.⁴

Public Health in the Constitution

Federal Powers

International trade and relations

War

Interstate Commerce - most federal laws and regulations to protect public health depend on the commerce power. There is a great debate over whether the federal government has the right to exercise the police power outside of the commerce clause.

State Powers

The states retained the Draconian powers they exercised during the colonial and Articles of Confederation periods. We call these powers to protect the public health and safety the police powers. They predate the development of police departments by many decades and are restricted to public health and safety actions.

Original Intent

Since the founders knew the public health powers of the colonies, which were retained when they declared independence from England, it is clear that the constitution intends the state police powers to be broad

⁴ Argument of counsel in *Smith v. Turner*, 48 U.S. (7 How.) 283, 340-41 (1849)

Public Health as the First Administrative Law

Public health service hospitals and quarantine stations

The public health service act was among the first laws passed by Congress. It dealt with the health of sailors and the inspection and quarantine of ships entering US waters.

State and Local Government

Public health was one of the first governmental functions

Boards of Health are among the first government agencies

Paul Revere served on the Boston Board of Health.⁵

Judicial deference to agencies

The courts, not surprisingly, tended to defer to the public health authorities - what judge wanted to be known as the one who kept the health officer from doing his duty and controlling the epidemic?

Even in modern cases in other areas of law, the courts are more deferential when there is a clear and present threat to public health and safety.

The Scope of Administrative Law

Governmental Organization and Function

Administrative law controls much of the organization and internal function of government agencies, including the courts and the police, and to a less extent the legislature. This is beyond the scope of this presentation.

Civil Enforcement and Adjudications

The enforcement of laws that do not lead to criminal prosecution and punishment. Food sanitation rules are enforced by health departments and violators can be fined or shut down. If there is an allegation of a crime related to food sanitation, such as intentionally adulterating food, then this must be investigated and prosecuted by the police using criminal law standards, not administrative law standards.

⁵ Forbes, Paul Revere And The World He Lived In, 76-77 (1942)

Standard Setting and Rulemaking

Agencies use their special expertise to develop rules and technical standards that are binding as law. An example would be restaurant inspection standards.

Investigation, Reporting, and Consultation

Agencies can investigate and prepare reports, and provide advice and assistance to individuals and to other agencies.

These last three are core public health agency functions

Some agencies do all three, but some do not. For example, the CDC's main role is to advise state health departments and collect and analyze public health information. Its enforcement and rulemaking roll is very limited, and while it does recommend standards, they do not become law until adopted by other state or federal agencies.

Public Health and Separation of Powers

The federal and state governments are divided into three branches:

Legislature

Courts

Executive Branch

Executive Branch Agencies

Agencies that do enforcement or rulemaking must be in the executive branch. Public health agencies are classic executive branch agencies at both the state and federal levels.

Independent Agencies

These are agencies that are technically in the executive branch but which are run by directors or boards that are not directly answerable to the executive. At the federal level, the SEC is an independent agency. At the state level, some states and local governments have boards of health that try to protect the health department from political influence.

State Law Separation of Power Issues

Most states do not have a single executive branch. Instead they have several, each headed by an independently elected official. For example, most states elect an attorney general who runs the state legal office and a governor who runs other agencies. The governor cannot tell the attorney general what to do, which can be

very problematic if the governor must depend on the attorney general for legal services. Many states also elect state auditors, insurance commissioners, and other state wide offices.

State and health departments are either run by a board of health or the governor's office. In some states the board of health is not directly controlled by the governor.

In states where only the Attorney General can provide legal services, the health department, which is under the governor or a board of health, cannot make its own legal decisions or appear in court unless the attorney general's office approves and provides counsel.

The Political Control of Agencies

Agencies carry out political policy

Agencies are the mechanism by which political decisions are carried out. The fundamental control over agency actions is through the election of the official that oversees the agency. Political control is exercised by the head of the executive branch giving orders to the agency director or replacing the agency director.

Independent agencies

Legislatures may insulate agencies from direct political action by having them answer to a board or commission that is appointed by the executive. The members of this board have fixed terms and can only be replaced when their term expires. This limits the political pressure the executive can put on the agency. At the federal level, the Securities and Exchange Commission is an independent agency. Some state and local health officers work for a board of health that provides greater or lesser protection from political influence.

Legislative control

Agencies may be part of the executive branch, but they are funded and authorized by the legislature. The legislature can direct agencies to carry out actions through statute or funding, and legislatures can block agency actions by statutory or funding changes. Even independent agencies such as health departments under boards of health are under the control of the legislature.

What does this mean for judicial review?

As long as an agency is operating within its enabling law and the constitution, courts defer to the agency because it is carrying out legislative goals. The courts often remind persons who are challenging agency actions that the proper way to change agency behavior is through the legislature.

Responsible Political Control

Public health agencies face two critical political threats. First, is the pressure to change public health policy to satisfy political agendas that are not based on good public health principles. At one time, health departments faced pressure to use public health powers to carry out racially discriminatory policies. A current example is the refusal of many states to do proper contact tracing and reporting of HIV because of the lobbying by privacy advocates.

The second threat is more insidious and pervasive - the pressure by the executive and the legislature to keep public health problems out of the news and to reassure the public that everything is fine. This reduces pressure to raise taxes or divert money from other areas to pay for public health services. Even when health directors know that they are unable to deal with critical problems, such as responding to emergencies, they know that raising these issues will often cost them their jobs.⁶

Traditional Public Health Authority

The General Grant of Power

All states, through legislation or the state constitution, gave their original health officers the general power to use their discretion to protect the public's health and safety. These were general grants of authority to protect the public health, with more specific public health laws evolving over time. The first comprehensive public health law was proposed by the Shattuck Report on Boston's Health Status in 1850.

Exercised by a health officer and/or Board of Health

The health officer would do what was necessary to deal with public health problems. Boards of health are quasi-legislative bodies that make public health policy decisions and oversee the health officer to insulate the health officer from political influence.

The Courts deferred to the health officer's expertise

This is the core principle of administrative law - an agency is given broad powers and is expected to use its expertise to tailor those powers to the situation at hand. The more detailed the statutory guidance, the more limited the agency's discretion.

Someone contesting the agency's action must show that it is arbitrary or capricious, or is a sham designed to use public health powers for improper

⁶ Institute of Medicine, 1988. *The Future of Public Health*. National Academy Press: Washington, DC.

purposes. The petitioner is not allowed to second guess the policy decisions behind the agency's actions.⁷

The classic smallpox vaccination case was decided on the issue of whether an aggrieved citizen could challenge the board of health's policy decision to require smallpox vaccinations.⁸

Modern Administrative and Public Health Law

As government has evolved since the early constitutional period, there has been a shift from general grants of authority to more specific laws and regulations, as discussed later. However, the foundation of administrative law remains the right of agencies to do specific enforcement and make specific regulations based on general grants of legal authority.⁹

Why Do the Courts Accept General Powers?

Efficiency

It is beyond the ability of the legislature to spell out everything necessary to protect the public health.

Flexibility

It is impossible to anticipate every threat to the public health. Laws that try to specify emergency actions with detailed provisions often cause more problems in enforcement than laws with more general provisions.¹⁰

Speed

Public health threats demand quick action, which is impossible if you have to pass a law to address a new threat.

The Delegation Doctrine

An important historical reason for accepting general powers was the belief by many courts that the legislature could not delegate the right to make rules to an agency. While this has been rejected, it left early courts with the choice of

⁷ City of New York v New St. Mark's Baths, 130 Misc. 2d 911, 497 N.Y.S.2d 979 (1986) - http://biotech.law.lsu.edu/cases/stds/St_marks_I.htm

⁸ Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) - http://biotech.law.lsu.edu/cases/vaccines/Jacobson_v_Massachusetts_brief.htm

⁹ Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) - http://biotech.law.lsu.edu/cases/adlaw/chevron_v_nrdc.htm

¹⁰ http://biotech.law.lsu.edu/blaw/bt/MSEHPA_review.htm

requiring a specific law by the legislature on everything, which was impossible, or letting the agencies use general authority.

Do Health Departments Still Have General Powers?

United States Supreme Court

The United States Supreme Court has never limited the state's right to use general powers in public health unless those are a sham to evade other constitutional protections.¹¹

State Courts

Unless the legislature has passed laws limiting the health department's use of general powers, the state courts have generally not interfered with the use of general powers. This is especially true for classic public health enforcement involving clear and immediate threats to health.

State and Local Legislatures

Many state legislatures have been successfully lobbied to limit the general powers of health departments, especially in communicable disease control. These can make public health actions difficult, but can be changed since they are not constitutional limitations. Many provisions of the model emergency health powers act are just restoring powers health departments had before they were limited in the 1980s and 1990s.

Bad Fish on the Side of the Road

The introductory example of the abandoned fish trailer is an example of a problem that could not have been anticipated by the legislature.

Due Process in Public Health¹²

When do you get a hearing?

The core due process requirement in the US legal system is the chance to tell your side of the story to a neutral decisionmaker. This need not be a judge in court, however. In many cases the right to be heard is satisfied by an administrative hearing at the agency level, which can only be reviewed by the court if the agency acts arbitrarily or capriciously. The key issue is when you get the hearing: before

¹¹ Yick Wo v. Hopkins, 118 U.S. 356 (1886) - regulations that applied different standards to Chinese owned laundries were struck down.

¹² Richards EP. The jurisprudence of prevention: society's right of self-defense against dangerous individuals. *Hastings Constitutional Law Quarterly* 1989;16:329-92.

the health department acts or after? Research shows that pre-action hearings can make it difficult for agencies to take action and make those actions much more expensive.

Classic Food Sanitation Case - North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)

City health officials seized 47 barrels of chicken that they claimed had become putrid. They did not give the owners of the cold storage plant a hearing before the seizure and they refused to pay the value of the chicken.

Is there a Constitutional Right to a Hearing before the Health Department Acts?

The United States Supreme Court said there is no constitutional right to a due process hearing before the state acts against a public health threat.¹³ If the defendants believed that the health department acted improperly they could challenge the action later in court, and if they won they could get compensation.

Is this a taking - Must the state pay for the chicken?

The Constitution has specific provisions requiring that property owners be compensated if property is taken for public purpose. This has been the subject of bitter litigation in land use cases where the owners claim that the restrictions on the use of their land, such as bans on the development of wet lands, are a taking. In the public health context, if property threatens the public, it can be destroyed without compensation.¹⁴ This can either be seen as a right to destroy dangerous property, or a determination that dangerous property has no value.

Injunctions

In many cases health departments will ask the courts to order someone to comply with a public health order or to cease and desist from an activity that endangers the public health. This is done through injunction proceeding. The court may grant an emergency injunction without hearing from the opposing party, but if it does, it will schedule a hearing as soon as possible to allow the party to be heard. The advantage of injunctions is that the court can use its power to hold persons in contempt to force them to comply with the order.

¹³ North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) - http://biotech.law.lsu.edu/cases/food/north_american_cold_storage_brief.htm

¹⁴ Raynor v. Maryland Department of Health and Mental Hygiene, 676 A.2d 978, 110 Md.App. 165 (Md.Sp.App. 1996) - <http://biotech.law.lsu.edu/cases/dogs/raynor.htm>

The United States Supreme Court Takes a Short Detour

Termination of Welfare Benefits - *Goldberg v. Kelly*, 397 U.S. 254 (1970)¹⁵

Many advocates and legal scholars oppose the use of public health decisionmaking and want all public health actions reviewed by the courts before the agency can act. They point to this case as evidence that the United States Supreme Court no longer accepts public health actions without a prior hearing. The plaintiff in *Goldberg* demanded a hearing and due process protections before the state could terminate her welfare benefits. She claimed that she needed special protections because she would be hurt so badly by the termination that a post-termination hearing would deprive her of her right to be heard.

Goldberg Rights

The United States Supreme Court found for the plaintiff and required the government to give her a hearing before the benefits were terminated, and set out certain rights for persons in such hearings. These included the right to present oral testimony and to present witnesses.

Over extending Goldberg

While this is not a public health case, many lawyers have read it as extending the right of a hearing to general public health orders.

Limiting Goldberg

In *Mathews v. Eldridge*, 424 U.S. 319 (1976),¹⁶ the United States Supreme Court limited *Goldberg* to its facts and allowed the termination of social security disability benefits without a pre-termination hearing. The court used a classic public health cost benefit analysis, focusing on whether the extra cost of the hearing increased the accuracy of the decision and changed the outcomes often enough to be worth doing. In almost all public health cases this test will be satisfied by a post-action hearing.

The court has extended the *Mathews* analysis in subsequent cases. While not overruling *Goldberg*, the court makes it clear that *Goldberg* is limited to its facts. With the subsequent revisions in the welfare laws to abolish the entitlement to welfare, it is not clear that *Goldberg* would even be applied in modern welfare cases.

¹⁵ <http://biotech.law.lsu.edu/cases/adlaw/goldberg.htm>

¹⁶ <http://biotech.law.lsu.edu/cases/adlaw/mathews.htm>

What if You are Locking Up People?

Public Health Orders against People

There are several types of modern public health orders against persons.¹⁷ Some orders restrict the occupations that a person can practice, such as preventing typhoid carriers from working in food handling, persons with Hanson's Disease from working in child care, or persons with HIV from working as prostitutes. Public health orders can require people to be tested for communicable diseases, to be treated for communicable diseases, or, if treatment is not sufficient or the person refuses treatment, to be confined so that they do not spread disease. Tuberculosis probably accounts for most of the orders to test, treat, or confine.¹⁸ Concerns about bioterrorism have raised questions about the use of mass quarantine and isolation orders, as was done in Canada and Asia for the control of SARS.

Must there be a hearing first?

The classic case upheld the detention of prostitutes for STI testing¹⁹ after they had been arrested on criminal charges. The federal court upheld this order as a proper exercise of public health powers and did not require a pre-detention hearing. Once the prostitutes were tested or treated, they were released. More generally, the courts have found that the constitution does not require pre-detention hearings on disease control orders unless mandated by specific laws.

Must there be a statutory provision for a hearing?

Many state laws have been criticized for not providing specific provisions for due process hearings on disease control orders that allow the detention of individuals. Specific due process provisions are not necessary for a detained person to demand a hearing. The US Constitution provides for the writ of habeas corpus, the right of every person detained by government for whatever purpose to have to be brought before a judge and be allowed to contest the legality of the detention. While there is an ongoing controversy whether this right can be suspended and when it applies to foreigners, there is no question that it applies to all public health orders. While a person is entitled to a habeas corpus hearing, there is no right to bail for public health detentions because that would undermine the

¹⁷ Richards, EP and Rathbun KC, "The Role of the Police Power in 21st Century Public Health," *Journal of Sexually Transmitted Diseases*, 1999;26(6):350-7.

¹⁸ *In re Halko*, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (Cal.App.Dist.2 1966) - http://biotech.law.lsu.edu/cases/disease_control/In_re_Halko.htm

¹⁹ *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973) - http://biotech.law.lsu.edu/cases/STDs/reynolds_v_mcnichols.htm

purpose of the detention.²⁰

Limiting Judicial Review

Outside of criminal law and takings and certain other areas protected by the US Constitution, the Constitution allows Congress to set the standard for judicial review of administrative actions. Congress can allow the courts to decide cases de novo, meaning the court can ignore the agency findings. Congress can also allow certain administrative actions to be done without review by the courts. For example, the determination of smallpox compensation awards by the secretary of HHS cannot be appealed to the courts. This legislative power to limit review can also be used to require persons seeking habeas corpus review of detention orders to submit to an administrative agency review of their claims before they can talk to a judge.²¹

Getting Specific - Why Make Regulations?

Delegated legislative power

Public health agencies can make rules if they are authorized by the legislature. While rulemaking is important in public health, many agencies, such as the CDC, have limited or no authority to make rules. These agencies either do not do enforcement or enforcement statutes or rules made by other agencies.

Regulations give direction to regulated parties

While general powers are valuable to dealing with unexpected events, they give little direction to people engaged in routine activities such as running restaurants. By adopting standards such as food sanitation code, the health department can give detailed guidance on how to prepare and serve food safely

Regulations allow public participation

Regulations are usually published before they become effective and the public is allowed to comment on them. In the federal system, there is no right to a hearing on a rule unless specifically required by Congress. All comments must be made in writing. Some states require that the agency have a hearing and allow oral testimony on rules if requested by a certain number of persons. Public comment is important for regulations that raise difficult public policy issues, such as whether volunteer organizations such as churches have to meet the same sanitary regulations as businesses. If an agency does not comply with the statutory

²⁰ Pauline Varholy v. Rex Sweat, 15 So. 2d 267, 153 Fla. 571 (1943) - <http://biotech.law.lsu.edu/cases/pp/varholy.htm>

²¹ Richards EP, Rathbun KC. Making state public health laws work for SARS outbreaks. Emerg Infect Dis Feb 2004. In appendix to this article.

requirements for promulgating regulations, the court can suspend the regulation until it has been properly promulgated.²²

Regulations harmonize practices between jurisdictions

While most public health enforcement is local or state based, businesses operate across many jurisdictions and need consistent standards. It is also important that public health standards reflect best practices. By adopting national standards, health departments across the country assure best practices and make it easier for national businesses to operate

Limiting Issues if there is Judicial Review

Once a regulation has been properly issued, its validity cannot be challenged in court. This allows an agency to limit the grounds for challenging an agency action.²³ For example, once the standards for food inspection are adopted, a restaurant cannot litigate the proper temperature for keeping food cold or whether their alternative dishwashing method is acceptable if these are specified in the rules. Challenges to the rule must be made when the rule is promulgated, not in later litigation challenging the enforcement of the rule. Challenges to the agency's legal authority to make the rule or the constitutionality of the rule can be made at anytime since the rule cannot be valid if the agency does not have the power to issue it.

When Agencies Make Decisions - Adjudications

How is an adjudication different from a rule?

Adjudications resolve issues for specific parties and are like court trials. Rules are like statutes and apply to everyone. Since there is generally an individual's right to be heard as part of an adjudication, but not during a rulemaking, the courts have set up standards to deciding which is which. If the proceeding applies to all parties in the same situations, then it is a rulemaking and there is no right to a hearing.²⁴ If the proceeding depends on specific information about the party and applies only to that party, then it is an adjudication and requires a hearing.²⁵

Expert Decisionmakers

²² *Chocolate Manufacturers Assoc. of the United States, Appellant, v. John R. Block, Sec. U.S. Dept. of Agriculture; Samuel J. Cornelius, Administrator, Food and Nutrition Service and U.S. Department of Agriculture*, 755 F.2d 1098 (1985).

²³ *Heckler v. Campbell*, 461 US 458 (1983).

²⁴ *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915) - <http://biotech.law.lsu.edu/cases/adlaw/Bi-Metallic.htm>

²⁵ *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908) - <http://biotech.law.lsu.edu/cases/adlaw/Londoner.htm>

In contrast with court trials, where the judge is not supposed to know about facts being decided, agency decisionmakers are generally selected to have expertise in the subject being decided so that they can make more accurate decisions.

Uniform Policy

In most situations the administrative judge or hearing officer in an adjudication does not make the final ruling but makes recommendations to the agency director who makes the final decision. This allows the agency to make sure that all cases involving similar facts are decided the same way. This is especially important for large federal agencies which may decide hundreds of thousands of cases all over the US. In contrast, courts make decisions solely on the case before them, without reference to effect on other cases or on society in general, and often reach very different decisions on cases involving similar facts.

Conflict of Interests?

Many people worry that agencies are biased against regulated parties and do not give them a fair hearing. While the courts usually reject these claims of agency bias, some states have taken the adjudication powers away from the agency and put it in a central panel of administrative judges to reduce bias claims. Unfortunately, in many cases this gives up the benefit of having the cases decided by expert decisionmakers.

Permits and Licenses

Permits

The right to do something once, such as the building permit for a new restaurant.

Licenses

Allows an ongoing activity, such as a license for running a restaurant.

Issued on Set Criteria

If you meet the standards, you get the permit or license. This allows for planning by businesses because they know what standards they must meet. This is much more efficient for the agency than allowing a business to open without review by the agency and only allowing the agency to close the business if it can prove it is not complying with the standards.

Conditioned on accepting enforcement standards

To get a license or permit you must agree to abide by the regulations of that business, to allow inspections of your business without notice or a warrant, and to keep records as required to show that you are in compliance with the appropriate

rules. For example, a restaurant is subject to inspection during normal business hours without a warrant. If the restaurant does not allow the inspector to enter, then it can be closed. Agencies have access to records that are maintained as a condition of the license or permit, without having to get a subpoena or court order. This can be very important when tracing a food borne illness outbreak or a batch of bad prescription drugs.

Inspections

Legally classified as an adjudication

The inspector is the judge and investigator. The party being inspected may accompany the inspector and present his side of the case during the inspection. The party is given a written report outlining problems and may appeal an adverse determination, such as a restaurant closing, to an administrative body or the courts.

License and permit holders

If you refuse inspection, you are shut down.

Administrative warrants

Health departments often conduct public health inspections of private residences and businesses that do not have health department permits. These may be fire inspections, rat inspections, or other general health and safety inspections. While these inspections were traditionally done without a warrant,²⁶ the United States Supreme Court now requires a general or area warrant if the owner objects to the inspection.²⁷ These warrants do not require probable cause or specific information, but are based on general criteria such as periodic inspection timetables. If an inspector is refused entry, the usual procedure is to seek a court order requiring compliance with the inspection. If the owner does not comply with the court order, the court can impose contempt sanctions.

Limits to administrative warrants

Administrative warrants cannot be used as a substitute for a criminal due process warrant. This is an important issue in joint public health/law enforcement investigations. The courts have carved out certain exceptions for closely regulated business that allows prosecution for information gained through

²⁶ Frank v. Maryland, 359 U.S. 360 (1959) - http://biotech.law.lsu.edu/cases/searches/frank_v_maryland.htm

²⁷ See v. Seattle, 387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967) and Camara V. Municipal Court City And County, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), Generally, see: <http://biotech.law.lsu.edu/cases/searches/index.htm>

administrative searches, but these exceptions are limited.²⁸

Appealing an Adjudication

Agency review

In most cases, the first appeal is to the agency, not to the courts, and is often done in writing. The review can also be to a political body, such as the appeal of food sanitation citations to the city council.

Exhaustion of remedies

State and federal courts require persons who want to contest agency actions to go through the agency review process before they can go to court. This saves the court's time and gives it a better record to review.

The agency is not bound by the recommendations

The agency does not need to defer to the inspector or the administrative judge, it can overrule them as long as it explains why.

Judicial review

Agency decisions can be reviewed by the courts according to the standards set by the legislature. If the regulated party believes that the action violates the Constitution or is not authorized by law, she may appeal directly to the courts. For example, there have been many challenges to rules banning smoking in restaurants, claiming that the health department does not have the authority to issue the rule. If the court rejects the constitutional challenge, the person has usually waived the agency appeal because she went to court before exhausting the agency process.

The Advisory and Consultative Role

Public health is about prevention as well as enforcement

Public health agencies, with the CDC as a prime example, provide public information to help prevent dangerous conditions.

Opening a new restaurant

The health department can help assure that the plans will meet the sanitation code. This is very important for small businesses which are new to food handling.

²⁸ New York v. Burger, 482 U.S. 691 (1987) - <http://biotech.law.lsu.edu/cases/searches/burger.htm>

Training kitchen personnel

The health department can help the employer train personnel who will be handling food, and can work with them to help understand the sanitary code requirements.

Managing problems

While the health department is often seen as an outsider that closes restaurants when it finds a problem, the health department has an important role in helping the restaurateur manage problems to protect the public and to protect the restaurant from closure or from legal claims that will result if a patron is injured by bad food. This is especially important when there is a risk a communicable diseases such as typhoid or hepatitis A being spread in the workplace by an infected employee.

Acting in an Emergency

Power expands with necessity

Starting in the colonial period, the courts have made it clear that agency power is greatest when it is dealing with imminent threats to the public health and safety, and the more people who could be affected, the greater the power to avoid harm.

Courts do not block emergency actions

The history of public health jurisprudence is one of courts finding reasons to support emergency public health actions, not one of preventing action unless it is specifically authorized by law.

In cases where public health actions have been attacked as contrary to other laws, such as federal laws regulating interstate commerce, the courts have found the public health actions valid, as long as they were not shams.²⁹

Knowing what to do is more important than the law

Just as the courts will not interfere with emergency actions, nor will having elaborate emergency laws substitute for good public health planning and adequate resources to carry out the plans. Many states have passed new emergency powers laws to address bioterrorism, but few have increased public health department personnel and resources. In many cases, health departments must sign onto plans that they cannot carry out.

²⁹ *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 186 U.S. 380 (1902) - <http://biotech.law.lsu.edu/cases/pp/compagnie.htm>

Law matters a month after

While law will not stand in the way of public health action if the health department is courageous and knows what it is doing, law is important in sorting out the claims that always arise after a major event. What is most important is not letting fear of the law lead to bad public health decisions, and in not passing new laws that inadvertently increase liability by setting up procedural requirements that cannot be satisfied in an emergency.

Appendix 1
Key Administrative Law Cases

Department of Housing and Urban Development, v. Pearlie Rucker et al., Oakland Housing Authority, et al., v. Pearlie Rucker et al., 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002)

United States v. Mead Corp., 533 U.S. 218, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001)

Carmen Velazquez, et al. v. Legal Services Corporation, et al., 532 U.S. 903, 121 S. Ct. 1224, 149 L. Ed. 2d 135 (2001)

Christine Todd Whitman, Administrator of Environmental Protection Agency, et al. v. American Trucking Associations, Inc., et al., 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)

Food and Drug Administration, et al. v. Brown & Williamson Tobacco Corporation, et al., 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)

City of Chicago, et al., Petitioners v. International College of Surgeons et al. 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)

Ada Van Harken v. City of Chicago, 103 F.3d 1346 (1997)

Lois M. Grant, on Behalf of Herself and All Others Similarly Situated Persons, v. Donna E. Shalala, Secretary of Health and Human Services, 989 F.2d 1332 (1993)

Portland Audubon Society, et al. v. the Endangered Species Committee, Oregon Lands Coalition, Intervenor, Northwest Forest Resource Council, et al., Intervenor, Association of O & C Counties, et al., Intervenor. 984 F.2d 1534 (1993)

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991)

Raphael Leo Reguero v. Teacher Standards and Practices Commission, 312 Ore. 402, 822 P.2d 1171 (1991)

Jaki Walker v. City of Berkeley, 951 F.2d 182 (1991)

Rust v. Sullivan, 500 U.S. 173 (1991)

In the Matter of Ciba-Geigy Corporation, 120 N.J. 164, 576 A.2d 784 (1990)

Marlus C. Zinermon, et al. v. Darrell E. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)

Craib v. Bulmash, 49 Cal. 3d 475, 777 P.2d 1120, 261 Cal. Rptr. 686 (1989)

Morrison, Independent Counsel v. Olson et al., 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988)

Berkovitz et al. v. United States, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)

Hung Hy Nguyen dba Mekong Market v. United States Of America, 824 F.2d 697 (1987)

University of Tennessee et al. v. Elliott, 478 U.S. 788, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986)

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)

Chocolate Manufacturers Assoc. of the United States, Appellant, v. John R. Block, Sec. U.S. Dept. of Agriculture; Samuel J. Cornelius, Administrator, Food and Nutrition Service and U.S. Department of Agriculture, 755 F.2d 1098 (1985)

Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)

City of West Chicago, Illinois v. United States Nuclear Regulatory Commission, Kerr-McGee Chemical Corporation, Intervenor, 701 F.2d 632 (1983)

Immigration and Naturalization Service v. Chadha et al., 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)

Motor Vehicle Manufacturers Association of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co. Et al., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)

Heckler v. Campbell, 461 US 458 (1983)

*Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, Federal Aviation Administration, Intervenor; Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority Federal Aviation Administration, Ronald W. Haughton, Albert Shanker, Henry B. Frazier, III, Leon B. Applewhaite, Intervenor*s, 222 U.S. App. D.C. 97, 685 F.2d 547 (1982)

Andrews v. Agricultural Labor Relations Board, 28 Cal. 3d 781, 623 P.2d 151, 171 Cal. Rptr. 590, *Robert S. Andrews et al., v. Agricultural Labor Relations Board, United Farm Workers of America, AFL-CIO, Real Party in Interest*, 28 Cal. 3d 781; 623 P.2d 151; 171 Cal. Rptr. 590 (1981)

*Sierra Club v. Douglas M. Costle, Administrator of the Environmental Protection Agency, National Coal Association Alabama Power Company, et al., Intervenor*s, 211 U.S. App. D.C. 336, 657 F.2d 298 (1981)

Federal Trade Commission et al. v. Standard Oil Company of California 449 U.S. 232, 101 S. Ct. 488, 66 L. Ed. 2d 416 (1980)

Industrial Union Department, AFL-CIO v. American Petroleum Institute et al. 448 U.S. 607, 100 S. Ct. 2844 (1980)

Association of National Advertisers et al., Inc. v. FTC et al., 201 U.S. App. D.C. 165; 627 F.2d 1151 (1979); **writ of certiorari denied**, 447 U.S. 921, 100 S. Ct. 3011 (1980)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978)

Board of Curators of the University of Missouri et al. v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978)

Ingraham et al. v. Wright et al., 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)

Paul, Chief of Police, Louisville, et al. v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)

Mathews, Secretary of Health, Education, and Welfare v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)

Buckley et al. v. Valeo, Secretary of the United States Senate et al., 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)

Portland Cement Association, an Illinois Not-for-profit Corporation v. William D. Ruckelshaus, Administrator, Environmental Protection Agency, Medusa Portland Cement Co., and Northwestern States Portland Cement Co., Intervenors, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973)

Weinberger, Secretary of Health, Education, and Welfare, et al. v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973)

Camp v. Pitts, 411 U.S. 138 (1973).

Perry et al. v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)

Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. John B. Connally, Individually, and as Chairman of the Cost of Living Council, et al., 337 F. Supp. 737 (1971)

D. C. Federation of Civic Associations et al., v. John A. Volpe, Secretary of Transportation, et al., the District of Columbia, et al., Walter J. Hickel, Secretary of Interior, et al. 148 U.S. App. D.C. 207, 459 F.2d 1231 (1971)

Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation, et al., 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)

Goldberg, Commissioner of Social Services of the City of New York v. Kelly et al. 397 U.S. 254, 90 S. Ct. 1011 (1970)

Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)

WAIT Radio, a Co-partnership v. Federal Communications Com., Carter Publications, Inc., Clear Channel Broadcasting Service, A. H. Belo Corporation, Midwest Radio-Television, Inc., Intervenors, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969)

Abbot Labs v. Gardner, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)

The Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952 (1966)

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951)

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)

Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46 (1950).

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946)

- Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108 (1945)
- NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944)
- Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
- SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)
- Yakus v. United States*, 321 U.S. 414 (1944)
- United States v. Gilliland*, 312 U.S. 86 (1941).
- United States et al. v. Morgan, Administratrix, et al.* 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)
- Morgan et al. v. United States et al.* 307 U.S. 183, 59 S. Ct. 795, 83 L. Ed. 1211 (1939)
- Morgan et al. v. United States et al.*, 304 U.S. 1, 58 S. Ct. 773, 58 S. Ct. 999, 82 L. Ed. 1129 (1938)
- Morgan et al. v. United States et al.*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936)
- Humphrey's Executor v. United States*, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935). The docket title of this case is: *Rathbun, Executor, v. United States*
- A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 545-548 (1935)
- J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).
- Myers, Administratrix, v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926)
- H. Ely Goldsmith, Certified Public Accountant, v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215; 70 L. Ed. 494 (1926)
- Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915)
- North American Cold Storage Company v. City of Chicago et al.*, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908)
- Londoner v. City and County of Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908)
- Henning Jacobson, *Plff. In Err.*, v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) found in **Balt.** Gas & Elec. Co. v. **NRDC**, 462 U.S. 87

Appendix 2

Selected Public Health Law Cases

Administrative Searches - US Supreme Court Cases

General Auto Checkpoints Violate 4th Amendment - City of Indianapolis v. Edmond, 531 U.S. 32 (2000)

Administrative inspections can support criminal convictions in "closely regulated" industries - New York v. Burger, 482 U.S. 691 (1987)

Customs Agents Can Search Ships in Commerce Without A Warrant - United States v. Villamonte-Marquez, 462 U.S. 579 (1983)

The Supreme Court Allows Area Warrants - Camara V. Municipal Court City And County, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)

SC Extends Area Warrant Requirement to Commercial Businesses - See v. Seattle, 387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967)

SC Upholds Conviction for Resisting Warrantless Administrative Search - Modified by See and Camara - Frank v. Maryland, 359 U.S. 360 (1959)

Administrative Searches - State Cases

The McReady Trilogy - Standards for inspection warrants - municipal court cannot issue area warrants - City of Seattle v. McCready, 123 Wash. 2d 260, 868 P.2d 134 (Wa. 02-24-1994) - McCready I; Tenants can consent to administrative searches - City of Seattle v. McCready, 124 Wash. 2d 300, 877 P.2d 686 (Wa. 08-04-1994) - McCready II; Landlords cannot recover attorney's fees for contesting area warrants - City of Seattle v. McCready, 931 P.2d 156, 131 Wash.2d 266 (Wash. 1997) - McReady III

Traffic Stops and Public Health and Safety - Commonwealth v. Rodriguez, 430 Mass. 577, 722 N.E.2d 429 (Mass. 2000)

Animal Control

Centers for Disease Control and Prevention. Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments - United States, 2001. MMWR 2003;52:605-610.

Dogs are property but can be destroyed if running loose - Altman v. City of High Point, 330 F.3d 194 (4th Cir.(N.C.) 2003)

No emotional damages for witnessing injury to a dog - Rabideau v. City of Racine, 243 Wis.2d 486, 627 N.W.2d 795 (Wi 2001)

Are Leash Laws Strict Liability Statutes? - Egenreither v. Carter, 23 S.W.3d 641 (Mo.App. E.D. 2000)

Brief - The Reasonable Dog Standard for Dog Bite Cases - Kirkham v. Will, 311 Ill.App.3d 787, 724 N.E.2d 1062, 244 Ill.Dec. 174 (Ill.App. 2000)

Brief - Criminal Liability for a Bad Dog - State v. Bash, 925 P.2d 978, 130 Wash.2d 594 (Wash. 11-07-1996)

Destroying an animal for rabies testing is not a taking - Raynor v. Maryland Department of Health and Mental Hygiene, 676 A.2d 978, 110 Md.App. 165 (Md.Sp.App. 1996) (ferret)

Food Law

Reports

Diagnosis and Management of Foodborne Illnesses: A Primer for Physicians and Other Health Care Professionals - April 16, 2004/Vol. 53/No. RR-4 (file size 487 KB)

FOOD SAFETY FDA's Imported Seafood Safety Program Shows Some Progress, but Further Improvements Are Needed GAO-04-246 - January 2004

Cases

Oyster Cases - Louisiana Holds State Liable for Not Enforcing Sanitary Code for Oysters - Gregor v. Argenot Great Central Insurance Co., 851 So.2d 959 (La. 2003); No liability for warning physicians and not the public about bad oysters - Simeon v. Doe, 618 So.2d 848 (La. 05-24-1993), also see: Does the state have a duty to warn about bad oysters? - Winstead v. Ed's Live Catfish & Seafood, Inc., 554 So.2d 1237 (La.App. 1 Cir. 1989)

McFat Litigation Trilogy - Brief - NY Dismisses First Fat Food Lawsuit - Pelman v. McDonald's Corp - S.D. NY (2003)

Pelman v. McDonald's Corp - S.D. NY dismisses first Fat Food Lawsuit.

Executive of food processor found guilty under strict liability for selling unsanitary food - United States v. Park, 421 U.S. 658 (1975)

Meat and Poultry: Better USDA Oversight and Enforcement of Safety Rules Needed to Reduce Risk of Foodborne Illnesses. GAO-02-902, August 30.

Pearl in an oyster is not evidence of negligence - Porteous v. Cafe, 713 So.2d 454 (La. 1998)

Is there a Duty to warn about bad oysters? - Simeon v. Doe, 618 So.2d 848 (La. 1993), also see Does the state have a duty to warn about bad oysters? - Winstead v. Ed's Live Catfish & Seafood, Inc., 554 So.2d 1237 (La.App. 1 Cir. 1989)

Punitive Damages for Food Poisoning - Averitt v. Southland Motor Inn of Oklahoma, 720 F.2d 1178 (10th Cir. 11-07-1983)

The Establishment Clause and the State Regulation of Religious Food - Commack Self-Service Kosher Meats, Inc. v. Rubin, 106 F.Supp.2d 445 (E.D.N.Y. 2000)

Can the DOA use HACCP to Inspect Meat Processors - Supreme Beef Processors, Inc. v. U.S. Dept. of Agriculture, 113 F.Supp.2d 1048 (N.D.Tex., May 25, 2000) - 5th Circuit upholds lower circuit - Court Rejects Bacterial Testing on Processed Meat - Supreme Beef Processors, Inc. v. United States Dept. of Agriculture, 275 F.3d 432 (5th Cir. 2001), Nebraska court follows ruling, rejected authority to close meat processing plants based on bacterial testing -

Emotional distress (denied) from insect in canned food - Ford v. Aldi, Inc., 832 S.W.2d 1 (Mo.App. W.D. 1992)

The Classic Case of Destruction of Bad Food without a Hearing - North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)

Habeas Corpus

Classic case up holding health hold orders detaining prostitutes - Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973)

Classic TB restriction case - In re Halko, 246 Cal. App. 2d 553, 54 Cal. Rptr. 661 (Cal.App.Dist.2 11-18-1966)

Court denies habeas corpus on tuberculosis patient - Moore v. Draper, 57 So.2d 648 (Fla. 1952)

Court explains habeas corpus review in public health detentions and denies bail - Pauline Varholy v. Rex Sweat, 15 So. 2d 267, 153 Fla. 571 (1943)

Can Habeas Corpus be Suspended - Ex Parte Milligan, 71 U.S. 2 (1866)

Land Use

Classic USSC case on public health rationale for zoning - Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926)

Mass Gatherings and Public Events

Supreme Court Allows Content Neutral Regulation of Mass Gatherings - Thomas v. Chicago Park Dist., No. 00-1249 (U.S. 01-15-2002)

Standing to Contest Future Controls on Mass Gatherings - Park v. Forest Service of the United States, 205 F.3d 1034 (8th Cir. 03-03-2000)

Must Regulations of Mass Gatherings be the Least Intrusive? - Ward v. Rock Against Racism, 491 U.S. 781 (1989)

Municipal Mass Gathering Permits - Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, No. 99-11385 (11th Cir. 2000)

The Rainbow People v. The National Forests - U.S. v. Kalb 86 F.Supp.2d 509 (W.D.Pa. 2000)

Police Powers

Court Reiterates that Treaties Can Expand the Power of Congress - U.S. v. Lara, - -- S.Ct. ----, 124 S.Ct. 1628, (2004)

Supreme Court Upholds Sex Offender Notification as a Public Health Law - Smith v. Doe, 538 U.S. 84 (2003)

City may prohibit live sex shows - State v. Mutschler, 204 Ariz. 520, 65 P.3d 469 (Ariz.App. Div. 1 2003)

Dogs are property but can be destroyed if running loose - Altman v. City of High Point, N.C., 330 F.3d 194 (4th Cir.(N.C.) 2003)

Cir Court Upholds Injunction to Stop West Nile Spraying but Allows Underlying Claim to Continue - No Spray Coalition, Inc. v. City of New York, 252 F.3d 148 (2d Cir. 2001) - later case - Cir Court Rules Citizen Suit against Mosquito Spraying can continue under Clean Water Act - No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003)

Health and Safety Regulations Upheld for Abortion Clinics - Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir.(S.C.) 2000), including allowing the review of patient medical records by state inspectors.

Court upholds temporary detention of DUI suspects - State v. Atkinson, 755 So.2d 842, 755 So.2d 842 (Fla.App. 2000)

Supreme Court allows city to bar public nudity in clubs - City of Erie v. Pap's A.M., 529 U.S. 277 (2000)

Brief - Police Powers and Sexual Predator Laws - Kansas v. Hendricks, 521 U.S. 346 (1997)

State may regulate nude dancing - Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)

USSC Upholds Public Health Reporting - Whalen v. Roe, 429 US 589 (1977)

Classic case up holding health hold orders detaining prostitutes - Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973)

The Bill of Rights is not a Suicide Pact - Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

Classic case upholding broad public authority and fluoridation of water - Kaul v. City of Chehalis, 45 Wash. 2d 616, 277 P.2d 352 (Wa. 1954)

Court denies habeas corpus on tuberculosis patient - Moore v. Draper, 57 So.2d 648 (Fla. 1952)

Court explains habeas corpus review in public health detentions and denies bail - Pauline Varholy v. Rex Sweat, 15 So. 2d 267, 153 Fla. 571 (1943)

Supreme Court Upholds Detention of Japanese Americans - Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944) - Companion case to Korematsu- Hirabayashi v. United States, 320 U.S. 81, 95, 63 S.Ct. 1375, 1383, 87 L.Ed. 1774 (1943) - Court Reverses Korematsu Conviction - Korematsu v. U.S., 584 F.Supp. 1406, 16 Fed. R. Evid. Serv. 1231 (N.D.Cal. Apr 19, 1984)

Public Health Regulation Trumps Trade Secrets - Corn Products Co. v. Eddy, 249 U.S. 427 (1919)

The Classic Case of Destruction of Bad Food without a Hearing - North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) - Classic public health police power case involving the right of the state to require small pox vaccination.

State May Exclude Persons From a Locale to Prevent the Spread of Disease - *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 186 U.S. 380 (1902)

Public Health and Health Care In Prisons

City not responsible for costs of emergency care for pre-trial detainees - *Myrtle Beach Hospital, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 341 S.C. 1, 532 S.E.2d 868, 532 S.E.2d 868 (S.C. 06/05/2000)

1st Amendment and Prison Grooming Regulations - *Gartrell v. Ashcroft*, 191 F.Supp.2d 23 (D.D.C. Feb 19, 2002)

Court Defines Rights to Abortion in Prisons - *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 03/19/1987)

Co-Payments for Prison Medical Care - *Collins v. Romer*, 962 F.2d 1508 (10th Cir. 05/05/1992)

Private Contractor Corporations Cannot be Sued Under Bivens (state tort remedies are available) - *Correctional Services Corp. v. Malesko*, 122 S.Ct. 515, 534 U.S. 61 (U.S. 2001)

Liability for Prison and Post-release Health Care - *Lugo v. Senkowski*, --- F.Supp.2d ----, 2000 WL 1456235 (N.D.N.Y. Sep 25, 2000)

Ignoring prisoner's HIV medications can be constitutionally impermissible - *Sullivan v. County of Pierce*, 2000 WL 432368 (9th Cir (Wash) 2000)

Duty to Treat Prisoners After Release - *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 05-27-1999)

Standards for Prison Physician Liability - *Hathaway v. Coughlin*, 99 F.3d 550 (2d Cir. 11-08-1996)

Deliberate Indifference in Treatment of Transsexual Prisoner - *Farmer v. Brennan*, 511 U.S. 825 (1994)

Standards for Prison Physician Liability - *White v. Napoleon*, 897 F.2d 103 (3rd Cir. 02-23-1990)

Limitations on the State's Duty to Provide Services - *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)

Standard for Medical Care in Prisons - *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)

Privacy

9th Cir Limits DNA Testing of Convicts - *United States v. Kincade*, No. 02-50380 (9th Cir. 10/02/2003)

Statutory Confidentiality Protection of Research Data - Subject: Statutory Confidentiality Protection of Identifiable Research Data Collected with AHRQ Support

Patient Can Sue Physician for Providing Information on Defective Subpoena - Crescenzo v. Crane, 350 N.J.Super. 531, 796 A.2d 283 (N.J.Super.App.Div. 2002)

Supreme Uphold Public Health Reporting - Whalen v. Roe, 429 US 589 (1977)

Brief - Registering medical marijuana users does not violate privacy rights - Rollins v. Ulmer, No. S-9197 (Alaska 2000)

Brief - Supreme Court Reviews Drug Testing of Pregnant Women - Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001)

EMT Liable for damages and attorney's fees for violating patient's privacy - Pachowitz v. Ledoux, 2003 WL 21221823 (Wis.App. May 28, 2003)

GAO report on the use of Social Security Numbers as IDs.

NY Restricts the Right of Parents and Guardians to Consent to Research on Children and Incompetents - T.D. v. New York State Office of Mental Health, 228 A.D.2d 95, 650 N.Y.S.2d 173, 65 USLW 2439 (N.Y.A.D. 1 Dept. 1996)

Court Recognizes Genetic Privacy - Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir. 1998)

Brief - What is the action for a third party breach of medical confidentiality? - Jane Doe v. Community Health Plan-Kaiser Corp., No. 85529 (N.Y.App.Div. 05/11/2000)

Banning Use of Laetrile Does Not Violate Right to Privacy - People v. Privitera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (Cal. 1979)

Brief - Counties Are Persons Under the FCA and Substance Abuse Records are Protected from Discovery - U.S. ex rel. Chandler v. Cook County, Ill., 277 F.3d 969 (7th Cir. 2002)

Brief - Liability for allowing a drug salesman in an examination room - Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410 (Cal.App. 2 Dist. 2001)

School pregnancy test violates student's privacy rights - Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000)

State Constitutional Protections for Medical Information - King v. State, No. S99A1490, 2000 WL 1468217 (Ga. 10-02-2000)

State Can Limit Professor's Access to Materials on the Internet - Urofsky v. Gilmore, No. 98-1481 (4th Cir. 06-23-2000)

HIV Testing without the Patient's Consent - Sierakowski v. Ryan, No. 99-2705 (7th Cir. 08-03-2000)

Balancing Patient Privacy and Public Health Risks to Others - Baptist Memorial Hosp.- Union County v. Johnson, 2000 WL 5424 (Miss 2000)

Does the Conditional Privilege for Public Health and Safety Reporting Extend to Reports to Neighbors? - Schmitz v. Aston, 317 Ariz. Adv. Rep. 9, 2000 WL 279215 (Ariz.App. Div. 1, Mar 16, 2000)

May the state open previously closed adoption records? - Jane Does 1-7 v. State, No. CA A107235 (Or.App. 12-29-1999)

Are state DNA banks constitutional? - Johnson v. Com. of Virginia, --- S.E.2d ----, 2000 WL 432395 (Va. 2000)

California requires psychiatrists to warn about dangerous patients - Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 07-01-1976)

Sexually Transmitted Infections

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Making State Public Health Laws Work for SARS Outbreaks

Edward P. Richards* and Katharine C. Rathbun†

In their article, HHS/CDC Legal Response to Outbreak of Severe Acute Respiratory Syndrome (SARS), Misrahi, et al. (1) describe the updated federal laws and response plans for handling SARS and related communicable diseases. Federal authority is important to control the interstate and international movement of persons who are potentially infectious, but most isolation and quarantine orders will be performed by state and local officials, using state and local law. We discuss how existing laws might be modified to facilitate effective SARS control while providing legal protections to restricted persons.

Traditional Powers

The drafters of the U.S. Constitution gave states broad powers to control communicable diseases because the colonies were ridden with malaria, yellow fever (2), cholera, and typhoid. States exercised these powers as necessary, quarantining persons and even whole cities and regions (3). This public health authority has been upheld by the U.S. Supreme Court in all cases (4), except when it was clearly a subterfuge for racial discrimination (5), and in 1950, every state and local health department had clear powers to conduct case-finding and isolate or quarantine persons who represented a potential public health risk (6).

State public health laws do not need to be detailed and specific, but they can give public health agencies the general authority to protect the public's health and safety. Consistent with the Constitution, courts allow government agencies to fill in the details of these laws (7). Statutes do not need specific judicial review because all detentions are reviewable through habeas corpus proceedings. Habeas corpus is a fundamental part of Anglo-American law, protecting persons against illegal detention. A part of the U.S. Constitution, habeas corpus needs no additional statutory authorization, although all states provide for it.

Persons detained by the state may file a habeas corpus petition and demand that a court review their detention. In

the case of quarantine due to disease, a judge would determine whether the state has shown that the detained person deserves quarantine. The judge must defer to public health authorities on their choice of public health strategies (8). Public health orders get the most permissive judicial review, the rational relationship test, because they are based on objective criteria, are usually of limited duration, and are necessary to prevent imminent harm (9).

Contemporary Public Health Laws

With the advent of AIDS in the 1980s, some civil libertarians argued that the old public health laws were outdated and no longer enforceable. There was no judicial support for this argument then (10), and today's courts are even more supportive of state powers to protect the public. Nonetheless, many states rewrote their isolation and quarantine laws to provide varying levels of mandatory judicial review, in some cases requiring that a person be provided counsel and an opportunity for a trial before detention. Such proceedings take so much time and money that they make it almost impossible to impose quarantine (11).

Even public health laws rewritten in the wake of the 9/11 events often include judicial review provisions that would be unworkable in a large outbreak; persons would either be detained illegally or be released because of legal technicalities. Improperly detained persons can sue, and these lawsuits will probably not be barred by the immunity provisions in emergency public health laws. Improperly released persons will nullify the disease control plan.

Administrative Law Solution

The best way to balance public protection with private rights is to use administrative hearings rather than judicial hearings to review quarantine and other public health orders. Administrative review is used routinely in state and federal agency proceedings, including for mental health commitments in Maryland (12). Courts have required more due process for mental health commitments than for quarantines; this difference is strong evidence that administrative review would be an acceptable alternative for public health orders. Such reviews can be appealed to the courts,

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but having the agency do the first review makes a factual record that allows quick and efficient judicial review. A petitioner can be required to go through an agency appeal before a habeas corpus review by the courts (13).

Persons who want to contest their isolation orders could be required to petition the decision maker doing the reviews. This petition could be to a health agency staff member or an appointed board. The health agency would present the basic information, and the petitioner could supply additional information in writing. Telephone interviews could be used to allow personal statements without the danger of in-person testimony. The decision maker would make a brief, written ruling based on predefined classifications. This ruling could be reviewed by an agency appeals board and would greatly simplify any subsequent appeal to the courts (14). If such a process is adopted, the statutory language to implement these reviews should be kept general to allow flexibility in the face of different epidemic conditions.

Such a review should also be part of the quality assurance for isolation and quarantine orders. A key part of any isolation and quarantine process for SARS would be thorough recordkeeping of all orders, whom such orders apply to, their duration, and the disease outcome in each case. There should be administrative oversight to ensure that the orders are proper and that other necessary actions are carried out, such as providing food and medical services to restricted persons.

Conclusions

A major SARS outbreak would stretch many state and local public health laws to the breaking point. These laws should be reviewed and rewritten as necessary. Fair process can be based on sound administrative law principles that dramatically reduce the role of judicial review in isolation and quarantine orders.

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