

Alabama Department of Public Health Fatality Management Conference - Legal Issues

**John R. Wible, General Counsel Brian Hale, Associate General Counsel and
Greg Everett, General Counsel, AlaHA**

Objectives - You will be made aware of:

- State and County Public Health Powers
 - State and County Boards of Health
 - State Health Officer
- The Nature of Emergencies
 - Proclamations and Declarations
 - Orders
 - Powers – federal and state
- Quarantine – State and Federal
- Cross Border Issues
- Jurisdictional Conflicts
- Decedent's Issues
- First Amendment Problems

Powers of the State Board of Health. Generally, "Control of public health work under county and state boards of health." *Code of Ala., 1975 §22-1-3.*

No local board of health or other executive body for the exercise of public health functions other than the county board of health shall be established or exist in any county or municipality. No municipality shall have a municipal health officer or other like officer. No board, body or organization or any official or person, acting or claiming to be under any federal authority or acting without claim of federal or state authority shall engage in any public health work except under the supervision and control of the State Board of Health.

State Board of Health - Authority and jurisdiction. *Code of Ala., 1975 §22-2-2*

The State Board of Health shall have authority and jurisdiction:

- (1) To exercise general control over the enforcement of the laws relating to public health.
- (2) To investigate the causes, modes or propagation and means of prevention of diseases.
- (3) To investigate the influence of localities and employment on the health of the people.
- (4) To inspect all schools, hospitals, asylums, jails, theatres, opera houses, courthouses, churches, public halls, prisons, stockades where convicts are kept,

markets, dairies, milk depots, slaughter pens or houses, railroad depots, railroad cars, street railroad cars, lines of railroads and street railroads (including the territory contiguous to said lines), industrial and manufacturing establishments, offices, stores, banks, club houses, hotels, rooming houses, residences and other places of like character, and whenever insanitary conditions in any of these places, institutions or establishments or conditions prejudicial to health, or likely to become so, are found, proper steps shall be taken by the proper authorities to have such conditions corrected or abated.

(5) To examine the source of supply, tanks, reservoirs, pumping stations and avenues of conveyance of drinking water, and whenever these waters are found polluted or conditions are discovered likely to bring about their pollution, proper steps shall be taken by proper authorities to improve or correct conditions.

(6) To adopt and promulgate rules and regulations providing proper methods and details for administering the health and quarantine laws of the state, which rules and regulations shall have the force and effect of law and shall be executed and enforced by the same courts, bodies, officials, agents and employees as in the case of health laws, and a quorum, as provided for by the constitution of the medical association of the State of Alabama, shall be competent to act.

(7) To exercise supervision and control over county boards of health and over county health officers and county quarantine officers in the enforcement of the public health laws of the state in their respective counties, and whenever any such county board of health, county health officer or county quarantine officer shall fail or refuse to discharge its or his duties, said duties may be discharged by the State Board of Health until proper arrangements are made to insure their discharge by said county board of health or said county health officer or said county quarantine officer, as the case may be.

(8) To act as an advisory board to the state in all medical matters and matters of sanitation and public health.

County boards of health - Duties generally. *Code of Ala., 1975 §22-3-1*

It shall be the duty of the county boards of health in their respective counties and subject to the supervision and control of the State Board of Health:

(1) To supervise the enforcement of the health laws of the state, including all ordinances or rules and regulations of municipalities or of county boards of health or of the State Board of Health, and to supervise the enforcement of the law for the collection of vital and mortuary statistics and to adopt and promulgate, if necessary, rules and regulations for administering the health laws of the state and the rules and regulations of the State Board of Health, which rules and regulations of the county boards of health shall have the force and effect of law and shall be

executed and enforced by the same bodies, officials, agents and employees as in the case of health laws;

(2) To investigate, through county health officers or quarantine officers, cases or outbreaks of any of the diseases enumerated or referred to in Section 22-11-1 and to enforce such measures for the prevention or extermination of said diseases as are authorized by law;

(3) To investigate, through county health officers or quarantine officers, all nuisances to public health and, through said officers, to take proper steps for the abatement of such nuisances;

(4) To exercise, through county health officers or quarantine officers, special supervision over the sanitary conditions of schools, hospitals, asylums, jails, theatres, opera houses, courthouses, churches, public halls, prisons, markets, dairies, milk depots, slaughter pens or houses, railroad depots, railroad cars, dining cars, street railroad cars, lines of railroads and street railroads (including the territory contiguous to said lines), airports, industrial and manufacturing establishments, offices, stores, banks, club houses, hotels, rooming houses, residences and the sources of supply, tanks, reservoirs, pumping stations and avenues of conveyance of drinking water and other institutions and places of like character and, whenever insanitary conditions are found, to use all legal means to have the same abated;

(5) To elect a county health officer, subject to the approval of the State Committee of Public Health, who shall devote all of his time to the duties of his office and to fix his term of office at not less than three years in such counties of the state as shall, through their proper authorities, make appropriations for full-time public health service. No county health officer elect shall assume office until his election shall have been approved by the State Committee of Public Health, and if such committee refuses to approve his election, another county health officer shall be forthwith elected. The jurisdiction of such officer shall extend to all parts of the county, including all incorporated municipalities; and should the health officer so elected neglect or fail faithfully to perform any of the duties which are lawfully prescribed for him or if he fails or refuses to observe or conform to the rules, regulations or policies of the State Board of Health, the State Health Officer shall remove said county health officer from office. When any county health officer shall be so removed, he shall have the right to appeal to the State Committee of Public Health, and when such appeal has been taken, said committee shall investigate fully the causes for which he was removed from office. If six members of said committee vote to affirm the action of said State Health Officer, then his action shall be affirmed; otherwise, it shall be reversed; and

(6) Whenever two or more counties, acting through their respective county commissions, shall agree to appropriate proportionately from the funds of their

respective counties a sufficient sum to provide a district health department, then the county boards of health of these respective counties shall meet in joint session and elect a full-time health officer and fix his term of office at not less than three years. The full-time health officer shall devote all of his time to the duties of his office in the district for which he is elected. No full-time health officer elected under the authority of this subdivision shall assume office until his election shall have been approved by the State Committee of Public Health, and if such committee refuses to approve his election, another district health officer shall forthwith be elected. The jurisdiction of such officer shall extend to all parts of each county in the district, including all incorporated municipalities in the several counties composing such district, and he shall be subject to removal as provided in subdivision (5) of this section. The salary of district health officers shall be fixed in the same manner as those of county health officers. Wherever the term "county health officer" occurs in this chapter, it shall be construed as applying likewise to district health officers.

Nuisances menacing public health are to be abated by the County Board of Health. *Code of Ala., 1975 § 22-10-2.*

Any such nuisance shall be abated by the county board of health and the county health officer in any of the ways provided in this chapter that may be appropriate or in any other lawful manner including abatement by a complaint. And an effort to abate by one method shall not preclude resort to any other method or methods. In litigation undertaken by such board for the abatement of a nuisance, said litigation may be conducted in the name of said board.

The State Board of Health is to control notifiable (contagious) disease outbreaks. The Board is to designate notifiable diseases and health conditions.

The State Board of Health shall designate the diseases and health conditions which are notifiable. The diseases and health conditions so designated by the Board of Health are declared to be diseases and health conditions of epidemic potential, a threat to the health and welfare of the public, or otherwise of public health importance. The occurrence of cases of notifiable diseases and health conditions shall be reported as provided by the rules adopted by the State Board of Health. *Code of Ala., 1975 § 22-11A-1.*

The State Board of Health is to take charge of disease investigations within the State. *Code of Ala., 1975 § 22-11A-5.*

The State Board of Health may take charge of the investigation of an epidemic or of the suppression thereof, or both, whenever, in the opinion of the State Health Officer, the public welfare requires such a course of action and, in that event, shall have and exercise all the power and authority that the county board of health and county health officer would have in the premises.

The Health officer is to investigate complaints of diseases and move afflicted persons to a “suitable place.” *Code of Ala., 1975 § 22-11A-8.*

Whenever complaint is made in writing to the health officer of a county that a person, not at his own home, is afflicted with any of the notifiable diseases or health conditions designated by the State Board of Health, such health officer shall, thoroughly and promptly, investigate said complaint. If, upon investigation, said health officer is of the opinion that said complaint is well founded, he may cause such person to be removed to such place as may have been provided for such cases in the county, city or town in which such person is found or, if there is no such place provided for such cases, then, to such place as said health officer may deem suitable, subject to the approval of the authorities of the county, city or town, as the case may be. The removal of said person shall be at the expense of said person, or, in case the person is a minor, then, at the expense of his parent or guardian or, if the person be indigent, then, at the expense of the town, city, or county, as the case may be.

Any person believed exposed to diseases is to be tested and must seek and accept treatment or be compulsorily treated.

Any person who the State or county Health Officer has reason to believe has been exposed to any of the diseases designated under this chapter shall be tested. Any person who the State or county Health Officer has reason to believe is afflicted with any of the diseases designated under this article shall seek and accept treatment at the direction of the health officer or a physician licensed to practice medicine in Alabama. *Code of Ala., 1975 § 22-11A-23.*

Persons who refuse treatment are to be committed to the custody of the Department of Public Health for compulsory treatment.

When any person exposed to a disease or where reasonable evidence indicates exposure to a disease or infection designated under this article refuses testing or when any person afflicted with a disease designated under this chapter refuses treatment and/or conducts himself so as to expose others to infection, the State or county Health Officer or the designee may petition the probate judge of the county in which such person is located to commit him to the custody of the Alabama Department of Public Health for compulsory testing, treatment and quarantine. *Code of Ala., 1975 § 22-11A-24.*

State Health Officer’s duties and powers

- Function for the State Board of Health
- Supervise county health officers and Boards.
- Advise the Governor on disease outbreaks
- Declare and abate nuisances 22-10-1,2,3
- Declare and abate diseases outbreaks 22-11A-1,5

- Isolate, commit and treat infected persons, 22-11A-23, et seq.
- Proclaim and supervise quarantine 22-12-1 et seq.
- Supervise ESF-8 (See State EOP)
- ADPH Incident Commander

The State Committee of Public Health shall elect an executive officer who shall be a physician licensed in the State of Alabama to be known as the State Health Officer and shall fix his term of office and salary. . . . When the State Committee of Public Health is not in session, the State Health Officer, as executive officer of the Department of Public Health, shall act for said committee and shall have and discharge all the prerogatives and duties of said committee. He shall report his actions to the committee at its next meeting after such action is taken, and such action of the State Health Officer shall then be subject to confirmation or modification by the committee. The State Health Officer shall exercise general supervision over county boards of health and county health officers and promptly report to said county boards of health any delinquencies of official duty on the part of said county health officers which may come to his knowledge, keep himself informed in regard to all diseases which may be in danger of invading the state and, as far as authorized by law, take prompt measures to prevent such invasions and keep the Governor and the Legislature informed as to the health conditions prevailing in the state, especially as to outbreaks of any of the diseases enumerated in Chapter 11 of this title, and submit to the Governor and Legislature such recommendations as he deems proper to control such outbreaks. *Code of Ala., 1975 § 22-2-8.*

Whenever in this chapter rights are granted to, or duties imposed upon, the State Board of Health or a county board of health, such rights and such duties may be exercised or executed by the committees of public health or health officers, respectively, of said boards as their legal and accredited agents. *Code of Ala., 1975 § 22-12-3.*

Measures Available without a Declaration. To control communicable disease, public health can exercise certain measures without "declaring" public health emergency – including

- Mandatory Surveillance
- Quarantine/Isolation
- Travel Restrictions
- Contact tracing
- Vaccinations/Medical Examinations.

Lets step back a moment - review how issues like these have been treated in the courts. Smallpox: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905.) Henning Jacobson, a prominent local minister, refused to be vaccinated after City of Cambridge, MA. Passed an ordinance finding "smallpox prevalent in the city and continues to increase" and directed vaccination of all inhabitants of city except children who present a certificate

signed by physician that they are unfit subjects of vaccination. State law authorized city boards to require and enforce vaccination and specified a fine of \$5 for anyone who refuses to comply

Jacobson was fined, and took his case to state Supreme Court and then to US Supreme Court which held:

The police power of state must be held to embrace; at least, such reasonable regulations established directly by legislative enactment as will protect the public health and safety. . . .The mode or manner in which those results are to be accomplished is within discretion of the state, subject, of course, that . . . no rule . . . or regulation . . . shall contravene the Constitution of the United States, or with any right which that instrument gives or secures." at 25. Real liberty for all could not exist if each individual can use his own, whether in respect of his person or property, regardless of the injury that may be done to others. . . . Upon the principle of self defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." At 26-27.

A Recent Case: *Best v. St. Vincent's Hospital*, No. 03 CV.0365 RMB JCF, 2003 WL 21518829 (S.D. NY July 2003 - Magistrate's opinion); affirmed by *Best v. Bellevue*, 2003 WL 21767656 (S.D.N.Y. July 2003 - District Judge); aff'd in part, vacated in part, dismissed in part, *Best v. Bellevue*, 2004 WL 2166316 (2d Cir. 2004) - all opinions are unpublished. Mr. Best had TB and refused treatment. New York public health law provided for hearings and individual determinations on whether continued detention of one individual - Mr. Best - was required for public health and safety. The federal courts ultimately upheld Mr. Best's detention - but described the constitutional standards that must be met before an individual can be detained:

- the right to a particularized assessment of an individual's danger to self or others
- the right to less restrictive alternatives where available.

The Court also described standard to determine constitutionality of detention procedures:

To determine whether the procedural safeguards provided by Health Code § 11.47 are constitutionally sufficient to protect an individual's due process rights, the following factors must be considered: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In Alabama, *Code of Ala., 1975* § 22-11A-28 allows for instantaner detaining of infected persons. This has been most effectively used with tuberculosis.

(a) When a petition has been filed, seeking to have limitations placed upon the liberty of a person, pending the outcome of a final hearing on the merits, the probate judge shall order the sheriff of the county in which such person is located, to serve a copy of the petition upon such person and to bring such person before the probate judge instanter. When any such person against whom a petition has been filed, seeking to have limitations placed upon such person's liberty pending the outcome of a full and final hearing on the merits, is initially brought before the probate judge, the probate judge shall determine from an interview with the person sought to be committed and with other available persons, what limitations, if any, shall be imposed upon such person's liberty and what temporary treatment, if any, shall be imposed upon such person pending further hearings.

(b) No limitations shall be placed upon such person's liberty nor treatment imposed upon such person unless such limitations are necessary to prevent such person from doing substantial and immediate harm to himself or to others or to prevent such person from leaving the jurisdiction of the court. No person shall be placed in a jail or other facility for persons accused of or convicted of committing crimes unless such person poses an immediate, real and present threat of substantial harm to himself or to others, and no other appropriate public facility is available to safely detain such person.

(c) When any person sought to be committed has any limitations imposed upon his liberty or any temporary treatment imposed upon him by the probate judge, pending final hearings on such petition, the probate judge, at the time such limitations or treatment is imposed, shall set a probable cause hearing within seven days of the date of such imposition. If, at such probable cause hearing, the probate judge finds that probable cause exists that such person should be detained temporarily and finds that temporary treatment would be in the best interest of the person sought to be committed, the probate judge shall enter an order so stating and setting the date, time and place of a final hearing on the merits of the petition. The final hearing shall be set within 30 days of the filing of the petition.

Governmental Authority Model - At height of emergency - authority is at its peak. Broad discretion exists under both state and federal laws for the executive - including police and public health officials - to take actions deemed necessary to reduce imminent threats to life, property, and public health and safety. When the crisis is brought under control - when there are no longer imminent threats to life, property, and public health and safety requiring immediate action, the scope of authority is reduced - as need to protect other values and individual rights, resume normal roles. Further, once immediate threats to life and to public health, safety, and property are addressed, all those involved in a response will necessarily be faced with the challenge of paying for the loss and damage that has been sustained.

Though legal issues become more and more important as the emergency moves from the crisis to the recovery phase, legal issues are still very important even at the height of a crisis - and choices made during crisis moments can have a substantial impact on how losses and damages are paid for after the event.

What are Public Health Emergencies? Public health is an important component of every catastrophic event requiring emergency response as well as specific public health incidents.

- Stand alone Public Health Emergencies - Public Health Emergencies w/o other emergency conditions Public health emergencies w/o other emergency conditions E.g. Epidemic or pandemic.
- Combined Public Health Emergencies where other emergency conditions exist and additional, complicating emergency conditions exist. These may include earthquake/hurricane/tornado with impacts on water, sanitation and/or medical infrastructure.

Homeland Security Presidential Directive-5 (HSPD-5) directs the Homeland Security Secretary to develop and administer: National Incident Management System (NIMS) and the National Response Plan (NRP) to ensure effective management of large-scale emergencies. While the secretary of Homeland Security is responsible for developing and Administering NIMS and the NRP, HSPD 5 indicates that it is to apply to ALL federal resources and all resources paid for by Federal Funds, before, during and after an emergency.

The National Response Framework (NRF), which is the successor to the National Response Plan, has been released and will become effective March 22, 2008. Until that time, the National Response Plan, last updated May 25, 2006 remains in effect. The National Response Plan establishes protocols to help:

Save lives and protect the health and safety of the public, responders, and recovery workers; Ensure security of the homeland; Prevent an imminent incident, including acts of terrorism, from occurring; Protect and restore critical infrastructure and key resources; Conduct law enforcement investigations to resolve the incident, apprehend the perpetrators, and collect and preserve evidence for prosecution and/or attribution; Protect property and mitigate damages and impacts to individuals, communities, and the environment; and Facilitate recovery of individuals, families, businesses, governments, and the environment.¹

The NRF is intended for senior elected and appointed leaders, such as Federal department and agency heads, State governors, mayors, tribal leaders, city managers and the private sector. It is designed to inform emergency management practitioners by explaining the operating structures and tools routinely used by first responders and emergency managers at all levels of government.

It helps define the roles, responsibilities, and relationships critical to effective emergency planning, preparedness, and response to any emergency or disaster. Today's release reflects the culmination of many months of hard work and collaboration among the nation's emergency management community.²

¹ FEMA Website. <http://www.fema.gov/news/newsrelease.fema?id=42361>.

² Id.

The NRF is designed to be scalable, flexible and adaptable; always in effect; and is to articulate clear roles and responsibilities among local, state, and federal officials.

The Secretary of Homeland Security is the principal Federal official for domestic incident management. Pursuant to the Homeland Security Act of 2002, the Secretary is responsible for coordinating Federal operations within the United States to prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies.

The Secretary shall coordinate the Federal Government's resources utilized in response to or recovery from terrorist attacks, major disasters, or other emergencies if and when any one of the following four conditions applies:

- (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary;
- (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local authorities;
- (3) more than one Federal department or agency has become substantially involved in responding to the incident; or
- (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.³

Declaring or Proclaiming a disaster or state of emergency. Proclamations and declarations are public announcements - a statement or declaration that the government recognizes that emergency situation exists and, presumably, intends to do something about it. A Declaration in the context of this course is a legal determination made by an authorized official, in accordance with criteria specified by law which has the particular effect specified in the governing law. A declaration may trigger special emergency powers; allow expenditure of emergency funds, or expenditure of funds in advance of appropriation or in lieu of appropriation. It waives or modifies normal legal requirements. It has significant legal impact and import.

In Alabama, under *Code of Ala. 1975*, § 31-9-2, the Governor proclaims an "emergency" defined as: enemy attack, sabotage, or "other hostile action;" Fire, flood and "other natural causes." Definition is broad enough to cover B/T incidents or naturally occurring events like hurricanes and tornadoes. Additionally, the legislature has amended the act to clarify the definition of "State of Emergency."

The Amendment creates a "State Public Health Emergency" which is one of the kinds of "Emergencies" which the Governor can proclaim. The act says:

"(4) STATE PUBLIC HEALTH EMERGENCY. A public health emergency is an occurrence or imminent threat of an illness or health condition that does all of the following:

"a. Is believed to be caused by any of the following:

³ Homeland Security Act of 2002. P.L. 107-296.

1. Bioterrorism;
2. The appearance of a novel or previously controlled or eradicated infectious agent or biological toxin;
3. A natural disaster;
4. A chemical attack or accidental release; or
5. A nuclear or radiological attack or accident. and

"b. Poses a high probability of any of the following harms: 1. A large number of deaths in the affected population; 2. A large number of serious or long-term disabilities in the affected population; 3. Widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population. "

Alabama's definition is taken from Johns Hopkins' Model Public Health Emergency Powers Act.⁴

The Governor's Authority. In addition to those listed, §31-9-6 the Governor has the authority to:

- Make orders, rules and regulations;
- To utilize all state employees;
- To utilize any state or local officers or agencies, granting state officer immunity to such, including volunteers.

Emergency Proclamations Contemplated: At this time we are contemplating drafting to have at the ready emergency order for the Governor to issue in a catastrophic emergency such as a PI outbreak. These include:

- Proclamation of State of Emergency
- Fatality Management Issues
- Altered Standards of Care
- Vaccine Rationing Isolation and Quarantine
- Social Distancing - closing mass events

Now we turn from the state declarations that trigger emergency powers of state officials and waivers of state law, to the key declarations that are available to the federal government to trigger emergency powers, emergency waivers - and release of emergency and disaster relief funding. Remember that these are independent legal authorities. A Public health emergency can exist without a Stafford Act emergency declaration.

The Stafford Act.⁵ A Stafford Act Emergency or major disaster can exist without a public health declaration - although the Governor must declare a state of emergency and activate state emergency plan before asking President for a Stafford Act declaration. Both federal Stafford Act and Public Health Emergencies can be declared for same event - as occurred after the terrorist attacks on 9/11.

⁴ www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf

⁵ Robert T. Stafford Disaster Relief and Emergency Assistance Act, PL 100-707.

After virtually every hurricane, earthquake, or major tornado, the media reports that the Governor of an affected state has asked the President to declare a major disaster. This is THE principal discretionary authority that Congress has provided the President to respond to and recover from catastrophic events of virtually any type. It is a particularly useful statute because it provides both authority and appropriated funds to act. Although every disaster or emergency impacts public health, the Stafford Act has only rarely been used to address incidents that primarily involve health: Emergencies were declared in several states in 1999-2000 time frame to provide funding for mosquito spraying to combat West Nile Virus/encephalitis.

But note: no declaration was made for anthrax incidents in 2001 or SARS. FEMA cannot provide any significant direct funding without a declaration. FEMA can position resources w/o a declaration in anticipation of that declaration

The Stafford Act, as amended, is codified at 42 USC 5121 - 5206. Principal provisions governing major disasters are found in Title IV; Principal provisions governing emergencies are in Title V. Implementing regulations at 44 CFR, and particularly Part 206 thereof.

The Stafford Act is the principal discretionary federal authority to assist state and local governments in responding to catastrophic events of any type. It is activated only by presidential declaration of a "major disaster" or an "emergency." The Stafford Act provides for federal authorities and funds to:

- Plan and provision pre-event
- Send equipment and FEMA manpower in-event;
- Send in the Army in a catastrophic event, and
- Back pay post-event.

(Federal) Public Health Emergency Declaration. Often referred to in jargon as a "319 Emergency" as a reference the section of the Public Health Act authorizing this declaration, the Secretary of HHS is authorized to initiate the wheels of the emergency.

Procedure: Secretary of HHS

- Determines that disease or disorder presents a public health emergency or
- Determines that a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks otherwise exists
- "After consultation with such Public Health Officials as may be necessary -

The Secretary "may take such action as may be appropriate to respond to the public health emergency including:

- Making grants
- Providing awards for expenses
- Entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease and disorder.
- Mobilizing Public Health Service corps
- Issue emergency approvals of medical products

- Allow requirement waivers for Medicare, Medicaid, other HHS programs
- Allow waiver of any of deadlines for submission of any data or reports required under any law administered by Secretary.
- Funding: Public Health Emergency Fund -Which may not have any appropriations--Congress often funds AFTER events occur. Note; Section 319 does not define any formal criteria for this declaration other than the Secretary of HHS requesting it. Section 319 of Public Health Service Act is codified at 42 USC 247d "Potential impact of public health emergency declaration includes: 42 USC 1320b-5.
- The Secretary can waive requirements of Social Security Act during a declared emergency if necessary to ensure that items and services are available to recipients of Social Security, Medicare, and Medicaid patients, and that providers can be reimbursed even if cannot comply with all requirements due to emergency. 42 USC 360bbb-3.
- Authorization for medical products for use in emergencies - allows authorization of medical products without prior approval for duration of emergency declared by Secretary HHS .42 USC 262a.
- Enhanced control of dangerous biological agents and toxins - in emergency the requirements for control of dangerous toxins can be waived if necessary to allow someone to work The Stafford Act is the broadest and most well known of the federal government's emergency programs.

Quarantine. Isolation is when you've got it and Quarantine is when you might have it. In Alabama, See *Code of Ala., 1975 §22-12-1*, et seq., "Enforcement of quarantine. Quarantine shall be enforced by the state, by counties and by incorporated cities and towns in accordance with the provisions of this chapter." Further, "the quarantine authority of the state shall be paramount to that of any county, city or town therein." *Code of Ala., 1975 §22-12-2*.

The Governor or State Board of Health may proclaim quarantine.

The Governor, whenever he deems it necessary, or the State Board of Health shall proclaim quarantine, and when proclaimed, said Board of Health shall enforce such quarantine under such regulations as may, from time to time, be prescribed. *Code of Ala., 1975 §22-12-4*

Likewise, counties, cities and towns may proclaim quarantine.

Upon the recommendation of the board of health of a county, and subject to the approval of the State Board of Health, quarantine may be proclaimed for a county by the probate judge thereof or, in case of his inability to act, then, by the presiding officer of the county commission and for an incorporated city or town by the mayor or chief executive officer thereof. In case of emergency, quarantine may be proclaimed by said officers without such recommendations, subject, however, to approval, modification or withdrawal by the board of health of the county. *Code of Ala., 1975 §22-12-12*.

Quarantine began during the fourteenth century in an effort to protect coastal cities from plague epidemics. Ships arriving in Venice from infected ports were required to sit at anchor for forty days before landing. This practice, called quarantine, was derived from the Latin word *quaresma*, meaning forty.

What Happens? An order is issued by proper authorities. The person or place is "locked down." No one crosses the line. No one in - no one out. It is enforced by civil and law enforcement authorities based on the existence or threat of a quarantinable disease. There are criminal fines and jail time for "breaking quarantine." Escapes from Detention are criminally punishable. Likewise, arrests may be made without warrants.

Federal Quarantine. Federal power to issue quarantine rests Constitutionally on the "commerce clause."⁶ Under powers granted by the Public Health Services Act,⁷ whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

Likewise, federal quarantine is issued when the diseased individuals or goods are directly in interstate commerce.

The diseases for which quarantine is authorized are listed in an Executive Order of the President, the most recent of which is Executive Order 13295, issued on April 4, 2003. Pandemic Influenza was added to the quarantinable list. Pres. Bush on April 1, 2005 issued an amendment to Executive Order 13295 of April 4, 2003, to make a federally quarantinable condition "Influenza caused by novel or re-emergent influenza viruses that are causing, or have the potential to cause, a pandemic."

Section 361 of Public Health Service act codified at 42 U.S.C.A. § 264, as amended: Regulations to control communicable diseases provides:

(a) Promulgation and enforcement by Surgeon General The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the

⁶ *United States Constitution*, Article I, Section 8, Clause 3: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes"

⁷ 42 USC § 201, *et seq.*

Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

(b) Apprehension, detention, or conditional release of individuals Regulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in

Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General. The federal government may restrict the movement of persons suspected of carrying specified communicable diseases in order to prevent the interstate spread of disease.

CDC may take direct action in certain cases. Actions necessary to prevent interstate transmission of disease include actions taken wholly within a state if the Director of CDC finds under 42 USC §264 that actions taken by local health authorities are inadequate and that:

(c) Application of regulations to persons entering from foreign countries Except as provided in subsection (d) of this section, regulations prescribed under this section, insofar as they provide for the apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State or possession from a foreign country or a possession.

(d)

(1) Apprehension and examination of persons reasonably believed to be infected 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. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary. For purposes of this subsection, the term "State" includes, in addition to the several States, only the District of Columbia.

(2) For purposes of this subsection, the term "qualifying stage", with respect to a communicable disease, means that such disease

(A) is in a communicable stage; or

(B) is in a precommunicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.

(e) Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision

conflicts with an exercise of Federal authority under this section or section 266 of this title. Federal Regulations implementing this section define § 70.2 Measures in the event of inadequate local control.

Due Process and Procedural Requirements under federal quarantine. Requirements for accommodations, food, medical care etc are not only found in cases involving state quarantine/treatment (e.g. *Best v. Bellevue*) but also in cases holding prison accommodations to be unconstitutional, or discussing denial of treatment of inmates.

Showing that detention is "necessary" to protect public health incorporates the "less restrictive alternative discussed earlier. A recent example would be how federal and state governments preventing entry into the U.S. of persons returning from areas with livestock foot and mouth disease (e.g., UK)-in 2001 Federal statutes specify few procedural requirements for imposition Constitution requires due process when depriving an individual of 'liberty' –

- Notice and hearing requirements
- Showing detention needed to protect public health
- Right to counsel; reviewable final decision Provision for the following is required:
- Access to food, water, medical supplies & treatment
- Basic needs for survival

Alabama law is silent on procedural requirements, however, the following principles would most certainly apply. The text is based on provisions in the Draft Model State Emergency Powers Act.⁸ However, similar provisions have been adopted in many states, and even where not expressly adopted, they may reflect existing constitutional requirements. For example, the draft Model Act includes language stating that quarantine must be by "the least restrictive means necessary;" many state statutes do not include this language. However, the US Constitution provides that states cannot deprive persons of their "life, liberty, or property without due process."

This language has been interpreted to mean that if the public health objective can be achieved by measures short of quarantine - by "less restrictive alternatives" to detaining cases, suspected cases, or contacts in a locked facility - then the formal quarantine order may well be an unreasonable restraint and violate the constitution. Detention must be by:

- "least restrictive means necessary" including "confinement in private homes or other public or private premises"
- Separate isolated from quarantined individuals
- Monitor health status of individuals
- Attend to needs of detained individuals
- Provide food, clothing, medical treatment, communication, shelter
- Safe and hygienic detention facility
- Consider cultural and religious beliefs ("to the extent possible")

⁸ *Supra.*

The key to success is good communication to the public. Public behavior can be very responsible during an emergency when properly informed. But how can it be determined when a person who is part of a voluntary mass quarantine has broken quarantine? More workers are needed to monitor voluntary quarantine (e.g., make daily phone calls to thousands of homes) than to enforce quarantine. Police and National Guard have little to or no training in the control of communicable diseases.

Given the significance of lost wages to the success of quarantine orders (at least those that do not involve physically locking up individuals, but direct them to stay in particular facilities) it is important to note that there may not currently be any government programs, state or federal, that compensates for wages lost as a result of a quarantine order.

Large quarantine only with the consent of those involved is more effective. Even with voluntary compliance, there are factors that undercut compliance:

- Lost wages or income
- Groceries and essential services
- Boredom

In lieu of quarantine, the objective of preventing transmission of disease may be met by:

- Use of masks and gloves
- "Snow Day" "Shelter-in-Place"
- Voluntary isolation/quarantine (in designated facility)
- Telephone monitoring in the home
- "Work Quarantine" or
- Active use of law enforcement officers to serve process and monitor.

These options are "less restrictive alternatives" to mandatory quarantine. Some lessons Learned from the Canadian SARS Quarantine Enforcement.

- Over 30,000 quarantined in Toronto by provincial health authorities
- "Mandatory" requirement that those exposed stay home
- Only 27 formal quarantine orders were served.
- Only ONE formal appeal which was later voluntarily withdrawn after and explanation. BTW, he was a doctor.

Federal Quarantine of International Goods. 42 USC § 265. Suspension of entries and imports from designated places to prevent spread of communicable diseases.

Where "serious danger" of introduction of disease into US, from a country or places, and Danger is increased with entry into US of people or things Surgeon General can prohibit entry of people or things from that country or place for such

time as determined to be necessary. Enforcement of Quarantine Laws Fine of \$1000 Imprisonment for not more than one year.

Note: While this is a very old law that not been used for a very long time, this law is still on the books. It still may be a powerful tool in the hands of a qualified public health official to ensure the health and safety of the public.

For example. Colorado has found that the state could issue travel restrictions to persons not to board an airline, but this is difficult to enforce- The saving grace is that the airline will give the person a ticket on another day without charge if the order is shown to the airline; as for driving a car across state borders, CO could never enforce that.

No Emergency Declaration is necessary to invoke this clause. Only the Director of the CDC (or her designee) can issue a permit for people with in the contagious phase of certain communicable diseases (cholera, plague, smallpox, typhus, or yellow fever) to travel on board an interstate conveyance (e.g. Plane, Train, Bus) per 42 CFR § 70.3; 42 CFR § 70.3.

In addition, an individual in the communicable stage of a disease may not travel from one State to another without obtaining a permit from the health officer of the destination State, assuming that such a permit is required under the law of the destination State.

Furthermore, individuals in the communicable period of certain diseases (cholera, plague, smallpox, typhus, or yellow fever) may not travel on board an interstate conveyance without obtain a permit from the Director of CDC. A person who has a communicable disease in the communicable period:

Cross Border Issues:

- Commerce Clause - Interstate Commerce
- Closing the Border
 - Governor
 - US PHS Quarantine
- Interstate Transportation of Decedents
- EMAC and licensing issues
- Full Faith and Credit Issues
- DoD Authority
- "Insurrection Act"
- Posse Commitatus Act"
- John Warner National Defense Auth. Act 20071.

Commerce Clause - U.S.C.A. Const. Art. I § 8, cl. 3. The Congress has the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

The Supreme Court has recognized that the protection of public health is a fundamental component of the police power. "It is elemental that a state has broad power to establish

and enforce standards of conduct ... relative to the health of everyone there. It is a vital part of a state's police power." Barksy v. Bd. of Regents, 347 U.S. 442, 449 (1954). A state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there, and such power is a vital part of the state's police power.

Closing the Borders – The border to a state can be closed by the Governor under Title 31, federal quarantine under PHS Act. Authority is not the issue – enforcement is. There are probably not enough guns owned by the Army and National Rifle Association together to effectively seal a state border.

Interstate Transportation of Dead Bodies. *Code of Ala., 1975 §22-19-2.*

“Body removed from state to be embalmed or cremated; exception. It shall be unlawful for any person, firm or corporation to take, carry, transport or remove from within the confines of this state any dead human body unless said body has been embalmed or cremated. Any person, firm or corporation who violates this section shall be guilty of a misdemeanor and shall be, upon conviction, punished as prescribed by law. Nothing in this section, however, shall be construed to prohibit exportation of an unembalmed dead human body which has been disposed of for the purpose of advancement of medical science, or for the replacement of diseased or worn out parts of other humans or for the rehabilitation of human parts or other organs, in accordance with the provisions of Article 3 of this chapter.4.”

We would expect to have an order for the Governor to sign suspending the effect of this law should the occasion arise, though in a Pandemic, it is difficult to imagine why or how bodies would need to be brought into the state or carried out of it. The contrary probably would exist – how to effectively and propitiously, yet appropriately bury or otherwise dispose of dead bodies in staggering numbers.

EMAC and Licenses - Under and EMAC, *Code of Ala., 1975 § 31-9-40 (Art V)* "deemed status" is given to the various licensees of sister states.

Licenses and Permits. Whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when assistance is requested by the receiving party state, the person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving the skill to meet a declared emergency or disaster, subject to limitations and conditions as the governor of the requesting state may prescribe by executive order or otherwise.

Without an EMAC invocation, see each discipline's law as to emergency licensing. See for example, *Code of Ala., 1975* § applying to nurses.

This chapter does not prohibit: the furnishing of nursing assistance in an emergency; the practice of any legally qualified nurse of another state, who is employed by the United States government or any bureau, division or agency thereof, while in the discharge of his or her official duties; the practice of nursing by students enrolled in approved schools of nursing, as may be incidental to their course of study, nor shall it prohibit such students working as nursing aides; the practice of any currently licensed registered nurse or licensed practical nurse of another state whose employment responsibilities include transporting patients into, out of, or through this state or who is presenting educational programs or consultative services within this state not to exceed 30 days; persons, including nursing aides, orderlies and attendants, carrying out duties necessary for the support of nursing services, including those duties which involve supportive nursing services performed in hospitals and elsewhere under the direction of licensed physicians or dentists, or under the supervision of professional nurses licensed hereunder, nor gratuitous nursing of the sick by friends or members of the family, nor the care of the sick when done in accordance with the practice of religious principles or tenets of any well recognized church or denomination which relies upon prayer or spiritual means alone for healing.

Full Faith and Credit- U.S.C.A. Const. Art. IV § 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

"[O]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 522 U.S. 232 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," *id.*, at 233, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Sun Oil v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)).

In *Allstate Insurance Co. v. Hague*,⁹ a majority of the Supreme Court agreed that the test was the same under both clauses for determining whether a state could constitutionally apply its own law to a case. The test is whether the state has a sufficient contact or aggregation of contacts creating state interests that would make the application of its law neither arbitrary nor fundamentally unfair.

⁹ *Allstate Insurance Co. v. Hague*, 449 US 302 (1981).

Department of Defense Authority – Two Acts of Congress traditionally have limited the use of federal troops within the borders of states. The Posse Comitatus Act¹⁰ was passed after the end of Reconstruction. The Act prohibits most members of the federal uniformed services (Army, Air Force¹¹, and State National Guard forces when such are called into federal service) from exercising nominally state law enforcement police or peace officer powers that maintain "law and order" on non-federal property in the former Confederate states. The statute generally prohibits federal military personnel and units of the United States National Guard under federal authority from acting in a law enforcement capacity within the United States, except where expressly authorized by the Constitution or Congress. The Coast Guard is exempt from the Posse Comitatus Act.

The Insurrection Act of 1807¹² is the set of laws that govern the President's ability to deploy troops within the United States to put down lawlessness, insurrection and rebellion. The general aim is to limit Presidential power as much as possible, relying on state and local governments for initial response in the event of insurrection.

The Posse Comitatus Act and the Insurrection Act substantially limit the powers of the federal government to use the military for law enforcement. However, Recent congressionally passed law may have explicitly given the authority to the President to send the military into states in an unprecedented manner.¹³ HR - 5122 also known as the John Warner Defense Authorization Act for Fiscal Year 2007 was signed by the president on Oct 17, 2006. The text of HR 5122 is titled "Use of the Armed Forces in major public emergencies".

Section 1076 of the new law changes Sec. 333 of the "Insurrection Act," and widens the President's ability to deploy troops within the United States to enforce the laws. Under this act, the President may also deploy troops as a police force during a natural disaster, epidemic, serious public health emergency, terrorist attack, or other condition, when the President determines that the authorities of the state are incapable of maintaining public order. The bill also modified Sec. 334 of the Insurrection Act, giving the President authority to order the dispersal of either insurgents or "those obstructing the enforcement of the laws." The new law changed the name of the chapter from "Insurrection" to "Enforcement of the Laws to Restore Public Order."¹⁴

Removing the legalese from the text, and combining multiple sentences, it provides that: The President may employ the armed forces to restore public order in any State of the United States the President determines hinders the execution of laws or deprives people of a right, privilege, immunity, or protection named in the Constitution and secured by law or opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. The actual text is on page 322-323 of the legislation.

¹⁰ 18 U.S.C. § 1385.

¹¹ Obviously added later by amendment.

¹² 10 U.S.C. § 331 - 10 U.S.C. § 335.

¹³ Unprecedented at least since the Civil War and Reconstruction.

¹⁴ For a flow-chart of the comparison of the Acts see: http://en.wikipedia.org/wiki/Insurrection_Act, to which the writer is indebted for information on this narrow topic.

Jurisdiction at the Scene.

Question: There is a large-scale event involving a number of local, state and federal agencies. The question is who has jurisdiction at the scene and how do their overlapping authorities sort themselves out?

State Agencies.

Sheriff and Local law enforcement agency. The Sheriff is to “ferret out crime, to apprehend and arrest criminals and to secure evidence of crimes in their counties and to present a report to the district attorney.” *Code of Ala., 1975 § 36-22-3*

State Troopers. *Code of Ala., 1975 § 32-2-5.*

It shall be the duty of the Director of the Department of Public Safety, and he shall have power to do all that is necessary to administer and enforce:

- (1) All laws contained in this title, as the same may now or hereafter be amended;
- (2) All other laws relating or pertaining to the operation or movement of vehicles on the public highways of this state;
- (3) Such other laws as the Department of Public Safety has heretofore administered and enforced.

Peace Officers in general. *Code of Ala., 1975 § 32-5-310.*

Enforcement of chapter; arrest procedure; bail bond.

Any peace officer, including state troopers, sheriffs and their deputies, constables and their deputies, police officers and marshals of cities or incorporated towns, county police or patrols, state or county license inspectors and their deputies, and special officers appointed by any agency of the State of Alabama for the enforcement of its laws relating to motor vehicles, now existing or hereafter enacted, shall be authorized,

Fire and Medical personnel. See *Code of Ala., 1975 §22-18-6(e)* .Control until law enforcement arrives.

(e) Control of an emergency scene may be taken by an emergency medical technician or other emergency personnel if the personnel arrive at the scene of an emergency prior to the arrival of law enforcement personnel, and if managing the emergency scene will not interfere with other emergency medical care duties. Emergency scene control shall include the authority to direct traffic.

HazMat Team/Bomb Squad

Radiation and Biohazard Personnel

Coroner/ME jurisdiction of the body (*Code of Ala., 1975 §11-5-1, et seq.*) The Coroner is to certify and determine the time, cause and manner of death.

Federal Agencies - PDD-39 Homeland Security (DHS) -Major Events (HSPD-5).

The FBI derives its jurisdiction at the scene by virtue of 28 U.S.C. § 533 - domestic terrorism, NBC incidents. During the past two decades, the U.S. Government has expanded the FBI's authority to investigate terrorist activities against U.S. interests overseas. Specifically, the *Comprehensive Crime Control Act of 1984*, the *Omnibus Diplomatic Security and Antiterrorist Act of 1986*, the *Antiterrorism and Effective Death Penalty Act of 1996*, and *Presidential Decision Directive 39* have served to extend FBI investigative authority beyond U.S. borders when U.S. interests are harmed or threatened.

FAA. – Organized under 49 USC § 06, The Federal Aviation Administration, as a branch of the US DOT is charged with the in-flight conduct of commercial aviation. The FAA is in control of an in-flight airplane and on the ground until it reaches the gate. The FAA loses control at the gate. In practice, each airline has its own security that provides guidance to the pilot in-flight and until the “doors are opened.” In flight, the pilot is the “Captain of the Ship” and exercise plenary control of the passengers to maintain safety and security.

National Transportation Safety Board - The NTSB investigates interstate commercial carrier incidents whether air or rail. 49 C.F.R. § 831.5 Code of Federal Regulations Title 49. Transportation. Section 831.5 gives priority to the Safety Board to make its investigations.

Any investigation of an accident or incident conducted by the Safety Board directly or pursuant to the appendix to part 800 of this chapter (except major marine investigations conducted under 49 U.S.C. 1131(a)(1)(E)) has priority over all other investigations of such accident or incident conducted by other Federal agencies. The Safety Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that such agencies may not participate in the Safety Board's determination of the probable cause of the accident or incident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident or incident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident or incident, provided they do so without interfering with the Safety Board's investigation. The Safety Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner

¹⁵ See discuss, *supra*.

FEMA - Consequence management. ¹⁶ FEMA is an agency of the United States Department of Homeland Security. The purpose of FEMA ¹⁷ is to “coordinate the response to a disaster which has occurred in the United States and which overwhelms the resources of local and state authorities.” The governor of the state in which the disaster occurred must declare a state of emergency and formally request from the President that FEMA and the federal government respond to the disaster. The only exception is when an emergency or disaster occurs on federal property or to a federal asset, for example, the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, in the 1995 bombing, or the Space Shuttle Columbia in the 2003 return-flight disaster.

While on-the-ground support of disaster recovery efforts is a major part of FEMA's charter, the agency provides state and local governments with experts in specialized fields and funding for rebuilding efforts and relief funds for individual citizens and infrastructure, in conjunction with the Small Business Administration. FEMA also assists individuals and businesses with low interest loans. In addition to this, FEMA provides funds for training of response personnel throughout the United States and its territories as part of the agency's preparedness effort.

Department of Health and Human Services. Through the HHS Secretary, HHS has statutory responsibility to make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States. ¹⁸

The Centers for Disease Control and Prevention (CDC), a component of HHS, is responsible for preventing and controlling disease and promoting health and education activities designed to improve the health of the people of the United States. CDC has statutory authority to detain, isolate, quarantine, or conditionally release persons arriving into the United States reasonably believed to be infected with quarantinable diseases. Some of the activities CDC undertakes to meet its legal and regulatory responsibilities include: overseeing the screening of arriving international travelers for symptoms of illness that could be of public health significance; providing travelers with essential health information; performing inspections of carriers, maritime vessels, and cargos for infectious disease threats; enforcing entry requirements for certain animals, etiologic agents, and vectors deemed to be of public health significance; and promulgating and implementing quarantine regulations.

Homeland Security (DHS) is responsible for preventing and protecting the Nation against terrorist attacks, major disasters, and other emergencies. Component agencies of DHS analyze threats and intelligence, secure the borders and the transportation system, protect the critical infrastructure, and plan the coordinated response. Three agencies within DHS consistent with their legal authorities, are statutorily permitted, pursuant to 42 U.S.C. § 268(b), to aid CDC "in the enforcement of quarantine

¹⁶ See discussion of the Stafford Act, *supra*.

¹⁷ Established by Executive Order 12127--Federal Emergency Management Agency. See also authorization in FEMA's FY 2008 Budget Request, March 9, 2007.

¹⁸ See discussion, *supra*.

rules and regulations." They may also detain, pending a determination of inadmissibility, aliens arriving into the United States. The agencies are:

- U.S. Customs and Border Protection (CBP),
- U.S. Immigration and Customs Enforcement (ICE), and the
- United States Coast Guard (USCG), Under 14 U.S.C. § 2, the Coast Guard "shall enforce or assist in the enforcement of all applicable federal laws on, under, or over the high seas and waters subject to the jurisdiction of the United States," thereby granting the Coast Guard concurrent authority over maritime matters with other federal agencies.

Generally, where the scene involves international ingress into the US, such as a ship coming from the high seas and landing in the Port of Mobile or an international flight landing directly from outside the country in Huntsville, the jurisdiction is purely federal. There is a Memorandum of Understanding between HHS and DHS detailing how they would handle public health threats on such international flights or ships.

The same would apply to non-passenger flights and voyages handling strictly cargo. It would also apply to international flight crashes in the state. Should a plane from Mexico City headed toward Atlanta crash in Alabama, the jurisdiction at the site for these purposes is purely federal until cleared and released to the state.

So, who's in charge at the scene?

There are three functions of government at the scene of any event in this order of precedence:

1. protect and preserve life
2. secure the scene
3. protect property

It is confusing at best at a mass scene. This is why ICS Procedure was established. In a complicated scene, the easy answer when there are conflicting jurisdictions is to form a Unified Command.¹⁹

According to HSPD-5, observing ICS procedure:

will provide a consistent nationwide approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity. To provide for interoperability and compatibility among Federal, State, and local capabilities, the NIMS will include a core set of concepts, principles, terminology, and technologies covering the incident command system; multiagency coordination systems; unified command; training; identification and management

¹⁹ For a good run-through of ICS see the PowerPoint at:
http://www.fws.gov/contaminants/FWS_OSCP_05/fwscontingencyappendices/C-ICS/pps/CHAP13.ppt

of resources (including systems for classifying types of resources); qualifications and certification; and the collection, tracking, and reporting of incident information and incident resources.

Decedent Issues. We turn now to some particular decedent issues all of which are addressed in a draft order for the Governor to sign in the case of a cataclysmic event such as pandemic.

- Interstate Transport
- Non-Traditional Burial
- Local Cemetery Establishment Regulation
- Record-keeping
- "Funeral Directors"
- 24 hour cremation rule
- Re-interment
- Non-deseccration (abuse) of a corpse
- 5-Year declaration of death

Interstate Transport of Dead Bodies. The law requires that all bodies shipped out of state be embalmed. Rules of the State Board of Health detail this requirement.

Body removed from state to be embalmed or cremated; exception. It shall be unlawful for any person, firm or corporation to take, carry, transport or remove from within the confines of this state any dead human body unless said body has been embalmed or cremated. Any person, firm or corporation who violates this section shall be guilty of a misdemeanor and shall be, upon conviction, punished as prescribed by law. Nothing in this section, however, shall be construed to prohibit exportation of an unembalmed dead human body which has been disposed of for the purpose of advancement of medical science, or for the replacement of diseased or worn out parts of other humans or for the rehabilitation of human parts or other organs, in accordance with the provisions of Article 3 of this chapter. *Code of Ala. 1975 § 22-19-2.*

...

(3) All dead human bodies shipped by common carrier shall be in a sealed container; caskets and coffins containing human remains in a state of decomposition shall remain tightly and permanently closed.
Alabama Administrative Code, r. 420-7-1-.13.

Local Cemetery establishment requirements. Under Title 11, municipalities and/or counties have authority governing establishment of cemeteries. These would be suspended under Proposed Governor's Order.

Record Keeping - *Code of Ala. 1975 § 22-9A-14(a)* requires that a certificate of death for each death which occurs in this state be filed with the Office of Vital Statistics, or as otherwise directed by the State Registrar, within five days of the death. This time frame could be difficult to achieve in an event. We would propose to suspend it by Governor's order.

Funeral Directors - *Code of Ala. 1975 § 22-9A-14* Signing death certificate "acting as a funeral director." See Title 34. Title 22 allows persons to sign a death acting "as the funeral director." Out of an abundance of caution, we are proposing to suspend the wording of this requirement or at least clarify by the Governor's order that any person in the emergency, who signs a death certificate is not unlawfully acting as a funeral director under Title 34.

24 hour cremation Rule - *Code of Ala. 1975 § 34-13-121(a)* provides that (a) "human remains shall not be cremated within 24 hours after the time of death." Given the few number of crematory units in the State, in an event of massive proportions, this would be difficult to achieve. We would propose to suspend the requirement by the Governor's order.

Re-interment - See language in the proposed order.

The State Health Officer shall maintain records of the place and method of the disposition of the dead bodies, and shall report such disposition to me periodically throughout the existence of the public health emergency. Bodies so buried may be re-interred in the ordinary and customary manner after the state public health emergency or at such time as is practicable.

This would allow for the careful disinterment and later traditional re-interment of bodies buried by non-traditional means in a massive event.

Code of Ala. 1975 § 13A-11-13. Abuse of corpse. –

(a) A person commits the crime of abuse of a corpse if, except as otherwise authorized by law, he knowingly treats a human corpse in a way that would outrage ordinary family sensibilities. Abuse of a corpse may include knowingly and willfully signing a certificate as having embalmed, cremated, or prepared a human body for disposition when, in fact, the services were not performed as indicated.

This is suspended under proposed order as non-traditional burial would involve conduct that, under normal circumstances, would "shock the conscience" of the community. Such could be considered abuse of a corpse in the statute.

Code of Ala. 1975 § 43-8-6 regarding a five-year presumption of death.

(3) A person who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier

Under our proposed order, this would be set aside as time frames in an acute and protracted emergency would be difficult to fix. In such an event, there would be a myriad of record-keeping issues that might never be resolved. While unfortunate, that would be one of the consequences of such a traumatic event. It is incumbent on planner to anticipate as much of this type of consequence and provide for it to the best extent possible. Obviously, record-keeping problems would be the least of society's worries in an event of magnitude anticipated herein.

Conflicts with First Amendment – Religious Freedom- Issues.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." ²⁰ This portion of the First Amendment renders the "establishment clause" and the "free exercise clause." Issues involving the First Amendment are addressed herein below. The principle question is the extent to which the state may go to enforce its police power to protect the public health, safety, welfare and morals without unduly limiting the free expression of religious liberty.

The Supreme Court under Chief Justice Warren adopted the "compelling interest" doctrine regarding the clause, holding that a state must show a compelling interest in restricting religion-related activities. Later court decisions retreated from this standard, permitting governmental actions that were neutral to interfere with religion, but Congress attempted to restore it by passing the Religious Freedom Restoration Act, which the Supreme Court held was inapplicable to state and local government actions, albeit applicable to federal action. ²¹ Consider the following:

- Cheema v. Thompson - Sikh Case
- Warner v. City of Boca Raton - Burial practices, vertical monuments prohibited
- Church of the Likumi Babalui, Inc. v. City of Hialea
- Animal Sacrifice
- Hill v. State (Ala. 1956) Snake Handling
- State laws/rules protecting public health and safety OK if "minimal infringement" of religious liberty.

Religious Freedom Restoration Act. The Religious Freedom Restoration Act of 1993²² prohibits governments from substantially burdening the rights of individuals to religious

²⁰ First Amendment to the Constitution of the United States.

²¹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²² 42 U.S.C.A. §§ 2000bb, *et seq.*

exercise without compelling justification, even if the burden results from a rule of general applicability unless the government can demonstrate that its regulation is the least restrictive means of furthering a compelling government interest. The courts have applied this new statutory test in a variety of contexts.

For example, in *Cheema v Thompson* (1995, CA9 Cal) 67 F3d 883, 95 CDOS 8004, 95 Daily Journal DAR 13786, 135 ALR Fed 675, Khalsa Sikh schoolchildren, whose religion required them to carry kirpans, or ceremonial knives, were prohibited from carrying the knives at school based upon the school's total ban of all weapons from school grounds. The children brought an action under RFRA, alleging that their statutory right to free exercise of religion was violated in that they were given the choice between leaving their kirpans at home and violating a fundamental tenet of their religion or bringing their kirpans to school and facing expulsion and/or criminal prosecution. The court upheld the District Court's order lifting the wholesale ban on kirpans, allowing the children to attend school so long as they complied with various requirements such as carrying only a dull blade, sewn tightly to its sheath, to be worn under the children's clothing. This article collects and analyzes federal cases brought under RFRA.

Warner v. City of Boca Raton 420 F.3d 1308 C.A.11 (Fla.),2005 – A city ordinance restricted vertical grave decorations was zealous Muslims who argued that the prohibition violated their First Amendment rights to express their religion. The Court held that the ordinance was “viewpoint neutral” and thus, reasonable. Therefore it did not violate plot owners' rights under the First Amendment free speech clause.

In *Church Of The Lukumi Babalu Aye, Inc., and Ernesto Pichardo, v. City Of Hialeah*, 723 F.Supp. 1467, (1989), municipal ordinances regulating ritual sacrifice of animals were held not to violate the First Amendment, as applied to members of Santeria religion, which practices animal sacrifice. The Court held that the ordinances were directed at conduct rather than belief, had secular purpose and effect, and were justified by governmental interests in public health and safety, and animal and child welfare.

Lastly we consider an Alabama case from the end of the heyday of the era of religious snake-handling, *Hill v State* 38 Ala.App. 404, 88 So.2d 880 (1956). The Alabama Court of Appeals held that the statute prohibiting any person from displaying, exhibiting or handling or using any poisonous or dangerous snake or reptile in such manner as to endanger the life and health of any person did not violate the federal or state constitutional guarantees of freedom of religion.

It is concluded that many practices involving, *inter alia*, mortuary practices that would have to be carried out in a postulated event would both “shock the conscience” of society in a normal setting and likewise would present an infringement on traditional and non-traditional religious practices involving treatment of the body, funerals and grieving times and burial. However, a careful look at the case law leads to the conclusion that a state could enunciate a public health law or rule that presents an affront to religious tenets if the pronouncement is necessary to protect the public health and presents the least restrictive infringement possible.