

Before the
CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC),
DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)
Atlanta, GA 30329

Control of Communicable
Diseases (Quarantine),
Notice of Proposed
Rulemaking; CDC Docket
No. CDC-2016-0068,
RIN 0920-AA63,
FR Doc. 2016-18103

**COMMENTS OF THE
IDENTITY PROJECT
(IDP)**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

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October 14, 2016

The Identity Project (IDP) submits these comments in response to the Notice of Proposed Rulemaking (NPRM), “Control of Communicable Diseases” (Quarantine); docket number CDC–2016–0068, RIN 0920–AA63, FR Doc. 2016–18103, published at 81 *Federal Register* 54230–54316 (August 15, 2016), <<https://www.regulations.gov/document?D=CDC-2016-0068-0001>>.

The NPRM describes the proposed rules as a medical quarantine program. But they go far beyond what is medically indicated, authorized by statute, or permitted by the Constitution.

The CDC's proposal completely ignores existing medical and legal procedures for involuntary commitment of individuals determined to constitute a danger to themselves or others. Instead, the proposed rules include (1) indefinite extrajudicial mass detention without due process, (2) compelled responses by travelers to extrajudicial interrogation concerning their exercise of First Amendment rights including rights of movement and assembly, regardless of whether there is any current outbreak of any communicable disease, much less whether there is any basis for belief that any specific traveler subjected to this interrogation is infected with such a disease; and (3) charging innocent detainees for the costs of their detention.

These misguided, unauthorized, and unconstitutional proposals should be withdrawn.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a

nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. Indefinite extrajudicial mass detention without due process

The proposed rules would allow any designated CDC “official” to issue, “A Federal order authorizing quarantine, isolation, or conditional release” of an “individual or group”.

Violation of such an order would be subject to criminal penalties.

The proposed rules would place no limits on:

- the size of the group subject to such an order;
- the duration of such “quarantine or isolation” (detention) or “conditional release” (restrictions on movement, assembly, and/or other liberties); or
- which CDC officials could be designated as authorized to issue such orders, or the medical, legal, or adjudicatory qualifications of such officials.

The only review of such an order provided by the proposed rules would be a “medical review” by a single “physician, nurse practitioner, or similar medical professional”. This review would be limited to “ascertaining whether the CDC has a reasonable belief that the individual is infected with a quarantinable communicable disease in a qualifying stage,” and would exclude any consideration of legal or other objections to the order. An unlimited number of such reviews could be consolidated in a single proceeding before a single reviewer.

An indigent detainee could be “represented” before the reviewer by a “medical representative”, but that “representative” would be appointed by the CDC, and would be a “physician, nurse practitioner, or similar medical professional”, not an attorney.

There are no provisions in the proposed rules for access of detainees to legal counsel, representation of detainees by retained or appointed counsel, confrontation or cross-examination of witnesses, compulsory process for obtaining evidence or testimony, independence of the reviewer from the initial decision-maker, judicial review, or any other aspect of due process.

So the lowliest single CDC employee, subject only to review on an exclusively medical basis by a single reviewer employed by the same agency and with qualifications “similar” to those of a nurse practitioner, could order the extrajudicial arrest and detention for an unlimited duration of a “group” defined in any manner and including an unlimited number of individuals.

The NPRM states disingenuously that, “Individuals seeking to challenge the legal basis for their quarantine may do so through whatever legal mechanism may be available. HHS/CDC does not express an opinion regarding what form the legal action should take or what legal remedies may be available to individuals seeking to challenge their public health restrictions.”

Since HHS/CDC declines to express an opinion as to the procedures that should be followed for legal review of CDC applications for detention or restrictive orders, we will do so:

For any detention that is not exigent or that exceeds a brief and expressly time-limited period, CDC should either obtain the informed explicit written consent of the patient for custodial treatment or other restrictions, or utilize the existing legal procedures for involuntary commitment of persons duly adjudicated to pose a hazard to themselves or others sufficient to warrant commitment, or a judicial finding of incompetence and appointment of a guardian.

Medical opinions of CDC staff should be only one of the categories of evidence available to be considered in the judicial review of a CDC application for a commitment or restriction order or finding of incompetence, which should be conducted in accordance with Constitutional

requirements for due process, including access to counsel, confrontation and cross-examination of witnesses, and procedures to compel the production of evidence and appearance of witnesses.

We recommend that any period of permissible exigent extrajudicial detention or restriction be limited to no more than the usual period within which arrestees must be produced before a judge for arraignment and an opportunity to contest their continued detention.

III. Compelled responses by airlines and travelers to CDC interrogatories

The NPRM proposes to require airlines to provide the CDC, on demand but without warrant, with access to personal information about air travelers and their itineraries. The NPRM provides no justification for exempting these demands for information from normal warrant requirements, and this provision of the proposed rules violates the 4th Amendment.

Having decided to require access for government use to logs of travelers' movements by air to determine where they have been, when, and who they might have infected, will the CDC next claim the authority to require access to logs of time and location data for travelers on the ground, maintained by and obtained from cellphone and wireless data network operators?

The NPRM also proposes to add new regulations requiring travelers to answer CDC interrogatories concerning their past and present locations and movements:

§ 71.20 (a) The CDC may conduct public health prevention measures, at U.S. ports of entry or other locations... to detect the potential presence of communicable diseases.

(b) As part of the public health prevention measures, CDC may require individuals to provide contact information such as U.S. and foreign addresses, telephone numbers, email addresses, and other contact information, as well as information concerning their intended destination, health status, and travel history.

It's unclear what provision of law, if any, the CDC claims provides statutory authority for this regulation requiring responses to CDC interrogatories. We believe there is none.

The closest the law comes is 42 U.S. Code § 264 , which provides as follows:

Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State.

But this provision applies only to individuals who are already “reasonably believed to be infected with a communicable disease”. The proposed rule 42 CFR § 71.20 is not limited to individuals who satisfy this threshold of reasonable belief (not mere reasonable suspicion), but purports to require responses to interrogatories by anyone at unlimited “other locations”.

In addition, the authority of this statute is limited to “examination”. In a medical context, “examination” ordinarily refers to inspection, not interrogation. A requirement to (passively) submit to (medical) examination does not denote an obligation to answer interrogatories.

In both of these respects, the proposed rules exceed the CDC’s statutory authority.

This portion of the proposed rule also violates the the Privacy Act of 1974, 5 U.S. Code § 552a (e)(7), which provides as follows:

Each agency that maintains a system of records shall ... (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

Records of where we have been, where we are going, and who we have associated with or intend to associate with are records of how we exercise rights of freedom of assembly guaranteed by the 1st Amendment. The CDC’s purported justification for these proposed rules is

to determine with whom we have assembled or intend to assemble, and how closely, in order to determine whether we are likely to be infected or to pose a risk of infecting others.

Accordingly, this record-keeping requires explicit statutory authorization, unless it is part of an authorized law enforcement activity.

The CDC has taken pains to specify that it does not consider this to be a law enforcement activity (since if it were, it would obviously require due process). Accordingly, the CDC cannot claim that these activities are subject to the law enforcement exception in the Privacy Act.

Any arguable statutory authorization for the CDC to maintain records of travel, assembly, and association is at most implicit in a strained interpretation of “examination”, and falls far short of the requirement of the Privacy Act for *explicit* statutory authorization.

Last but certainly not least, this portion of the proposed rule violates the 1st Amendment to the U.S. Constitution (to the extent that compelled responses to interrogatories about acts of assembly and association implicate and are likely to chill the exercise of 1st Amendment rights), the 4th Amendment (to the extent that this “examination” constitutes a search, which we believe it does), and the 5th Amendment (to the extent that one of the intended uses of the responses to these questions is as part of the basis for decisions to detain or otherwise restrict the liberty of individuals, in which answers to these questions could be used against them).

At an immigration checkpoint, government agents have been held to have the right to ask questions. But individuals have the right to remain silent, cannot be required to consent to search, and must be allowed to proceed without more than at most a brief delay unless some evidence other than their silence provides probable cause for belief that they have violated some law.

Similarly, the CDC has the statutory authority to “examine” individuals at an infectious disease checkpoint, if there is a basis for a reasonable belief that they are infected with a communicable disease. But they have the right to remain silent, and must be allowed to proceed without more than a brief delay unless some evidence other than their silence provides probable cause for belief that they are infected with a communicable disease.

IV. Charging detainees for the costs of nonconsensual "treatment"

The proposed rules at 42 CFR § 71.30 would provide that:

(a) The CDC may authorize payment for the care and treatment of individuals subject to medical examination, quarantine, isolation, and conditional release, subject to paragraphs (b) through (h) of this section.

(b) Payment for care and treatment shall be in the CDC’s sole discretion and subject to the availability of appropriations.

This provision confuses consensual treatment, and its costs, with nonconsensual detention, and ignores the legal obligation to provide treatment for detainees.

In the absence of either (a) informed consent of the patient or (b) a judicial finding of incompetence, appointment of a guardian, and consent by that guardian, nonconsensual physical intervention imposed on a "patient" conscious and able to grant or withhold consent is prohibited by medical ethics, and cannot properly be described as “care” or “treatment”.

Depending on the nature of the intervention, nonconsensual “treatment” may constitute medical malpractice, assault and battery (possibly including sexual assault and battery or rape, depending on the body parts touched), kidnapping, and/or torture. The proper role of the government is to prosecute the perpetrators of such crimes, and to provide a judicial forum for

civil redress for damages, not to charge the victims for their abuse. Charging detainees for the costs of nonconsensual "treatment" amounts to charging victims for the costs of their abuse.

Conformity with existing, well-established, judicially reviewed and approved procedures for involuntary commitment (as the basis for any but the briefest necessary exigent detention) and findings of incompetence and appointment of guardians (as the basis for any nonconsensual treatment or physical intervention) would avoid the risk to well-intentioned medical professionals and other quarantine staff of criminal, civil, or professional sanctions or liability for complicity in unlawful detention or other violations of detainees' rights.

Charging detainees for involuntary "treatment" including hospitalization, long-distance ambulance transport, or other prohibitively expensive measures could also amount to duress.

Suppose that "conditional release" is the the only alternative you are offered to hospitalization *at your own expense* at a cost which, according to the NPRM, could exceed \$60,000 a day. In such a case, is your "consent" to wear an electronic monitoring device like a parolee, as contemplated by the proposed rules, "voluntary"? Or the result of *de facto* duress?

Even if detainees consent to, or affirmatively seek, treatment, those responsible for their detention are responsible for the costs of any such treatment, especially for indigent detainees.

Well-established principles of medical ethics require medical professionals and medical institutions to provide necessary (consensual) treatment even for indigent patients.

International humanitarian and human rights law recognizes that all detainees have the right to adequate medical treatment, regardless of the putative basis for their detention, and that the provision of adequate medical treatment is the responsibility of the detaining party.

The U.S. Constitution requires the government to provide adequate medical care and treatment to prisoners. The government has the obligation to insure that adequate medical treatment is provided to detainees. Unambiguous Supreme Court case law requires that, “If, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay.” (*City of Revere v. Mass. General Hospital*, 463 U.S. 239, 1983).

V. Conclusion

The proposed rules exceed the CDC’s statutory authority, and would violate the Privacy Act and numerous provisions of the U.S. Constitution and international humanitarian law. They would create a regulatory framework for martial law in the guise of medical orders.

The proposed rules should be withdrawn.

Respectfully submitted,

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_____/s/

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