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FROM WITHOUT TO WITHIN

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The threat and reality of biological terrorism in this country calls for a re-examination of the legal authority of the nation's public health machinery.

"Public health" mixes science, law and politics, and the potential for the predominance of the latter over the former has led to some criticism of the government's initial response to instances of anthrax in the mails. In contrast to environmental law, where statutory authority and court decisions provide government agencies with clear authority to take measures to safeguard the public health from pollution, the authority to protect the public from outbreaks of infectious disease has not been put to the test in recent decades.

Indeed, environmental law arose in large part from public health law, and the environmental statutes were enacted largely in response to the perceived inadequacy of the existing public health authority. Unfortunately, that public health authority has not been modernized.

In the late 19th century, state health departments were formed to enforce quarantines, improve sanitation and take other measures based on the newly emerging science of infectious disease control. By the 1940s, however, with the threat of infectious disease abating, the public health establishment focus was diverted from this role.

In Illinois, authority to protect the public from contagious disease, particularly those manifesting in epidemic form, is vested in the Department of Public Health, pursuant to self-titled statute, 20 ILCS 2305/2. Moore v. Lumpkin, 258 Ill.App.3d 980 (1994), app. den., 156 Ill.2d 559.

The department may "order a person to be quarantined or isolated or a place to be closed and made off limits to the public to prevent the probable spread of a dangerously contagious or infectious disease" (section 2305/2(b), but only with the consent of the person or property owner, or upon court order obtained by the department on a showing of clear and convincing evidence of significant endangerment. Id., section (c).

Interestingly, given the recent state of anthrax hoaxes, the act classifies as a Class A misdemeanor the knowing or malicious dissemination of any false information concerning the existence of any dangerously contagious or infectious

disease, but only in connection with the department's quarantine power. Id., section (e).

The quarantine authority was limited by the courts in People ex rel. Barmore v. Robertson, 302 Ill.2d 422 (1922). This case held that a person could not be quarantined on mere suspicion of contagion or infection, and that the health authorities must have reliable information on which to base a reasonable belief that public health will be endangered by permitting the person to be at large.

The court stated, however, that where the danger of an epidemic actually exists, health and quarantine regulations will always be sustained by the courts on the law of necessity. In addition, the Illinois courts have held that the power to detain persons suspected of having contagious disease rests within the state's police power. People ex rel. Baker v. Strautz, 386 Ill. 360 (1944).

With respect to the prospect of mandatory vaccinations against infectious or contagious diseases, older decisions have held that a pupil could not be compelled as a condition precedent to attending school, to take a smallpox vaccination, in the absence of an actual threat of smallpox in the community. People ex rel. Labauh v. Board of Education, 177 Ill. 572 (1899).

Cities in Illinois do not have statutory authority to provide for inpatient care and treatment to residents with contagious diseases. County of Cook v. City of Chicago, 229 Ill.App.3d 173 (1992).

Medical privacy laws may prohibit or limit disclosure to authorities or to the public of the results of infectious disease tests. People v. C.S., 222 Ill.App.3d 348, app. denied, 146 Ill.2d 636 (1991); May v. Central Illinois Public Service Co., 260 Ill.App.3d 41, app. denied, 157 Ill.2d 504 (1994).

Finally, if the state Public Health Department does not act, citizens are without a private cause of action to enforce the Public Health Act with regard to investigation and suppression of contagious disease. Moore v. Lumpkin, 258 Ill.App.3d 980, app. denied, 156 Ill.2d 559 (1994).

As can be seen, Illinois statutory public health authority is limited and does not confer administrative authority for personal or property quarantine on the Department of Public Health, which must first seek a court order, under a stringent evidentiary standard.

This may be contrasted with the authority given environmental agencies to act immediately -- without court approval -- in instances where the agency deems that a site containing hazardous substances presents a threat to public health or to the environment. See, e.g., 42 U.S.C. [sec]9404(a); 9401(23) (Superfund immediate removal authority, including evacuation); 42 U.S.C. [sec]300i (Safe Drinking Water Act authorization of administrative finding of imminent and substantial endangerment to public water supplies); 42 U.S.C. [sec]303(a) (Clean Air Act emergency administrative order); 415 ILCS 5/34 (Illinois Environmental Protection Agency authority to seal equipment or facility where emergency exists creating immediate danger to health, without need to seek Pollution Control Board or circuit court authorization).

The current threat clearly calls for a review of the adequacy of existing public health authority, with a view toward providing the public health agencies with administrative order authority comparable to that currently invested in the environmental agencies. Environmental Law By **Richard** M. **Kuntz Kuntz** is an attorney with Bollinger, Ruberry & Garvey. He is a graduate of the George Washington University National Law Center in Washington, D.C., where he worked for the U.S. Environmental Protection Agency before entering private practice. **Kuntz** may be reached via e-mail at rkuntznn@counsel.com.

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