

ARTICLE

Federal Enforcement of Mass Involuntary Quarantines:
Toward a Specialized Standing Rules for the Use of
Force

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Table of Contents

Introduction	60
I. Quarantine Use Has a Long History	62
II. Quarantine Use Will Continue	64
A. <i>Modern Medicine Cannot Prevent Pandemics</i>	65
B. <i>Limited Response Options</i>	66
C. <i>Quarantines Can Work</i>	67
III. The Military May Enforce Mass Quarantines	68
A. <i>The Department of Defense Has a Defined Role in Domestic Pandemic Response</i>	69
B. <i>Circumstances May Force the Military to Exceed a Support Role</i>	70
C. <i>The President Could Authorize the Military to Enforce Quarantines</i>	72
IV. Standing Rules for the Use of Force are Ill Suited to Quarantine Enforcement	74
A. <i>Existing Provisions Could Lead Military Personnel to Use Excessive Force</i>	77
1. <i>Deadly Force to Prevent Escape</i>	77
2. <i>Imminent Threat and Hostile Intent</i>	80
B. <i>The Use of Riot Control Agents May Result in Deadly Force</i>	82
C. <i>The Law Does Not Allow the Use of Deadly Force to Prevent Quarantine Violations</i> ..	83
1. <i>The Fourth Amendment Reasonableness Standard</i>	83
2. <i>Applying <i>Tennessee v. Garner</i> to the SRUF for Quarantine Enforcement</i>	85
3. <i>Graham v. Connor, Scott v. Harris, and the Argument for Deadly Force</i>	87
D. <i>The SRUF Lacks Special Provisions Needed for Quarantine Enforcement</i>	89
1. <i>Disease Identification Guidance for Quarantine Enforcement</i>	89
2. <i>Escalation of Force Procedures During Quarantine Enforcement</i>	91
3. <i>Due Process Requirements for Quarantined Persons</i>	95
V. Quarantine Enforcement Rules Must be Packaged, Trainable, and Accessible	98
A. <i>The Deployment Timeline May Preclude a Mission Specific RUF</i>	98
B. <i>Quarantine Enforcers Must Learn the Rules Before Deployment</i>	99
Conclusion	101
Appendix A. SRUF-Q	102
Appendix B. SRUF-Q EOF Procedures	108
Appendix C. SRUF-Q EOF Kit	111

[I]f there is any chance to limit the geographic spread of the disease, officials must have in place the legal power to take extreme quarantine measures. . . . Questions about who will have the authority to make and enforce such decisions, and under what circumstances, must be settled in advance. Neither an epidemic nor an attack will leave time for debate.¹

Introduction

On Wednesday morning, August 20, 2014, residents of the West Point slum in Monrovia, Liberia awoke to find the government had placed a quarantine around their neighborhood.² Soldiers wearing riot control gear and carrying assault rifles blocked the streets. Coast Guardsmen blocked escape by canoe. Surprised and angry, the people of West Point lashed out against the quarantine enforcers, throwing rocks and attacking barricades.³ Ten days into the twenty one day quarantine, the Liberian Government abandoned the effort.⁴ By that time, gunfire from quarantine enforcers had killed a fifteen year old boy and wounded two young men.⁵

Readers in the United States may be tempted to think that an armed clash between citizens and military personnel would never result from a public health emergency in an American neighborhood. After all, since we have systematic processes for isolating individuals, we would never need to impose mass quarantines.⁶ But, such armed clashes have occurred in the United States. When smallpox hit Muncie, Indiana in 1893, “Entire

¹ JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* 465–66 (2005).

² Norimitsu Onishi, *Clashes Erupt as Liberia Sets an Ebola Quarantine*, N. Y. TIMES (Aug. 20, 2014), <http://perma.cc/E4GC-HHZZ>.

³ *Id.*

⁴ Clair MacDougall, *Liberian Government’s Blunders Pile Up in the Grip of Ebola*, TIME (Sept. 2, 2014), <http://time.com/3247089/liberia-west-point-quarantine-monrovia/>.

⁵ *Id.*

⁶ The CDC defines isolation as “the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease.” 42 C.F.R. § 70.1 (2013). CDC defines quarantine as “the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.” *Id.* The CDC defines cordon sanitaire as a “legally enforceable order that restricts movement into or out of the area of quarantine of a large group of people or community.” *Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (last visited May 19, 2014), <http://perma.cc/GJS5-53XY>.

neighborhoods were quarantined by patrolling armed guards; violators were incarcerated. Mandatory vaccination was instituted. Violence broke out as some civilians resisted the public health impositions, and several public officials were shot.”⁷

Further, the Liberian response to Ebola had not started with mass quarantines. Like the United States, in the cases of Thomas Duncan, Nina Pham, Amber Vinson, and Dr. Craig Spencer, the Liberian Government initially isolated individuals showing symptoms of Ebola.⁸ Leading up to the West Point quarantine, though, Liberia faced scrutiny after failing to prevent a patient from travelling to Lagos where he infected several other individuals, and when reports circulated that seventeen other patients had escaped from a clinic.⁹

The Liberian Government’s motivations for imposing the West Point quarantine—to demonstrate control,¹⁰ because quarantine use “has an intuitive appeal to a layperson,”¹¹ or because government health officials were genuinely convinced it was necessary—may never be clearly understood. Whatever the motivation, the facts are inescapable: a mass involuntary quarantine was imposed by a government and enforced by its military.

Military enforcement of a federal quarantine is also possible in the United States. As recently as 2005 the sitting president has suggested that military action would be necessary in the event of a pandemic¹² and two executive orders enumerate diseases for which officials may authorize “the apprehension, detention, or conditional release of individuals to prevent the

⁷ Joseph Barbera et al., Special Communication, *Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences*, 286 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 2713, 2713 (2001).

⁸ Lisa Maria Garza and Terry Wade, *New Texas nurse with Ebola had slight fever on airliner*, REUTERS, Oct 15, 2014, <http://perma.cc/ZU4J-A8N4>; see also Ellen Wulfhorst and Sebastien Malo, *Doctor with Ebola in NY hospital, nurse declared virus-free*, REUTERS (Oct. 24, 2014), <http://perma.cc/2Y9Y-L5HG>.

⁹ MacDougall, *supra* note 4.

¹⁰ *Id.*

¹¹ Amber Hildebrandt, *Ebola outbreak: Why Liberia's quarantine in West Point slum will fail*, CBC NEWS (Aug. 25, 2014), <http://www.cbc.ca/news/world/ebola-outbreak-why-liberia-s-quarantine-in-west-point-slum-will-fail-1.2744292> (quoting Dr. William Schaffner, a professor of preventative medicine at Vanderbilt University).

¹² David Brown, *Military's Role in a Flu Pandemic*, WASH. POST (Oct. 5, 2005), <http://perma.cc/QP2B-ZZ4D> (discussing President George W. Bush’s comment that “If we had an outbreak somewhere in the United States, do we not then quarantine that part of the country? And how do you, then, enforce a quarantine? . . . And who best to be able to effect a quarantine? . . . One option is the use of a military that's able to plan and move.”).

introduction, transmission, or spread of suspected communicable diseases.”¹³

If U.S. military forces were used to enforce mass quarantines, those forces would follow the Standing Rules for the Use of Force (SRUF). But the SRUF was not drafted to deal with the unique dynamics of quarantine enforcement. Unlike any other type of domestic law enforcement operation, mass quarantine enforcement involves the use of force against civilians because of their designated status rather than their conduct. In that sense, quarantine enforcement presents a discomfoting parallel to uses of force in an international armed conflict against a declared hostile force.

Such a unique dynamic calls for a specialized approach to the use of force. It calls for an appreciation that quarantined persons are fundamentally different from bandits, rebels, or rioters; that the motivation for quarantined persons to violate quarantine orders arises from a desire to escape a perceived death sentence for themselves and their families. Because the current SRUF fails to deal with the unique dynamics of quarantine enforcement operations, it must be replaced by a specialized set of standing rules, with associated escalation of force procedures, which guard against inappropriate uses of force and ensure respect for the due process rights of quarantined persons.

I. Quarantine Use Has a Long History

The word “quarantine” comes from the Italian word for forty, which was the number of days foreign vessels were forced to remain in isolation inside the port of Venice before the crew was allowed to come ashore—a practice instituted to prevent the spread of the black plague.¹⁴ That practice was followed by most other major European port cities, including London, where vessels were required to fly a yellow jack “Q” flag to show they were under quarantine.¹⁵

¹³ See Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (April 4, 2003) (listing cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, and severe acute respiratory syndrome (SARS)); see also Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (April 1, 2005) (adding “Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic”).

¹⁴ Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1303 (2007) (citing RALPH CHESTER WILLIAMS, *THE UNITED STATES PUBLIC HEALTH SERVICE: 1798-1950*, at 65 (1951)).

¹⁵ Gregory P. Campbell, Comment, *The Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 SAN DIEGO INT’L L. J. 497, 507 (2011) (citing Joseph Topinka, *Yaw, Piich, and Roll—Quarantine and Isolation at United States Airports*, 30 J. LEGAL MED. 51, 58 (2009)) (noting the “Q” flag is still represented today on Centers for Disease Control and Prevention (CDC) Quarantine Officers’ uniforms and at official Quarantine Stations).

Evidence of the practice of separating sick people from healthy people can be traced back much further. The Book of Leviticus provides an early written example of the practice of isolation: “All the days wherein the plague shall be in him he shall be defiled; he is unclean: he shall dwell alone; without the camp shall his habitation be.”¹⁶ In keeping with such biblical writings, the Catholic Church drafted rules and procedures to separate lepers from the rest of the population. Those documents constitute some of the earliest written records of quarantine law.¹⁷

The history of quarantine law extends into the early days of the American colonies and the United States, driven by epidemics of cholera, yellow fever, smallpox and influenza.¹⁸ In 1647, the Massachusetts Bay Colony was the first jurisdiction to enact a quarantine law.¹⁹ That law was used to deny entry to ships from the West Indies in order to prevent the spread of plague.²⁰ New York’s health inspection station, built in 1784, inspired other port cities in the United States to establish similar facilities where incoming vessels suspected of carrying disease would be “detained for specified periods before being permitted to unload their crews or cargo.”²¹

Throughout most of the eighteenth century the federal government left the business of quarantines to state and local governments. Then, prompted by an outbreak of yellow fever in 1796, Congress enacted the first federal quarantine law.²² That law was replaced in 1799 with an Act Respecting Quarantine and Health Laws.²³

Over the next century, states continued to have the primary role in quarantine law. In 1865, for instance, Hawaii established the first American leper colony on the island of Molokai.²⁴ But the federal government increasingly played a role in quarantine policy. In 1870, Congress passed a

¹⁶ *Leviticus* 13:46 (King James).

¹⁷ Campbell, *supra* note 15, at 507.

¹⁸ The CDC defines epidemic as “an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area.” The CDC defines pandemic as “an epidemic that has spread over several countries or continents, usually affecting a large number of people.” *Principles of Epidemiology in Public Health Practice*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (last visited March 21, 2014), <http://perma.cc/ZH2G-7S9H>.

¹⁹ Campbell, *supra* note 15, at 508.

²⁰ Karen Weathersbee, Essay, *Quarantine: Its Use and Limitations*, A.B.A. 1, 2 (2012), <http://perma.cc/EL59-ZB3T>.

²¹ Jorge L. Contreras, *Public Health versus Personal Liberty – the Uneasy Case for Individual Detention, Isolation and Quarantine*, 7 *THE SCITECH LAWYER*, 1, 2 (2011) (citing Felice Batlan, *Law in the Time of Cholera: Disease, State Power and Quarantines Past and Future*, 80 *TEMP. L. REV.* 53, 63–64 (2007)).

²² Campbell, *supra* note 15, at 508.

²³ Weathersbee, *supra* note 20, at 2.

²⁴ Contreras, *supra* note 21, at 2)).

resolution which called for an Army Medical Officer to inspect major port cities throughout the United States in order to compile a report outlining recommendations for controlling an outbreak of yellow fever.²⁵ In his report, the appointed Army Medical Officer stated that “unity of control” was necessary to respond to the epidemic, and concluded that “a national system of quarantine [should] be substituted for the various local systems.”²⁶ His report foreshadowed an increased federal role in quarantine administration.

A short time later, in 1878, Congress enacted the National Quarantine Act.²⁷ That Act created a Division of Quarantine which “established numerous federal quarantine stations, began to inspect state and local quarantine facilities, and to conduct health examinations of immigrants.”²⁸ Then, in 1918, the federal government imposed large scale, involuntary quarantines to stop the spread of a catastrophic influenza pandemic. No large scale quarantine has been imposed in the United States since.²⁹ The Public Health Services Act, which provides the current federal authority for the “apprehension, detention, or conditional release of individuals,” was enacted in 1944.³⁰

The prevalence of quarantine use throughout recorded history demonstrates the natural human reaction to the spread of deadly disease: separate the sick from those who are not sick, by force if necessary. Whether from medieval societies that believed sickness emanated from unwholesome vapors, or modern societies with sophisticated knowledge of microorganisms, the reaction has always been the same. Even in the United States, as events unfold with the Ebola outbreak, the calls to ban all travel to West Africa show the preference to contain by separation.

II. Quarantine Use Will Continue

The prevalence of quarantine, throughout history and up to the present day, strongly suggests societies will continue to use quarantines to control infectious diseases whenever less restrictive measures fail. But, the

²⁵ Weathersbee, *supra* note 20 at 3.

²⁶ *Id.* The appointed Army Medical Officer was Dr. Harvey E. Brown, Jr. (July 9, 1836 – August 20, 1889). He was considered one of the foremost experts in the field during his twenty-five year career. A member of the Surgeon General's office in later years, he became a military historian detailing the history of the U.S. Army Medical Department in *The Medical Department of the United States Army from 1775 to 1873*. HOWARD A. KELLY & WALTER L. BURRAGE, AMERICAN MEDICAL BIOGRAPHIES 153 (1920).

²⁷ Contreras, *supra* note 21, at 2.

²⁸ *Id.*

²⁹ *Legal Authorities for Isolation and Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (last visited Nov. 19, 2013), <http://perma.cc/79XA-YUDJ>.

³⁰ *History of Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (last visited Mar. 16, 2014), <http://perma.cc/57DW-CYBV>.

magnitude of the threat and the limited response options available, even to modern medicine, present even more compelling reasons to believe quarantines will be used in the future.

The threat posed by an infectious disease pandemic cannot be understated. Documentaries on historical scourges like the Black Death and current news reports covering the drama of Ebola strike fear into the heart. But an even greater threat may arise from a familiar source, like the flu. Because the flu is familiar and, usually, less lethal than bubonic plague, hemorrhagic fevers, or other exotic diseases, the threat posed to the United States by a pandemic influenza virus may seem less than serious. In fact, influenza holds the record for lethality. As John Barry recounts in his book, *The Great Influenza: The Story of the Deadliest Pandemic in History*:

In the winter of 1918, at the height of World War I, history's most lethal influenza virus erupted in an army camp in Kansas, moved east with American troops, then exploded, killing as many as 100 million people worldwide. It killed more people in twenty four weeks than AIDS has killed in twenty four years, more in a year than the Black Death killed in a century. But, this was not the Middle Ages, and 1918 marked the first collision between modern science and epidemic disease.³¹

Since 1918, no disease has wreaked the kind of destruction seen during the Great influenza. But, if expert predictions are correct, the worst may be yet to come.

A. Modern Medicine Cannot Always Prevent Pandemics

The ability to prevent an infectious disease from reaching an epidemic or pandemic scale is determined by four factors: “how easily the disease is transmitted; how feasible it is to develop a vaccine and a treatment; how long before symptoms are visible the patient is infectious; and the severity of the disease – what proportion of people who contract it die.”³² In the case of Ebola, the United Nations warned on October 14, 2014 that the world had 60 days to stem the tide of the disease.³³ The head of the UN's Mission on Ebola stated that “[w]ith each passing day as more people are infected, the number of people infected grows exponentially. We either

³¹ BARRY, *supra* note 1, at back cover.

³² Nicky Woolf, *Ebola isn't the big one. So what is? And are we ready for it?*, THE GUARDIAN, Oct. 3, 2014, <http://perma.cc/GFD4-3SPJ> (quoting Christophe Fraser, a professor of epidemiology at the medical research council center for outbreak analysis at Imperial College, London).

³³ Lia Eustachewich, et. al., *Ebola infections outpacing health authorities' efforts: UN official*, N.Y. POST (Oct. 15, 2014), <http://perma.cc/Z8K9-8BDH> (quoting Anthony Banbury, head of the UN's Mission for Ebola Emergency Response).

stop Ebola now or we face an entirely unprecedented situation for which we do not have a plan.”³⁴

Ebola, however, is only one of several infectious diseases with the potential to reach pandemic proportions despite the efforts of modern medicine. Many experts think a new strain of influenza is our greatest threat.³⁵ Speaking about the risk of a major influenza pandemic, Robert Webster, a globally recognized infectious disease expert at St. Jude’s Children’s Research Hospital warns, “[i]t is not a matter of if but when.”³⁶

Looking at the historical record, we know that “[i]nfluenza pandemics have been reported for at least 500 years, with inter-pandemic intervals averaging approximately 40 years.”³⁷ Of course, the next pandemic may not arise from natural processes: “In January 2009, an Al-Qaeda training camp in Algeria was reportedly wiped out by the plague, killing approximately 40 Islamic extremists. Some experts said that the group was developing biological weapons.”³⁸

Despite modern medical technology, the CDC “estimates that if a new pandemic virus strikes, then the U.S. death toll will most likely fall between 89,000 and 300,000. It also estimates a best case scenario of 75,000 deaths and a worst case scenario in which 422,000 Americans would die.”³⁹ Wherever the next pandemic comes from, whenever it hits, there will only be so many things that people in either the public or private sector can do to deal with it.

B. Limited Response Options

The options to respond to widespread infectious diseases are limited. Preventative measures like vaccination, education on sanitary practices, and regulation of food, water, sewage, and garbage disposal undoubtedly stop many pandemics before they start.⁴⁰ However, when a particularly virulent

³⁴ *Id.*

³⁵ Woolf, *supra* note 32.

³⁶ Tamar Kahn, ‘Just a matter of time’ before next influenza pandemic, BUSINESS DAY (Sept. 10, 2013), <http://perma.cc/4KT8-K4FF>.

³⁷ See Jeffery K. Taubenberger & David M. Morens, *Influenza: The Once and Future Pandemic*, PUBLIC HEALTH REP. (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862331/>.

³⁸ *Al-Qaeda Cell Killed by Black Death ‘was developing biological weapons,’* THE TELEGRAPH (Jan. 20, 2009), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/algeria/4294664/Al-Qaeda-cell-killed-by-Black-Death-was-developing-biological-weapons.html>. The Algerian government later denied the report.

³⁹ BARRY, *supra* note 1, at 313.

⁴⁰ See generally, *CDC Global Health Strategy 2012-2015*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (2012), <http://perma.cc/P5SQ-GYWS>.

infectious disease reaches epidemic or pandemic proportions, there are really only two things a society can do: stop the spread of the infection to healthy individuals and treat sick individuals to the extent treatment is available. In fact, *The National Strategy for Pandemic Influenza* includes multiple sections dealing with the nature of the threat, preparedness and detection.⁴¹ Only one section, though, covers response, and that section focuses heavily on “containment.”⁴² The need to contain a deadly contagious disease may require the use of mass quarantines.

C. Quarantines Can Work

Despite the likelihood of future pandemics and the dearth of possible response options, some experts and commentators believe mass quarantines will never be used again. In a 2005 interview for USA Today, following President Bush’s suggestion that the military could be used to quarantine a part of the country, William Schaffner of Vanderbilt University—who served as an advisor to the federal government based on his expertise with influenza—said, “I don’t think either the Tennessee National Guard or the U.S. Army and Marines will try to establish a cordon sanitaire around Nashville. That’s not going to happen.”⁴³ In a comment for the San Diego International Law Journal, Gregory Campbell states, “As large-scale mandatory quarantines have historically proven to be ineffective and would likely fail at preventing the spread of disease in the modern era of mass transportation, large-scale mandatory quarantines should never be implemented.”⁴⁴

During the SARS outbreak in the early 2000s, many Canadians “refused to comply with the quarantine implemented by the Canadian government.”⁴⁵ In an attempt to deal with SARS in 2003, “Beijing officials announced a mandatory quarantine to stop the spread of the virus. [N]early 250,000 residents fled the city, dispersed throughout the country, and likely enabled the spread of the disease.”⁴⁶

More recently, experts like Dr. Richard Schabas predicted the failure of the Liberian Government’s West Point quarantine, calling it a “measure that basically goes back to the Middle Ages,” one that is “a reflection really

⁴¹ See generally, THE NATIONAL STRATEGY FOR PANDEMIC INFLUENZA, HOMELAND SECURITY COUNCIL (2005), <http://perma.cc/VZ4K-LL8U>.

⁴² *Id.* at 8.

⁴³ *Envisioning a 21st-century quarantine*, USA TODAY (Oct. 10, 2010), <http://perma.cc/TSC5-XNR2>.

⁴⁴ Campbell, *supra* note 15, at 521.

⁴⁵ Weathersbee, *supra* note 20, at 9. ((citing Schabas, Commentary, *Is the Quarantine Act Relevant?* 176 CAN. MED. ASSOC. J. 1840, 1841 (June 19, 2007)).

⁴⁶ Campbell, *supra* note 15, at 511.

of ignorance and panic,” and “has no place at all in disease control.”⁴⁷

But quarantines can work if they are strictly enforced. During the 1918 Influenza, strictly enforced quarantines were effective. In a few places “where it was possible to impose a rigid quarantine and where authorities did so ruthlessly [people] escaped the disease entirely.”⁴⁸ In *The Great Influenza*, Barry gives the example of the quarantine of American Samoa where “not a single person died of influenza.”⁴⁹ Effective enforcement was not only seen on far flung islands. George Soper, the Army’s Chief Investigator who reviewed all written medical reports and interviewed medical officers in the wake of the 1918 Influenza, concluded that “the only effective measure used against influenza in any of the camps has been to isolate both individual influenza victims and, if necessary, entire commands that became infected: these efforts ‘failed when and where they were carelessly applied’ but ‘did some good. . . . when and where they were rigidly carried out.’”⁵⁰

More importantly, the fact that some medical experts argue against the use of mass quarantines, and that those experts can point to historical examples where mass quarantines failed to achieve the intended effect, does not mean governments will decide against the use of mass quarantines in the future. The Liberian Government’s decision to quarantine the West Point neighborhood, with modern medical knowledge at its disposal, illustrates that point. Some events, particularly those that generate the kind of fear associated with the threat of war and pandemic disease, carry an irresistible momentum with them—a momentum that propels people to take action, often with a desperation that will not allow for cool reflection or regard for historical precedent. When a nation feels that kind of profound fear, it often calls upon its military.

III. The Military May Enforce Mass Quarantines

State law serves as the primary basis for the imposition of quarantine and isolation orders, since such orders constitute the exercise of police powers reserved to the states.⁵¹ However, the federal government also has the power to order quarantines and isolation, which derives from the

⁴⁷ Hildebrandt, *supra* note 11.

⁴⁸ BARRY, *supra* note 1, at 364.

⁴⁹ *Id.* at 364. While the geography of the island certainly made it easier to enforce the quarantine, enforcement was the key to success. Because the influenza spread so quickly, could be transmitted through the air, or by contact—including contact with hard surfaces where the virus could survive for up to two days—“[o]nly ruthless isolation and quarantine could affect its course.” *Id.* at 256–57.

⁵⁰ BARRY, *supra* note 1, at 371–372.

⁵¹ KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL33201, FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY 3 (2007).

Commerce Clause of the United States Constitution.⁵² Drawing on that power, the Public Health Services Act gives the Secretary of Health and Human Services the authority to issue quarantine or isolation orders to prevent the spread of communicable disease into the country and between states.⁵³ Title 42 C.F.R. Part 70 authorizes the detention and medical examination of individuals suspected of carrying certain communicable diseases between states.⁵⁴ Executive Orders 13295 and 13375 list the communicable diseases for which “apprehension, detention, or conditional release of individuals” is authorized.⁵⁵ The federal government thus has the power to impose quarantines and anticipates that the military will have a role in enforcement.

A. The Department of Defense Has a Defined Role in Domestic Pandemic Response

Whether quarantines are ordered by state governments in need of federal assistance or by the federal government, military forces governed by Title 10 of the U.S. Code will almost certainly take part in quarantine enforcement efforts. The *National Strategy for Pandemic Influenza Implementation Plan (Implementation Plan)* outlines the Department of Defense role during response to a disease pandemic:

The Secretary of Defense will be responsible for protecting American interests at home and abroad. The Secretary of Defense may assist in the support of domestic infrastructure and essential government services or, at the direction of the President and in coordination with the Attorney General, the maintenance of civil order or law enforcement, in accordance with applicable law. The Secretary of Defense will retain command of military forces providing support.⁵⁶

The tasks assigned primarily to DoD by the *Implementation Plan* fall under one of four objectives, three of which are relevant to domestic

⁵² *Id.* at 3–4 (citing U.S. CONST. art I, § 8).

⁵³ 42 U.S.C. § 264 (2002).

⁵⁴ 42 C.F.R. § 70 (2013).

⁵⁵ Exec. Orders No. 13295 and 13375 *supra* note 13.

⁵⁶ LAWRENCE KAPP & DON J. JANSEN, CONG. RESEARCH SERV., R40619, THE ROLE OF THE DEPARTMENT OF DEFENSE DURING A FLU PANDEMIC 2–3 (2009) (citing the HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN 29 (2006)). While the IMPLEMENTATION PLAN may seem dated, it is still listed as current on flu.gov. See *Federal Government, Pandemic Flu, National Strategy*, FLU.GOV, <http://perma.cc/2ZA5-L2EB> (last visited Mar. 17, 2014). Homeland Security’s National Strategy for Pandemic Flu page links to flu.gov, which is described as “[t]he official U.S. government Web site for information on pandemic flu and avian influenza.” See *National Strategy for Pandemic Flu*, HOMELAND SECURITY, <http://perma.cc/BA66-RFH7> (last visited Mar. 17, 2014).

operations: assisting in disease surveillance; protecting and treating U.S. forces and dependents; and, providing support to civil authorities in the United States.⁵⁷ In the Congressional Research Service Report, *The Role of the Department of Defense During a Flu Pandemic*, the authors recognize that “[d]uring a serious flu pandemic, there is a strong possibility that local, state, and federal responders will request assistance from the Department of Defense” because, “DoD has a broad range of capabilities that could be useful to civil authorities in emergency situations, including transportation assets, medical personnel and supplies, security forces, and communications equipment.”⁵⁸

The type of support activities that civil authorities may request from DoD includes activities that are clearly distinguishable from law enforcement functions, like “transporting response teams, vaccines, medical equipment, supplies, diagnostic devices, pharmaceuticals and blood products.”⁵⁹ However, the list also includes anticipated requests for support with, “controlling movement into and out of areas, or across borders, with affected populations; supporting law enforcement; and supporting quarantine enforcement.”⁶⁰ The line between *support* to an activity and *execution* of the activity is not always clear.

B. Circumstances May Force the Military to Exceed a Support Role

In the chaos of a serious disease pandemic, it would be difficult for federal military forces to differentiate *support* to enforcement from enforcement itself. That confusion would increase in locations with significant overlap between military control and control by municipal, county, or state authorities, since DoD has the primary task of protecting its forces and dependents.

On military installations, quarantine and isolation “can in certain circumstances be imposed by a Military Commander for individuals within the scope of the authority of the Commander.”⁶¹ That authority has recently been exercised over military personnel returning from duty in West Africa for Operation United Assistance.⁶² In a pandemic situation, a local CDC Quarantine Officer could also “authorize[] Military Commanders to quarantine individuals not within [the commander’s] scope of authority until

⁵⁷ *Id.* at 3. The second objective, which is not relevant to domestic operations, is for DoD to assist partner nations, particularly through military-to-military assistance.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ U.S. DEP’T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DEPARTMENT OF DEFENSE enclosure 3, para. 2.a. (2013) [hereinafter DoDI 6200.03].

⁶² Chris Carroll, *Some Ebola quarantine measures becoming clear, others remain undecided*, STARS AND STRIPES (Oct. 30, 2014), <http://perma.cc/5RTM-B65A>.

a formal written order is issued by the CDC.”⁶³ Fort Bliss illustrates the kind of confusion a commander could face during an infectious disease pandemic where large numbers of people may attempt to transit a checker board of federal, state, county, and municipal jurisdictions.

Fort Bliss sits in the middle of the city of El Paso, Texas. El Paso is located on the international border with Mexico and the border between the states of Texas and New Mexico. Four major highways intersect El Paso: Interstate 10, U.S. 180, U.S. 54, and U.S. 85. El Paso also serves as a major rail hub. El Paso’s international airport is adjacent to Fort Bliss. The training areas that stretch from Fort Bliss, north across the New Mexico border to White Sands Missile Range, and beyond to Holloman Air Force Base encompass an enormous area of federal land under military control, yet crisscrossed by state and county roads.⁶⁴

El Paso, as a significant international and interstate transit point, could be a prime candidate for travel restrictions and even quarantines in the event of a serious pandemic. In fact, on March 18, 2009, the first case of the H1N1 influenza virus (commonly referred to as “swine flu”) was reported in Mexico.⁶⁵ By that summer, swine flu had spread across the border, initially into Texas and California and then throughout the United States, prompting the World Health Organization to declare an H1N1 pandemic.⁶⁶

Fort Bliss military housing is under exclusive federal jurisdiction, yet some military housing is off the base and in the City of El Paso itself. So, despite the need to differentiate support to civilian quarantine enforcement from actual enforcement, commanders trying to secure barracks at far-flung range complexes in New Mexico may end up engaging in actual enforcement in areas where civilian jurisdictions overlap. Commanders are even more likely to err on the side of actual quarantine enforcement of areas outside their jurisdiction if confusion and inaction pervade the operations of civilian authorities in ways that threaten to compromise military force protection.

In very limited circumstances where, “prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation,” a commander could rely on emergency authority to temporarily engage in quarantine enforcement when “necessary to prevent

⁶³ *Id.* at para. 4.c.

⁶⁴ Fort Bliss encompasses 1,700 square-miles and is exceeded in size only by the adjacent White Sands Missile Range, which is the largest installation in the United States. DOD HOUSING NETWORK, <http://perma.cc/GH82-B3XJ>.

⁶⁵ Campbell, *supra* note 15, at 501 (citing *Press Release, Influenza-like Illness in the United States and Mexico*, WORLD HEALTH ORGANIZATION (Apr. 24, 2009), <http://perma.cc/946H-AR2L>).

⁶⁶ *Id.*

significant loss of life or wanton destruction of property.”⁶⁷ However, circumstances that would give rise to the legitimate exercise of a commander’s emergency authority would, almost certainly, trigger the President’s authority to use the military to enforce the laws in order to restore public order.

C. The President Could Authorize the Military to Enforce Quarantines

Federal military forces can engage in law enforcement activities, including quarantine enforcement, when directed by the President. Doctrine distinguishes DoD *support* to law enforcement from DoD *execution* of law enforcement because of the statutory restriction commonly known as the “Posse Comitatus Act” (PCA). The PCA, itself, is very brief:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.⁶⁸

Court rulings have developed the PCA’s application, finding violations of the Act when, “(1) civilian law enforcement officials make ‘direct active use’ of military investigators, (2) the use of the military ‘pervades the activities’ of the civilian officials, or (3) the military is used to subject citizens to the exercise of military power that is ‘regulatory, prescriptive, or compulsory in nature.’”⁶⁹

DoD policy provides more concrete guidance by prohibiting direct participation in specific types of law enforcement activities. Department of Defense Instruction 3025.21, *Defense Support of Civilian Law Enforcement Agencies*, lists activities which constitute prohibited direct assistance to law enforcement. The list includes interdiction of vehicles, searches and seizures, arrests, using force other than in self-defense, evidence collection, surveillance, and forensic investigation.⁷⁰ Direct enforcement of quarantines would, without question, require DoD personnel to engage in some, if not

⁶⁷ U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES enclosure 3, para. 3.a. (2013) [hereinafter DoDI 3025.21].

⁶⁸ 18 U.S.C.A. § 1385 (West 1994) [hereinafter PCA].

⁶⁹ SWENDIMAN, et. al., *supra* note 51, at 18; *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991); United States v. McArthur, 419 F.Supp. 186 (D.N.D. 1975), *aff’d*, 541 F.2d 1275 (8th Cir. 1976); United States v. Bacon, 851 F.2d 1312, 1313–14 (11th Cir. 1988).

⁷⁰ U.S. DEP’T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES, enclosure 3, para. 1.c. (2013).

all, of these prohibited law enforcement activities.

The PCA, however, is not an absolute bar to the direct participation of the military in quarantine enforcement.⁷¹ Exceptions to the PCA, created by Congress, “permit military involvement in law enforcement.”⁷² The most important exception to the PCA with respect to military quarantine enforcement is commonly known as the Insurrection Act.⁷³ Originally enacted to authorize the President to use the military to suppress insurrections at the request of state governments, the Act was amended in 2007 to cover “instances of ‘domestic violence’ where public order is disrupted due to a ‘natural disaster, epidemic, or other serious public health emergency.’”⁷⁴ The amendment also authorizes the President to “employ federal troops to ‘restore public order and enforce the laws of the United States,’ without a request from the governor or legislature of the state involved.”⁷⁵ For the military, actions to enforce the laws of the United States in a public health emergency would likely focus on enforcement of quarantine orders.⁷⁶

⁷¹ PCA *supra* note 68 (focusing on the language “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress”). In a report to Congress on the PCA, Jennifer Elsea, a legislative attorney, notes “older commentaries suggest that the word ‘expressly’ must be ignored, for otherwise in their view the Posse Comitatus Act is a constitutionally impermissible effort to limit the powers of the President. The regulations covering the use of the armed forces during civil disturbances do not go quite that far, but they do assert two constitutionally based exceptions – sudden emergencies and protection of federal property.” Jennifer Elsea, CONG. RESEARCH SERV., RS20590, THE POSSE COMITATUS ACT AND RELATED MATTERS: A SKETCH 2 (2005).

⁷² KAPP, et. AL., *supra* note 56 at n.49.

⁷³ 10 U.S.C. §§ 331-333 (2007) (now called “Enforcement of the Laws to Restore Public Order”). Neither the Public Health Services Act nor CDC regulations specifically authorize military enforcement of federal quarantine orders. *See*, 42 U.S.C. § 264 (2002) and 42 C.F.R. § 70.6 (2013). But, neither HHS nor CDC possess sufficient resources to enforce mass quarantines. This reality is reflected in the IMPLEMENTATION PLAN which designates the Department of Homeland Security for the lead in “overall domestic incident management and Federal coordination” even though HHS would lead the “medical response.” HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN 10 (2006). Regardless, the military’s authority to enforce laws to restore public order under the “Insurrection Act” would not be limited to laws expressly authorizing military enforcement.

⁷⁴ SWENDIMAN, et. al., *supra* note 51, at 21.

⁷⁵ *Id.* Note, however, that while the president can employ federal troops without a request from the governor or state legislature, he can do so only after making the determination that, that “local authorities are unable to maintain public order, where, as before, either the enjoyment of equal protection of the laws is impeded or the execution of federal law and related judicial process is obstructed.” *Id.*

⁷⁶ The IMPLEMENTATION PLAN provides the following example of a circumstance when federal military forces would exercise law enforcement authority under the “Insurrection Act” to enforce quarantines: “[I]f the President is asked by a State to assist and if the defiance to the State quarantine orders amounts to an insurrection against State authority that the State cannot handle (see 10 U.S.C. § 331), or there is widespread unlawful activity that has the effect of depriving people of rights secured by the Constitution and laws.” HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA

Quarantine enforcement would involve uses of force beyond self-defense, since quarantined persons may attempt to leave quarantined areas without threatening quarantine enforcers in a manner which would justify actions in self-defense. But the self-defense centered SRUF fails to provide federal military units with the necessary guidance to use force appropriately in quarantine enforcement operations. Provisions that focus on unit self-defense while providing support to civil authorities—or on force used to control the sort of overtly wrongful conduct that occurs during riots—do not help soldiers understand how much force they should use to prevent civilians from peacefully, though unlawfully, leaving designated quarantine areas. Inadequate guidance, including provisions in the SRUF that suggest unnecessarily aggressive uses of force, could lead to problems.

IV. The Standing Rules for the Use of Force (SRUF) Are Ill Suited to Quarantine Enforcement

In 2006, the *Implementation Plan* recognized that “[d]ifficult issues such as rules on the use of force to enforce quarantine if necessary and what to do with those who refuse to be quarantined should be settled as much as possible in advance of any quarantine implementation.”⁷⁷ Yet, eight years later, federal military personnel still have nothing other than the SRUF to guide their uses of force during quarantine enforcement.⁷⁸

The SRUF do not provide an independent legal basis for the use of force. According to the Department of Defense, rules for the use of force are “[d]irectives issued to guide United States forces on the use of force during various operations.”⁷⁹ The first section of Enclosure L states that the SRUF, “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all DoD civil support and routine Military Department functions occurring within U.S. territory or U.S. territorial seas.”⁸⁰

IMPLEMENTATION PLAN 226 (2006). However, recall that the President can employ federal troops without a request, and that the Insurrection Act was amended in 2007, a year after the IMPLEMENTATION PLAN was published, to cover instances where public order is disrupted due to epidemic or other serious public health emergency. *See* 10 U.S.C. § 331 (2007). That expansion renders defiance to a quarantine order less important than the disruption to public order occasioned by the epidemic as a trigger to the Insurrection Act.

⁷⁷ HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN 156 (2006) [hereinafter IMPLEMENTATION PLAN].

⁷⁸ *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT AND STANDING RULES FOR THE USE OF FORCE, enclosure L (2005) [hereinafter CJCSI 3121.01B].

⁷⁹ Major Daniel J. Sennott, *Interpreting Recent Changes to the Standing Rules for the Use of Force*, ARMY LAWYER (Nov. 2007), at 53, <http://perma.cc/V9EW-5CC7>.

⁸⁰ CJCSI 3121.01B, *supra* note 78, at para. 1.a.

The SRUF are intended to ensure that any use of force by federal military forces is consistent with domestic law. As noted in the Domestic Operational Law Handbook's discussion of the legal authority and standard for U.S. military use of force in domestic operations, "[a]ll Executive Branch uses of force are balanced against the civil rights of the public. While three primary provisions of the Bill of Rights limit federal use of force in domestic operations, the main focus is on the Fourth Amendment."⁸¹

Major Daniel J. Sennott, in his article *Interpreting Recent Changes to the Standing Rules for the Use of Force*, persuasively argues that the SRUF may promote confusion rather than compliance in any type of domestic operation:

The SRUF, by mirroring SROE [Standing Rules of Engagement], has changed into a more combat-oriented set of rules. Some may argue that this new language is necessary to ensure that Soldiers understand their inherent right to self-defense. However, the result may be confusion in the minds of combat veterans who have been dealing with hostile threats from insurgents—not from Americans protected by the Fourth Amendment.⁸²

That kind of confusion, though under different rules, played out on the streets of Los Angeles even before we had a military conditioned by more than a decade of combat. In May of 1992, forces including California Army National Guard, active duty Army, and Marines deployed under Joint Task Force Los Angeles to respond to widespread rioting.⁸³ Immediately following the riots, some of those forces patrolled with the Los Angeles Police Department. On one occasion:

Police officers responded to a domestic dispute, accompanied by marines. They had just gone up to the door when two shotgun birdshot rounds were fired through the door, hitting the officers. One yelled 'cover me!' to the marines, who then laid down a heavy base of fire The police officer had not meant 'shoot' when he yelled 'cover me' to the marines. [He] meant . . . point your weapons and

⁸¹ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW 2013 HANDBOOK FOR JUDGE ADVOCATES, 180 (2013) (explaining that "[t]he other two are the Fifth Amendment Due Process Clause, which limits the ability of federal officers to use force after an arrest has occurred, and the Eighth Amendment, which defines the rights of a prisoner when corrections personnel use force.") [hereinafter DOMOPS HANDBOOK].

⁸² Sennott, *supra* note 79, at 77.

⁸³ Lieutenant Colonel Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, at 88-109, <http://perma.cc/V2UG-L6AZ>.

be prepared to respond if necessary. However, the marines responded instantly in the precise way they had been trained, where ‘cover me’ means provide me with cover using firepower over two hundred bullets [were] fired into that house.⁸⁴

The Coast Guard has organized to avoid problems like the one that occurred in 1992 when Marines accompanied LAPD officers. During his presentation on Coast Guard operations to the 62nd Graduate Course at The Judge Advocate General’s Legal Center and School, Admiral Frederick Kenney, the former Judge Advocate General for the U.S. Coast Guard, explained that most Coast Guardsmen are trained to follow the “enforcer mindset,” meaning they are focused on using minimal force. The Coast Guard has special units where Coast Guardsmen are trained to follow the “warrior mindset,” meaning they are focused on using overwhelming force. But, the Coast Guard never allows personnel in those special units to operate outside their units because “a 20 year old can’t just flick a switch in his head from warrior to enforcer mindset.”⁸⁵

Because it incorporates the Standing Rules of Engagement (SROE) definitions of hostile act and hostile intent, the SRUF could lead to use of force issues in any type of domestic operation when applied by units accustomed to applying those definitions in combat.⁸⁶ This creates particular problems for quarantine enforcement. Lt. Col. John Erickson, the judge advocate responsible for legal issues related to pandemic response planning for the U.S. Northern Command Office of the Staff Judge Advocate believes “the existing SRUF is not adequate for quarantine enforcement activities.”⁸⁷ In some respects, the SRUF is more than inadequate, it is dangerous.

⁸⁴ JAMES D. DELK, *FIRES & FURIES: THE L.A. RIOTS* 221–22 (1995). Fortunately, no one in the house was injured. When the suspect later surrendered, police discovered that the couple’s children were also inside the home.

⁸⁵ Rear Admiral Frederick J. Kenney, Judge Advocate General & Chief Counsel, Presentation on Coast Guard Operations to the 62nd Graduate Course at The Judge Advocate Gen.’s Legal Ctr. & Sch. (Mar. 6, 2014).

⁸⁶ The Standing Rules of Engagement (SROE) are applied by U.S. military forces operating outside the United States, while the Standing Rules for the Use of Force (SRUF) are, usually, applied by U.S. military forces operating inside the United States while engaged in defense support of civil authorities operations, such as disaster relief. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, *THE STANDING RULES OF ENGAGEMENT AND STANDING RULES FOR THE USE OF FORCE*, enclosure A (2005) (encompassing both the SROE and SRUF) [hereinafter CJCSI 3121.01B, encl. A].

⁸⁷ Email from Lt. Col. John W. Erickson, Jr., Pandemic Response Legal Advisor, U.S. Northern Command Office of the Staff Judge Advocate (Feb. 06, 2014, 11:11 EST) (on file with author).

A. Existing Provisions Could Lead Military Personnel to Use Excessive Force

Potentially the most dangerous provision within the SRUF is the one that authorizes deadly force to prevent escape.

1. Deadly Force to Prevent Escape

The SRUF is unique in authorizing the use of deadly force to prevent escape. While the SROE states that “self defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent,” it provides no specific authorization to use force to prevent escape.⁸⁸ In contrast, Paragraph 5(d)(2) to the SRUF states,

Deadly force is authorized when deadly force appears to be necessary to prevent escape of a prisoner, provided there is probable cause to believe that such person(s) have committed or attempted to commit a serious offense, that is, one that involves imminent threat of death or serious bodily harm, and would pose an imminent threat of death or serious bodily harm to DOD forces or others in the vicinity.⁸⁹

The word “prisoner” appears only in paragraph 5(d)(2) of the SRUF, and thus, is left an undefined term. Yet, the definition of “prisoner” would be critical for federal military forces applying the SRUF during an involuntary quarantine operation. Reading the ordinary definition of “prisoner” into the SRUF would lead military personnel to use excessive force.

Merriam-Webster defines “prisoner,” as “a person deprived of liberty and kept under involuntary restraint, confinement, or custody.”⁹⁰ On its website, the CDC explains that “[q]uarantine is used to separate and restrict the movement of well persons who may have been exposed to a communicable disease.”⁹¹ In fact, according to the CDC, the whole point of a quarantine is to “protect the public by preventing exposure to infected persons or to persons who may be infected.”⁹² That effect can only be achieved by keeping people from leaving or entering designated areas. So, a prisoner is a person kept under involuntary restraint. A quarantined person is one whose movement has been restricted. Not only is there a potential for confusion, the common definition of “prisoner” encompasses involuntarily quarantined persons. Without a definition that specifically excludes

⁸⁸ CJCSI 3121.01B, encl. A, *supra* note 86.

⁸⁹ CJCSI 3121.01B, *supra* note 78, at para. 5.d.2.

⁹⁰ MERRIAM-WEBSTER DICTIONARY, <http://perma.cc/XA9Z-4P5C>.

⁹¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://perma.cc/UJR3-G4ND>.

⁹² *Id.*

quarantined persons, one can see how soldiers, and even highly educated commanders, might consider quarantined persons to be prisoners for purposes of the SRUF.

The remaining language in paragraph 5(d)(2) is equally problematic. A quarantined person attempting to leave a quarantined area without authorization is committing an offense. Title 42 U.S.C. § 271 directs that any person,

who enters or departs from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge, shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.⁹³

An offense under Title 42 U.S.C. § 271 is a misdemeanor. Paragraph 5(d)(2) of the SRUF refers to a “serious offense.”⁹⁴ Putting aside the statutory construction point that 42 U.S.C. § 271 does not expressly classify the included offense as either a “misdemeanor” or a “felony,” and putting aside the philosophical argument as to whether offenses punishable by up to one year in jail can be considered serious, one can expect that soldiers and their commanders will not have ever seen the text of 42 U.S.C. § 271. But, they will know that a quarantine order has been issued by officials who possess the legal authority to issue such orders. They will know that a violation of the quarantine order constitutes an offense.

To assess seriousness, for purposes of the SRUF, soldiers and their commanders will almost certainly focus on the language following “offense” in paragraph 5(d)(2): “[t]hat is, one that involves imminent threat of death or serious bodily harm, and would pose an imminent threat of death or serious bodily harm to DOD forces or others in the vicinity.”⁹⁵ A person who “enters or departs from the limits of any quarantine . . . without permission of the quarantine officer in charge,” may well pose “an imminent threat of death or serious bodily harm to DOD forces or others in the vicinity” due to the spread of infection.⁹⁶ Otherwise, there would be no basis to enforce the quarantine. Consequently, military personnel may believe paragraph 5(d)(2) authorizes the use of deadly force against quarantined persons who try to “escape” the designated quarantine area.

That dynamic—the fact that a quarantined person poses a threat of

⁹³ 42 U.S.C. § 271 (1953).

⁹⁴ See CJCSI 3121.01B, *supra* note 78.

⁹⁵ *Id.*

⁹⁶ See 42 U.S.C. § 271, *supra* note 93; see also CJCSI 3121.01B, *supra* note 78.

death or serious bodily injury no matter how he violates the quarantine, peacefully or violently—goes to the heart of what makes the use of force against quarantined persons unique: quarantined persons are dangerous because of who they are rather than what they are doing.⁹⁷ The basis to use force against them, even minimal force to restrict their freedom to leave a particular area, is based on status rather than conduct. The nearest equivalent is found in international law, where a member of a declared hostile force may be captured and confined without regard for his conduct at the time of capture.⁹⁸

There is no equivalent use of force paradigm anywhere else in the realm of domestic operations. This is why the SRUF is not suited to deal with quarantines, and why its application could result in uses of force against U.S. citizens—merely because they may be infected—that are functionally equivalent to uses of force against declared hostile enemy forces overseas.⁹⁹

⁹⁷ Quarantined persons could also become a threat based on what they are doing. For instance, quarantined persons shot public officials during the 1893 quarantine in Muncie, Indiana. However, quarantined persons pose a threat based on their status as potentially infected persons even without engaging in any sort of threatening conduct. Were that not the case, public officials would have no legal basis to impose a quarantine in the first place. *See* 42 C.F.R. § 70.1 (2013) (defining the basis for quarantine as the reasonable belief an individual or group has been “exposed to a quarantinable communicable disease.”).

⁹⁸ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK, at 140 (2013) [hereinafter LOAC Deskbook] (“The SROE recognize the status-based concept of a declared hostile force. Such groups or individuals may immediately be attacked without any showing of hostility.”).

⁹⁹ Force may be used against quarantined persons without regard for their conduct at the time the force is used, or on the basis of previous conduct. *See* 42 C.F.R. §§ 70.1 and 70.6 (read together, these two sections would authorize the force necessary to quarantine individuals based solely on the reasonable belief that they had been exposed to a qualifying communicable disease, without regard for whether the exposure resulted from the conduct of the exposed persons). The ability to declare a force hostile, and then engage members of that declared hostile force independent of conduct at the time of engagement, is invariably based on conduct undertaken by the force prior to its designation as hostile. *See*, LOAC Deskbook, *supra* note 98 at 32 (The discussion of Chapter VII of the United Nations Charter, “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” makes it clear that the modern concept of *jus ad bellum* justifies the use of force against nations in response to aggressive conduct). Similarly, civilians who continuously, directly participate in hostilities, while targeted without regard for conduct at the time of targeting, are targeted because of previous conduct. *See*, NILS MELZER, Legal Advisor, International Committee of the Red Cross, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, Part 1, Paragraph VII (2009) (The ICRC’s guidance states that “members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians and lose protection against direct attack, for as long as they assume their continuous combat function.”). In the domestic context, while force may be used against an individual for whom an arrest warrant has issued, independent of his conduct at the time of arrest, the authorization to use force to accomplish the arrest is based on that individual’s previous conduct. *See* 5 Am. Jur. 2d Arrest § 19 (2014) (Noting that an arrest warrant may only issue upon probable cause “to believe that the accused has committed an offense.”). Involuntary civil commitment is most like quarantine in that a person may be detained on the basis that he poses a danger to others due to his condition. However, there is no such thing as a mass

Unfortunately, the provision authorizing deadly force to prevent escape is not the only problematic component of the SRUF.

2. Imminent Threat and Hostile Intent

The SRUF's definition of "imminent" as applied to its definition of "hostile intent" could lead military personnel to believe deadly force is appropriate to prevent quarantined persons from leaving the designated quarantine area, or even to prevent them from approaching the perimeter. Paragraph 4(a) to Enclosure L of the SRUF establishes the inherent right of self-defense: "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent."¹⁰⁰ Paragraph 4(b) explains that "[i]ndividuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat."¹⁰¹ The same paragraph clarifies that "imminent does not necessarily mean immediate or instantaneous."¹⁰² Paragraph 4(d) defines hostile intent as, "[t]he imminent threat of the use of force against the United States, US forces or other designated persons or property."¹⁰³ Paragraph 4(d) states that hostile intent "includes the threat of force to preclude or impede the mission and/or duties of US forces."¹⁰⁴ Taken together, paragraphs 4(a), (b), and (d) could lead to unintended applications of force, given the unique dynamics of quarantine enforcement.

A quarantined person, by virtue of his potential to spread a deadly infectious disease, could be considered an individual "with the capability to inflict death or serious bodily harm."¹⁰⁵ A quarantined person potentially inflicts death or serious bodily harm by leaving the quarantined area. So, demonstration of intent to leave the quarantined area could be seen as an imminent threat. Worse yet, the fact that the imminent threat need not be "immediate or instantaneous" arguably extends the threat assessment from those who actually breach the quarantine to those loitering suspiciously near the perimeter as if preparing to breach.

Including acts that "preclude or impede the mission and/or duties of US forces" within the definition of hostile intent creates an even greater risk

involuntary civil commitment order. As with arrest warrants, involuntary civil commitment orders are individualized. *See generally* 53 Am. Jur. 2d Mentally Impaired Persons § 53 (2014). So, the pure status nature of mass quarantine enforcement is truly unique.

¹⁰⁰ CJCSI 3121.01B, *supra* note 78, at para. 4.a.

¹⁰¹ *Id.* at para. 4.b.

¹⁰² *Id.*

¹⁰³ *Id.* at para. 4.d.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at para. 4.b.

that force would be used against quarantined persons.¹⁰⁶ If federal military forces were deployed to enforce an involuntary mass quarantine, their primary mission would be to prevent quarantined persons from leaving the quarantine area without authorization. Any quarantined person leaving the quarantined area without authorization, then, could be seen as impeding the mission or interfering with the duties of those federal military forces, triggering the SRUF's authorization to use deadly force.

One might argue that uses of force under the SRUF will always be tempered by the minimum force language in paragraph 5(b)(1), “[n]ormally, force is to be used only as a last resort, and the force used should be the minimum necessary,”¹⁰⁷ and, in 5(c), “[d]eadly force is to be used only when all lesser means have failed or cannot reasonably be employed.”¹⁰⁸ Yet, the SROE similarly qualifies the right to respond with force to hostile acts and demonstrations of hostile intent with the principle of de-escalation, stating that “[w]hen time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.”¹⁰⁹ Despite that qualification, hostile intent tends to be broadly interpreted under the SROE. As Kate Clark, Senior Analyst for the Afghanistan Analysts Network has noted, “[i]mmminent’ threat can, in practice, be defined surprisingly loosely and can justify military actions in what is called ‘anticipatory self-defence.’”¹¹⁰

The fact that imminent threat can be, and has been, defined loosely in theaters of operation underscores MAJ Sennott's concern that combat veterans would apply the SRUF definition of hostile intent as broadly as they have become accustomed to applying the SROE definition of hostile intent: “Many veterans of Operation Iraqi Freedom and Operation Enduring Freedom are intimately familiar with ROE, but have little or no experience with SRUF. . . . [C]ombat ROE are typically much more aggressive than domestic RUF, so the potential for excessive use of force incidents in domestic operations may be significant.”¹¹¹ The SRUF's provision regarding the use of deadly force to prevent escape, and in response to demonstrations of hostile intent, fail to anticipate the unique, status-based threat concerns present during involuntary quarantine enforcement. The SRUF's provision regarding use of riot control agents fails to anticipate the effect of such agents on quarantined persons.

¹⁰⁶ *Id.* at para. 4.d.

¹⁰⁷ *Id.* at para. 5.b.1.

¹⁰⁸ *Id.* at para. 5.c.

¹⁰⁹ CJCSI 3121.01B, encl. A, *supra* note 86, at para. 4.a.1.

¹¹⁰ Kate Clark, Dispatch, *Winding Down or in for the Long Haul? The Emergence of a New US Counter-Terrorism Strategy*, AFGHANISTAN ANALYSTS NETWORK (ANN) (July 8, 2013), <http://perma.cc/X7HV-ZXKW> (footnote omitted).

¹¹¹ Sennott, *supra* note 79, at 52–53.

B. The Use of Riot Control Agents May Result in Deadly Force

Riot control agents (RCA) authorized for non-lethal force under the SRUF could result in lethal force if used against quarantined persons. Tear gas grenades and oleoresin capsicum (OC) spray are often considered as non-lethal means to control crowds. But, these agents could pose extreme dangers for individuals already experiencing respiratory distress, such as influenza, SARS, and pneumonia. Illustrating the point, research from the University of Alabama at Birmingham and the Southern Research Institute has shown that the influenza virus contains a protein which “damages lung epithelial cells, causing fluid buildup in the lungs,” making it “difficult to breathe and prevent[ing] oxygen from reaching the blood stream.”¹¹² The effects of OC spray on the respiratory system, “include burning of the throat, wheezing, dry cough, shortness of breath, gagging, gasping, inability to breathe or speak (due to laryngospasm or laryngeal paralysis), and, rarely, cyanosis, apnea, and respiratory arrest.”¹¹³ Capsaicin, the active ingredient in OC spray, “exacerbates pulmonary inflammation associated with respiratory infection.”¹¹⁴ In the lab, rodents exposed to Capsaicin during parainfluenza infection demonstrated, “a 3- to 5-fold increase in neurogenic inflammation of the airways.”¹¹⁵

Despite the risk, paragraph 5(b)(2) of Enclosure L specifically authorizes the use of riot control agents: “The use of Service-approved, unit issued non-lethal weapons and riot control agents, including oleoresin capsicum (OC) pepper spray, and CS gas, is authorized in operations other than war.”¹¹⁶ Given the likely condition of quarantined persons during an infectious disease pandemic, the use of those riot control agents could, unwittingly, convert the use of non-lethal force to lethal force.

The SRUF, unfortunately, not only authorizes the use of those agents, it encourages such use since the focus on minimal force naturally promotes the use of non-lethal weapons sets. U.S. Northern Command’s legal advisor

¹¹² *How Flu Damages Lung Tissue*, SCIENCE DAILY (July 20, 2009), <http://perma.cc/66WS-G582>.

¹¹³ C. Gregory Smith & Woodhall Stopford, *Health Hazards of Pepper Spray*, N.C. MED. J. 268–74 (1999), <http://perma.cc/4XFT-HP6E>.

¹¹⁴ *Id.*; *How Flu Damages Lung Tissue*, *supra* note 112.

¹¹⁵ *Id.* A study on human volunteers conducted by the University of California, San Diego and sponsored by The National Institute of Justice (NIJ), to “examine the combined effects of OC exposure, was unable to “make definitive conclusions due to the small number of subjects (eight) in [the] subgroup.” See THEODORE C. CHAN, et. al., U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, PEPPER SPRAY’S EFFECTS ON A SUSPECT’S ABILITY TO BREATHE 1, 4 (Dec. 2001), <http://perma.cc/5DBH-JQGW>.

¹¹⁶ CJCSI 3121.01B, *supra* note 78, at para. 5.b.2.

for pandemic response planning, Lt Col Erickson, expressed concern on this issue, stating “the SRUF does not adequately address appropriate implementation of non-lethal weapons.”¹¹⁷

The language of the SRUF creates a substantial risk of confusion, which could lead to excessive use of force incidents. Its authorization of RCA creates a substantial risk that non-lethal force would actually amount to lethal force. The SRUF, however, suffers from a more fundamental problem: it cannot authorize deadly force for non-violent quarantine violations.

C. The Law Does Not Allow the Use of Deadly Force to Prevent All Quarantine Violations

The legal test established by the U.S. Supreme Court to analyze the reasonableness of force used by law enforcement officers would not support the use of deadly force against persons peacefully attempting to leave a quarantined area without authorization.¹¹⁸

1. The Fourth Amendment Reasonableness Standard

Any use of force by military personnel against civilians during enforcement of an involuntary quarantine, including the use of deadly force, would be subject to the Fourth Amendment reasonableness standard. The Fourth Amendment guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹¹⁹

In *Tennessee v. Garner*, the U.S. Supreme Court was presented with a case where Memphis police officer Elton Hymon shot a fleeing suspect, Edward Garner, to prevent his escape following a burglary.¹²⁰ The officer acted in accordance with a Tennessee statute that allowed law enforcement

¹¹⁷ Email from Lieutenant Colonel (Lt. Col.) John W. Erickson, Jr., Pandemic Response Legal Advisor, U.S. Northern Command Office of the Staff Judge Advocate (Feb. 06, 2014, 11:11 EST) (on file with author).

¹¹⁸ See *Graham v. Connor*, *infra* note 135 (holding that the reasonableness test “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”).

¹¹⁹ U.S. CONST. amend. IV.

¹²⁰ *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985).

to use “all the necessary means to effect the arrest,” so long as the suspect attempted to flee or forcibly resist after the officer provided “notice of the intention to arrest.”¹²¹ Though more restrictive than the statute, Memphis Police Department policy permitted the use of deadly force following burglaries.¹²²

The Court stated, unequivocally, “there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”¹²³ Having determined the use of deadly force constitutes a seizure, the Court explained that, “[t]o determine the constitutionality of a seizure ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’”¹²⁴ Applying that balancing test, the Court found that “notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him.”¹²⁵ The court held that,

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.¹²⁶

However, the court clarified its holding by stating that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force . . . if, where feasible, some warning has been given.”¹²⁷ Quarantined persons may pose a threat of serious physical harm. One might argue, then, under *Garner*’s rationale, that it would be constitutionally reasonable to prevent them from leaving the quarantine by using deadly force.

¹²¹ *Id.* at 4.

¹²² *Id.* at 5.

¹²³ *Id.* at 7.

¹²⁴ *Id.* at 8.

¹²⁵ *Id.*

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 11–12.

2. Applying *Tennessee v. Garner* to the SRUF for Quarantine Enforcement

By failing to limit the use of deadly force to prevent a quarantined person from violating a quarantine order, the SRUF could lead soldiers to constitutionally unreasonable uses of force. The Supreme Court's Fourth Amendment test attempts to balance the individual's constitutional right to be secure from unreasonable seizure against the government's interest alleged to justify the intrusion. The government's interest in preventing the spread of a deadly, highly contagious disease would appear to justify seizures by deadly force. Seemingly, military quarantine enforcers who witness an individual breach the quarantine perimeter at an unauthorized location would not only be observing a violation of the quarantine order—a crime—but would have probable cause to believe “the suspect poses a threat of serious physical harm” to those outside the quarantine by virtue of the disease he carries, or may carry.¹²⁸

Assuming a warning is given by quarantine enforcers and is ignored by the individual who then attempts to flee, would a use of deadly force against that fleeing individual not satisfy the requirements articulated by the Court in *Tennessee v. Garner*? The answer is no, for two reasons.

The first reason, as noted previously, is that Congress has undercut any credibility an executive agency would otherwise have to make a legitimate argument about the government's compelling interest in preventing the spread of deadly infectious diseases by setting the penalty for violation of a quarantine order in 42 U.S.C. § 271 at a fine of not more than \$1000 or imprisonment for not more than one year.¹²⁹ Title 42 U.S.C. § 271 does not articulate a specific letter grade classification for the offense it contains.¹³⁰ However, 18 U.S.C. § 3559, Sentencing Classification of Offenses, classifies offenses punishable by a maximum term of imprisonment more than six months, but less than a year as, “a Class A misdemeanor.”¹³¹ The Supreme Court would not have heard *Tennessee v. Garner*, had the crime to which the officer responded not been a felony. In fact, the Court points out in a footnote that “[a]lthough the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanor.”¹³²

The second reason is that by the CDC's own definition quarantines

¹²⁸ *Id.*

¹²⁹ 42 U.S.C. § 271 (1953).

¹³⁰ *Id.*

¹³¹ 18 U.S.C. § 3559 (2006).

¹³² *Garner*, 471 at 5. Surveying multiple jurisdictions, American Jurisprudence states the general rule that “[a]n officer has no right to use deadly force to arrest a person who has committed a misdemeanor.” 5 Am. Jur. 2d Arrest § 88 (2013).

separate “an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.”¹³³ So, an individual’s presence inside a mass quarantine, without more, such as observed symptoms, amounts only to probable cause that he is a member of the group exposed to the disease, not particularized probable cause that he poses a threat of serious physical harm as a carrier of the disease.¹³⁴

Furthermore, the Court’s holding, which focused on the threat posed by someone suspected of having committed a crime because of the nature and manner of the crime committed, cannot be taken out of context. When a bank robber shoots a teller with a shotgun and then fires at police as he exits the bank and runs down an alley, there is a direct nexus between the crime committed and the threat posed to officers and others in the area.

A person who peacefully violates a quarantine order has committed a crime. But, unlike the case of the bank robber, there is no relation between the conduct underlying the crime—crawling through a culvert at night to evade quarantine enforcers, for example—and the threat of serious physical harm posed by the individual, even assuming the individual is actually infected with the disease for which the quarantine order was imposed. The threat posed by the quarantine violator arises from his status as a possible carrier of a deadly infectious disease, rather than his conduct while departing the quarantined area without authorization.

Serious threats of physical harm following misdemeanor offenses can, however, justify the use of deadly force in some circumstances. Consider an instance where a driver initially commits a minor traffic violation but then refuses to pull over and leads police officers on a high-speed chase through heavy traffic, seriously endangering motorists and pedestrians. Can the threat of serious physical harm posed by the risk of spreading a deadly infectious disease justify the use of deadly force against a quarantine violator despite the fact that violation of a quarantine order only amounts to a misdemeanor?

¹³³ 42 C.F.R. § 70.1 (2013).

¹³⁴ Black’s Law Dictionary explains “[t]he probable cause test [is] an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man,” and notes that probable cause is also termed, “reasonable cause; sufficient cause; [and], reasonable grounds.” BLACK’S LAW DICTIONARY (9th Ed. 2009). The CDC’s authority in 42 C.F.R. § 70.1 uses the language of reasonableness when it defines quarantine. *See* § 70.1. But it is critical to recognize the distinction between reasonable grounds to believe a group has been exposed to a disease, and the *Garner* Court’s reasonable grounds to believe a fleeing individual from that group poses a threat of serious physical harm because he is actually infected with the disease for which the group was quarantined.

3. *Graham v. Connor*, *Scott v. Harris*, and the Argument for Deadly Force

Application of the reasonable force analysis distinguishes circumstances where police officers could justifiably use deadly force to stop a vehicle during a high-speed chase following commission of a misdemeanor from a use of deadly force to apprehend a peaceful quarantine violator to prevent the spread of infection. Four years after deciding *Tennessee v. Garner*, the Supreme Court again addressed the question of what constitutes a reasonable use of force by police officers in *Graham v. Connor*. Graham, a diabetic, sustained injuries when he was held by Connor, a city police officer, while Connor investigated Graham's hasty departure from a convenience store.¹³⁵ The Court in *Graham* articulated a list of factors to flesh-out the Fourth Amendment reasonableness test articulated in *Garner*. The Court held that proper application of the test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."¹³⁶ Lower courts "recited *Graham* as if it were a mantra" for nearly 20 years,¹³⁷ until the Supreme Court ruled in *Scott v. Harris*.

Scott involved a driver, Victor Harris, who was rendered a quadriplegic when his car was forced off the road during a high-speed chase by a Georgia county deputy, Timothy Scott.¹³⁸ Harris had initially been clocked at 73 m.p.h. where the posted speed limit was 55 m.p.h. When a deputy flashed his lights for Harris to pull over, Harris fled down the two-lane road at speeds over 85 m.p.h. At one point during the chase, Harris collided with Scott's vehicle to avoid being boxed in.¹³⁹ The Court held that Deputy Scott did not violate the Fourth Amendment, stating that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions," and focused on the threat posed by Harris to "the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."¹⁴⁰ The court seems to have moved away from its previous analysis because "[b]oth *Graham* and *Garner* appear to demand consideration of the underlying crime of which Harris was initially suspected

¹³⁵ *Graham v. Connor*, 490 U.S. 386 (1989). Graham, who was having an insulin reaction, entered the convenience store to purchase some orange juice to counteract the reaction. When he saw the number of people ahead of him in line, he immediately ran back out. Officer Connor's investigative stop was based on his observation of an individual enter a convenience store and then run back out a minute later. *Id.*

¹³⁶ *Id.* at 396.

¹³⁷ Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1132 (2008).

¹³⁸ *Scott v. Harris*, 550 U.S. 372, 374–75 (2007).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 381, 382, 384.

in evaluating Scott's use of force, and both lower courts emphasized that the force was unreasonable in large part because Harris was suspected only of speeding.”¹⁴¹

But the analysis followed by the Supreme Court in *Scott v. Harris* does not undercut the severity of the crime at issue factor with respect to quarantine violations. First, the misdemeanor offense initially committed by the driver in *Scott*—driving above the speed limit—was separate from the conduct—the high-speed flight from the police—that created the threat of serious physical harm. In fact, Georgia law makes it a felony to “fail or refuse to bring [a] vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer” under circumstances where the vehicle is driven “in excess of 20 miles an hour above the posted speed limit; strikes or collides with another vehicle or a pedestrian; [or], flees in traffic conditions which place the general public at risk of receiving serious injuries.”¹⁴²

Unlike the exponentially increasing threat of physical harm posed by a driver who goes from committing a misdemeanor speeding offense, to clipping pursuing police vehicles and weaving through traffic at 120 m.p.h., the lethal properties of a particular disease do not increase because its host crosses an artificially established boundary. A quarantine violation presents a threat of serious physical harm precisely because the potential exposure occasioned by the violation could result in uninfected persons contracting a deadly, infectious disease. With knowledge that the specific risk inherent in a quarantine violation is the risk that quarantine violators will expose uninfected persons to deadly, infectious diseases, Congress set the penalty for 42 U.S.C. § 271 at misdemeanor level. Without some additional conduct, the Supreme Court’s analysis in *Scott* cannot be used to separate the severity of a 42 U.S.C. § 271 offense from the threat of serious physical harm posed during flight from a quarantine, because the flight from the quarantine is the offense.¹⁴³

The reasonableness test articulated in *Graham v. Connor* demonstrates that deadly force cannot be authorized to prevent quarantined individuals from violating a quarantine order unless their flight from the quarantine is accompanied by conduct that creates a sufficient threat of serious physical harm independent of the threat posed by the disease.¹⁴⁴ To

¹⁴¹ Harmon, *supra* note 137, at 1138.

¹⁴² GA.CODE ANN. § 395 (West 2010).

¹⁴³ Conduct in addition to violating the quarantine, like resisting apprehension with a deadly weapon, fleeing in a vehicle in a manner which endangers the public, etc., could render the use of deadly force reasonable. *See Scott*, 550 U.S. at 384. Note that an effective, large-scale military quarantine, with controlled access points, would render high-speed vehicular flight very difficult.

¹⁴⁴ *See* 490 U.S. 386, *supra* note 135, at 396.

comply with federal law, any military rules for the use of force intended for quarantine enforcement must contain an explicit prohibition on the use of deadly force to prevent individuals from peacefully violating the quarantine order. However, military personnel may need to use some level of force. Standardized guidance, techniques, and procedures would help ensure appropriate applications of that force.

D. The SRUF Lacks Special Provisions Needed for Quarantine Enforcement

To comply with federal law, SRUF provisions authorizing deadly force for escape, in response to hostile intent, and authorizing RCA would have to be rewritten. But, changes to those provisions would not, alone, render the SRUF appropriate for quarantine enforcement operations. Certain provisions would also need to be added. An SRUF for quarantines would need provisions addressing three closely related topics: disease identification guidance, specialized escalation of force techniques and procedures to facilitate the implementation of necessary due process requirements.

1. Disease Identification Guidance for Quarantine Enforcement

The SRUF lacks any guidance on identification of a threat justifying a particular use of force. But, an examination of use of force paradigms demonstrates that identification is the condition precedent to legitimate uses of force. Rules for the use of force designed for quarantine enforcement would need to contain identification guidance.

The Standing Rules of Engagement standard training package presented at JAG University teaches that, “once a Soldier establishes [positive identification] of [hostile intent], the Soldier may engage.”¹⁴⁵ Positive identification (PID) is a concept borrowed from offensive targeting operations against legitimate military targets. However, neither the abbreviation “PID” nor even the word “identification” appear anywhere in the SROE or SRUF.¹⁴⁶ But both the SROE and SRUF contain the statement that the right always exists to “exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”¹⁴⁷ That statement implies soldiers must identify actions that constitute hostile acts or demonstrations of hostile intent before responding with force in self-defense.

¹⁴⁵ PowerPoint Presentation of the Dep’t of Int’l & Operational Law, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, on The Standing Rules of Engagement (SROE), Standard Training Package at slide 22 (Oct. 2, 2013).

¹⁴⁶ See CJCSI 3121.01B, encl. A, *supra* note 86; see also CJCSI 3121.01B, *supra* note 78.

¹⁴⁷ See CJCSI 3121.01B, encl. A, *supra* note 86, at para. 2.a; see also CJCSI 3121.01B, *supra* note 78, at para. 2.

Similarly, a law enforcement officer's ability to use a particular level of force against a suspect depends on the identification of the suspect as a threat, making that level of force reasonable. In *Tennessee v. Garner*, the attention paid by the court to Officer Hymon's use of his flashlight demonstrates the importance of identification prior to the use of force: "With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon. . . . He thought Garner was 17 or 18 years old and about 5'5" or 5'7" tall."¹⁴⁸

In each instance—identification of a legitimate military target, identification of a hostile act or demonstration of hostile intent, identification of a threat posed by a suspect sufficient to justify the use of deadly force—the identification verifies the presence of the condition precedent to the legitimate use of force. Quarantine orders rest on the threat of infection posed by individuals who have been exposed to a disease. Consequently, at some point, military quarantine enforcers will need the ability to verify the presence of the condition precedent to their uses of force, even if only to restrict access or detain. That condition precedent is, obviously, the disease they are attempting to contain.

At this point, it must be acknowledged that no one knows what a federally-imposed, mass quarantine would look like inside the United States. One critique of the CDC's regulations is that they "are silent regarding how quarantines would be enforced, where those quarantines would be held, and what would happen to individuals who refuse to be quarantined."¹⁴⁹ Fundamentally, though, quarantines involve nothing more than the separation of people within a designated area.

For operational reasons, the designated quarantine area would need to be set within readily definable boundaries, like roads, rail beds, rivers, etc., and, therefore, would probably be more, rather than less, inclusive. The need to act quickly to prevent the spread of an infectious disease certainly justifies a degree of imprecision on the part of Health and Human Services (HHS) and CDC. But, military professionals have a low tolerance for imprecision and insist on constant bottom-up refinement; that is, reporting up the chain of command from subordinate units with the best knowledge of operations on the ground.¹⁵⁰ Providing bottom-up refinement to CDC would allow

¹⁴⁸ *Tennessee v. Garner*, supra note 120, at 3–4.

¹⁴⁹ Campbell, supra note 15, at 524 (citing Felice Batlan, *Law in the Time of Cholera: Disease, State Power and Quarantines Past and Future*, 80 *TEMPLE L. REV.* 53, 111, 115 (2007)).

¹⁵⁰ U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-0, UNIFIED LAND OPERATIONS at para. 2-47 (1 May 2012) ("[Mission command] establishes a mindset among Army leaders that the best understanding comes from a synthesis of information and an understanding from all echelons and unified action partners—bottom-up input is as important as top-down guidance.").

decision makers to lift quarantines from verifiably unaffected areas or expand quarantines to cover previously unidentified affected areas. For military commanders charged with quarantine enforcement to provide that kind of bottom-up refinement to CDC, they would need the ability to identify the disease.

The CDC may not be able to provide military units with detailed information explaining why a particular type of quarantine has been ordered prior to the time those units deploy. Rules for the use of force created specifically for quarantine enforcement could address that reality. First, the rules could highlight the importance of disease identification to the mission of quarantine enforcement. Next, the disease identification guidelines contained in the quarantine rules for the use of force could list any visually observable symptoms for the diseases listed in Executive Orders 13295 and 13375. The rules could also direct commanders to gather as much information as possible from the CDC, through the U.S. Northern Command Public Health Emergency Officer, as soon as practicable. Finally, the rules could direct commanders to obtain the necessary medical personnel and field testing equipment, as soon as practicable, to conduct screening, either with mobile teams within the quarantine or at fixed entry control points on the quarantine perimeter, or both.

Providing disease identification guidelines, particularly the list of visually observable symptoms, will not only allow for increased precision in setting quarantine boundaries, it will allow for safer, more predictable interactions between quarantine enforcers and quarantined persons, and facilitate more precise applications of graduated measures of force.

2. Escalation of Force Procedures During Quarantine Enforcement

When Liberian soldiers gunned down the 15 year old boy during the West Point Quarantine, Liberia's most prominent human rights lawyer, Counsellor Tiawan Gongloe stated,

The force was disproportionate, they were already using batons, sticks, they had access to teargas and equipment to things to control an unarmed crowd. I find it difficult to believe that there was any justification for shooting a 15-year-old boy who was unarmed. This is not a militarized conflict, it is a disease situation and a biological problem.¹⁵¹

Escalation of force procedures are critical to help military personnel determine whether a need to use force exists and, when it does, to control the situation with lower levels of force. To avoid the tragedy of West Point, rules for the use of force designed for quarantine enforcement would need to

¹⁵¹ MacDougall, *supra* note 4.

contain specific escalation of force guidance.

The Center for Army Lessons Learned (CALL) Handbook No. 10-11 on Escalation of Force in Afghanistan (Handbook 10-11) defines escalation of force (EOF) as, “sequential actions that begin with nonlethal force measures (visual signals to include flags, spotlights, lasers, and pyrotechnics) and may graduate to lethal measures (direct action) to include warning, disabling, or deadly shots to defeat a threat and protect the force.”¹⁵² Handbook 10-11 emphasizes that, “EOF procedures are not a substitute for but are a part of the rules of engagement (ROE). EOF is an aspect of the ROE that helps commanders and soldiers apply ROE principles for self-defense, use of force, military necessity, proportionality, and unnecessary suffering.”¹⁵³

The EOF tactics, techniques and procedures (TTPs) discussed in Handbook 10-11 are used to implement ROE in combat, rather than RUF in domestic operations. However, EOF TTPs used to implement RUF would hardly be out of place in a domestic operation. Recall that the SRUF requires force “to be used only as a last resort, and the force used should be the minimum necessary.”¹⁵⁴ The SRUF allows deadly force “only when all lesser means have failed or cannot reasonably be employed.”¹⁵⁵

EOF procedures are not inherently tied to ROE. At the most fundamental level, EOF simply consists of systematic processes designed to maximize the amount of time available to assess a situation when a potential need to use force arises: “Leaders should do all they can to increase the time a Soldier has to make an EOF decision.”¹⁵⁶ That time translates into greater certainty whether a need to use force exists and, if force is required, greater opportunity to control the situation with lower levels of force. Those outcomes are as desirable, if not more so, during a domestic operation than during combat. In fact, police departments throughout the United States have used procedures analogous to EOF, referred to as “force continuums,” since “the 1960s as a way to train officers in use of force.”¹⁵⁷ While some criticize force continuums, The Department of Justice, Civil Rights Division “urges agencies to adopt a progressive force continuum,” that covers “all types of force used by an agency, including firearms, pepper spray, batons, and

¹⁵² CTR. FOR ARMY LESSONS LEARNED, HANDBOOK NO. 10-11, ESCALATION OF FORCE: AFGHANISTAN TACTICS, TECHNIQUES AND PROCEDURES 2 (Dec. 2009) [hereinafter CALL 10-11].

¹⁵³ *Id.*

¹⁵⁴ CJCSI 3121.01B, *supra* note 78, at para. 5.b.1.

¹⁵⁵ *Id.* at para. 5.c.

¹⁵⁶ CALL 10-11, *supra* note 152 at 3.

¹⁵⁷ John G. Peters Jr., et. al., *Force Continuums: Three Questions, Chief's Counsel*, THE POLICE CHIEF (Mar. 2014), <http://perma.cc/7JM2-P78V>.

canines.”¹⁵⁸

As recognized by Handbook 10-11, leaders buy the maximum amount of decision making time through careful planning: “Force may be unavoidable, but through planning, preparation, and training, the number of those incidents can be decreased and the lethality of the incidents reduced.”¹⁵⁹ Planning, preparation, and training for EOF procedures are just as important in the domestic context, as illustrated by the 1997 shooting of Esequiel Hernandez, Jr. by a U.S. Marine.

Hernandez was shot and killed by Corporal Clemente Banuelos on May 20, 1997 near Redford, Texas during a Joint Task Force Six (JTF-6) mission in support of the U.S. Border Patrol.¹⁶⁰ On the day of the shooting, Corporal Banuelos was the leader of Team 7, consisting of four Marines occupying an observation post overlooking the Polvo Crossing area of the Rio Grande River.¹⁶¹ At 1805:38, Banuelos reported, “We have an armed individual, about 200 meters from us. He's armed with a rifle, appears to be in uh . . . herding some goats or something.”¹⁶² A short time later, “[t]he armed individual, Mr. Esequiel Hernandez, Jr., fired two shots from his 22. caliber rifle at the immediate location of Team 7 from a distance of approximately 185 meters.”¹⁶³ By 1827:42 one of the Marines with Banuelos reported, “[T]he man . . . the man pointed his weapon down range and we took him out.”¹⁶⁴ Hernandez was neither a drug runner nor a human trafficker, but rather an 18 year old high school student who “enjoyed a good reputation among his teachers and contemporaries” and “carried a loaded .22 rifle with him while he was herding his goats . . . because he was concerned with dogs attacking the goats.”¹⁶⁵

What happened between 1805:38 and 1827:42 is a case study in failures of planning, preparation, and training. In the aftermath, those who supported Banuelos pointed to his statement indicating he “observed Mr. Hernandez raise his weapon and point it in the direction of LCpl Blood”

¹⁵⁸ *Id.*

¹⁵⁹ CALL 10-11, *supra* note 152, at 3.

¹⁶⁰ Major General John T. Coyne, JAGINST 5800.7c Investigation to Inquire into the Circumstances Surrounding the Joint Task Force -6 (JTF-6) Shooting Incident that Occurred on 20 May 1997 Near the Border Between the United States and Mexico, para. 1.a (Apr. 7, 1998) [hereinafter JT-6 Investigation] (Findings of Fact) (on file with author).

¹⁶¹ *Id.* at para. 269.

¹⁶² *Id.* at para. 339.

¹⁶³ *Id.* at para. 342.

¹⁶⁴ *Id.* at para. 459.

¹⁶⁵ *Id.* at par. 111, 320. The Marines were not only almost 200 meters away, but were wearing guille suits to ensure they were completely camouflaged when Hernandez fired. In late February 1997, two Border Patrol agents had encountered Hernandez after hearing shooting near the Polvo Crossing. Hernandez told them, “I’m sorry that I was shooting. I thought someone was doing something to my goats. I didn’t know you were back there.” *Id.* at para. 106.

before he “fired a single shot from his M-16A2 rifle striking Mr. Hernandez.”¹⁶⁶ However, the investigation reached findings of fact and opinions that illustrate why planning, preparation, and training of EOF procedures are critical to avoid excessive uses of force: “Tragically, some of Cpl Banuelos’ actions in response to the two rifle shots fired by Mr. Hernandez did not defuse the situation. While awaiting the arrival of the U.S. Border Patrol, he moved himself and two members of his team forward from the high ground towards Mr. Hernandez.”¹⁶⁷

While the JTF-6 ROE directed Marines to “make every effort to avoid confrontation and armed conflict with civilians,” it provided no guidance on how to do so.¹⁶⁸ The Mission Commander, Capt McDaniel, “did not plan, nor rehearse, any specific actions for use by the LP/OP teams if contact with civilians required the Marines to break contact, abort, execute an emergency extraction, or escape.”¹⁶⁹

Planning, preparation and training of EOF procedures designed specifically for quarantine enforcement could reduce the number of incidents where force is used and the level of force used during those incidents. EOF procedures for quarantine enforcement would need to focus, primarily, on protecting quarantine enforcers from infection while providing quarantined persons with easily understood, predictable, uniform processes to safely communicate with quarantine enforcers for information, needed supplies, support, etc.

Procedures designed to protect quarantine enforcers would also protect quarantined persons by removing the natural incentive for enforcers to use higher levels of force at greater distances simply to avoid the risk of infection. Handbook 10-11 notes that “[u]nits should be resourced with the correct force protection equipment to increase reaction time, reduce unnecessary EOF incidents resulting in the use of lethal force, and reduce casualties.”¹⁷⁰

During quarantine enforcement operations, the most important piece of force protection equipment would be a suit capable of protecting the wearer from infectious diseases.¹⁷¹ Because such protective gear may not be available to all personnel engaged in quarantine enforcement and wearing a full protective suit for long periods of time would be difficult, procedures must be developed to complement the capabilities provided by the protective

¹⁶⁶ *Id.* at para. 450.

¹⁶⁷ *Id.* at para. 14b (Opinions).

¹⁶⁸ *Id.* at para. 188 (Findings of Fact).

¹⁶⁹ *Id.* at para. 265.

¹⁷⁰ CALL 10-11, *supra* note 152, at 23.

¹⁷¹ Identifying the right protective gear should, for obvious reasons, be left to medical professionals in the military, perhaps with input from the CDC.

gear. Those procedures would include establishment of fixed checkpoints at accessible locations around the quarantine perimeter. Through the use of signs, radio broadcasts, leaflets, or announcements, quarantined persons could be encouraged to access those checkpoints when necessary to interact with quarantine enforcers and, for their own safety, discouraged from approaching the perimeter at any other point. Incorporating procedures that limit the locations where quarantined persons and quarantine enforcers will likely interact allows priority allocation of the protective gear to the checkpoints, where personnel could then rotate the use of the suits among those actively manning their positions.

While the specific processes allowing quarantined persons to safely communicate with quarantine enforcers will depend on the location and circumstances of the quarantine enforcement operation, those processes must account for certain baseline considerations, including the number of persons each checkpoint can process for routine interactions; any surge capacity; required stand-off distance for quarantined persons waiting to approach the checkpoint; whether provisions for basic comfort can be provided at stand-off locations; and, required actions for persons approaching the checkpoint from the waiting area. EOF procedures must clearly guide units enforcing quarantines on the equipment to employ and the sequence of actions to take in the event a quarantined person either attacks a quarantine enforcer or attempts to leave the quarantined area without authorization.¹⁷²

A field testing kit, capable of determining whether or not quarantined persons are infected with the disease listed in the quarantine order would further enable EOF procedures.¹⁷³ More importantly, perhaps, field testing kits would facilitate the provision of due process rights to quarantined persons.¹⁷⁴

3. Due Process Requirements for Quarantined Persons

Although public health officials in Muncie, Indiana, following the 1893 small pox quarantine “ultimately concluded that their quarantine actions had been ‘an utter failure,’” they did so not because the quarantine had failed to prevent the spread of infection, but because, “the public had

¹⁷² As previously discussed, the SRUF’s unqualified authorization of RCA creates a substantial risk. However, with an emphasis on minimal uses of force, units should employ less-than-lethal equipment, such as shields, batons, tasers, 40-mm non-lethal rounds, etc. Personnel would follow the recommended sequences of action when time permits.

¹⁷³ Field testing kits may be even more difficult to obtain than protective suits. As with protective suits, identification of the right equipment would rely on the expertise of medical professionals, and may require special training to operate. If military medics, PAs, or doctors would not be capable of operating such equipment, then units would need to embed medical professionals with that capability, perhaps from CDC.

¹⁷⁴ Applied in the EOF context, the field testing kit could determine, definitively, that force was no longer required to detain, or that greater force was required to isolate.

repeatedly defied their quarantine efforts.”¹⁷⁵ The key to effective enforcement centers on obtaining the compliance of those subject to the quarantine. One hundred and twenty one years after Muncie, Indiana, the World Health Organization echoed the need to obtain compliance when its representative to Liberia, Dr. Nestor Ndayimirije, warned that the quarantine of the West Point neighborhood would only work with the communities consent, which was neither gained nor sought.¹⁷⁶

The SRUF does not address the due process protections implicated by imposition of a quarantine order. On April 28, 2009—one month after the first case of H1N1 influenza was reported in Mexico—Kim Dammers, former Assistant U.S. Attorney on detail to CDC, provided a brief during a CDC teleconference on Federal Public Health Emergency Law.¹⁷⁷ During that brief, she made it clear that due process protections flowing from the 5th and 14th Amendments to the U.S. Constitution—right to notice, right to counsel at certain stages, right to hearing on request, reasonable belief for detention—apply during quarantine and isolation.¹⁷⁸ Ms. Dammers’ position is consistent with the Congressional Research Service (CRS) report on Federal and State Quarantine and Isolation Authority, which states “[f]ederal and state quarantine laws are also subject to constitutional due process constraints,” citing to *Kansas v. Hendricks* for the proposition that, “freedom from physical restraint is a ‘liberty interest’ protected by the due process clause of the Fourteenth Amendment.”¹⁷⁹

Commanders are not only capable of providing basic due process protections for quarantined persons, they are expected to do so during quarantines imposed on military installations:

The [Public Health Emergency Officer] shall, as soon as practicable, ensure that every individual or group subject to quarantine is provided written notice of the reason for the quarantine and plan of examination, testing, and/or treatment designed to resolve the reason for the quarantine. The PHEO shall provide an opportunity to present information supporting an exemption or release from quarantine to any

¹⁷⁵ Barbera, *supra* note 7, at 2713.

¹⁷⁶ MacDougall, *supra* note 4.

¹⁷⁷ PowerPoint Presentation of Kim Dammers, former A.U.S.A. detailed to CDC, Teleconference Sponsored by CDC’s Public Health Law Program and the Coordinating Office of Terrorism Preparedness and Emergency Response, on Quarantine and Isolation Law, at slides 54-78 (Apr. 28, 2009) (on file with author).

¹⁷⁸ *Id.* at slide 59.

¹⁷⁹ KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL33201, FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY CRS-4 (2007) (citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

person or groups of persons subject to quarantine who contest the reason for quarantine. The Military Commander or designee (who has not been previously involved in any medical determination concerning the person or groups of persons) shall review such information. The reviewing official shall exercise independent judgment and promptly render a written decision on the need for quarantine for the person or groups of persons.¹⁸⁰

Certainly, providing even minimal due process would present significant challenges for large scale quarantines of civilians enforced by federal military personnel outside of military installations:

If the current quarantine system fails in the case of a single individual, it is doubtful that due process rights would be protected in the event of a mass quarantine. In the event of quarantine orders being issued to thousands of individuals in the same geographic area, a limited court system could not handle the influx of requested hearings or court orders. In such an event, the local health department and court system would be overburdened and lack the necessary resources to adequately protect due process rights. Individuals placed under quarantine order could be quarantined for weeks or even months while awaiting an individual hearing.¹⁸¹

Under circumstances requiring federal military forces to enforce mass quarantines, local health departments and court systems may not be functioning at all. The logistics of providing due process to thousands of quarantined persons may be complex, but the fundamental due process considerations are not.

A quarantine order issued to thousands of people in the same geographic area would only be issued based on the determination by the CDC that people within that area have been exposed to a particular infectious disease, one listed in Executive Order 13295 or 13375, and that they pose a risk of infection because of that exposure.¹⁸² Consistent with

¹⁸⁰ U.S. DEP'T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DEPARTMENT OF DEFENSE enclosure 3, para. 2.f. (2 Oct. 2013) [hereinafter DoDI 6200.03].

¹⁸¹ Campbell, *supra* note 15, at 530.

¹⁸² Recall that the CDC defines quarantine as “the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.” 42 C.F.R. § 70.1 (2013). The CDC relies on BioSense, a national health system database that applies algorithms to clinical data, like ER visits, and non-clinical data, like sales of over the counter medicine, to assist in the identification of outbreaks. See Jerome I. Tokars, et. al., *Enhancing Time-Series Detection*

DoDI 6200.03, the most straightforward, effective way to contest the basis for such an order would be the administration of medical testing capable of confirming either the presence or absence of the listed contagious disease.

Federal military units enforcing quarantines could provide information on behalf of the CDC, as authorized, and even maintain copies of the order at perimeter checkpoints, satisfying the notice requirement. Through the use of field testing kits, military units could provide quarantined persons with a definitive means to contest the basis for the order.

Presumably, military commanders of units enforcing quarantines would have the authority, or direct access to a designated approval authority, to release individuals who test negative for the disease specified in the order. Commanders would need to consult, through their chains of command, with the CDC to determine whether and how to move individuals who test positive from quarantine to isolation. Basic procedures and guidance could be included in the quarantine rules for the use of force to address those due process issues. But, it is not enough to consider what should go into the rules; military pandemic response planners must consider how to capture and present the rules.

VI. Quarantine Enforcement Rules Must be Packaged, Trainable and Accessible

The SRUF needs to be replaced by standing rules for the use of force drafted specifically for quarantines. Those rules would rest on a sound legal foundation and minimize unnecessary uses of force if drafted in accordance with Part V, above. The form the rules take is almost as important as the substance. The rules must take a form that renders them deployment ready, trainable, and readily accessible.

A. The Deployment Timeline May Preclude a Mission Specific RUF

One could argue that there is no need to create separate, standing rules for the use of force for quarantines, because planners and judge advocates could create, and obtain approval for, a mission specific RUF prior to the deployment of Title 10 units to a quarantine enforcement operation. That argument underestimates the need for time: time for units to react; time for judge advocates to research an unfamiliar area of law; time to draft, approve, and disseminate a mission specific RUF. Time, however, will likely be in short supply.

Algorithms for Automated Biosurveillance, EMERGING INFECTIOUS DISEASES (vol. 15, no. 4 Apr. 2009) <http://perma.cc/WS8T-XJNL>. However, the precise manner in which CDC would develop the reasonable belief that a group had been exposed to a quarantinable communicable disease is beyond the scope of this paper, and the control of military forces.

The military cannot rely on expert predictions to increase reaction time: “Our ability to anticipate pandemic events is poor and our anti-pandemic armamentarium weak.”¹⁸³ The lesson history teaches about the reaction time military planners might face is nothing short of shocking:

In 1918 in particular, influenza struck so suddenly that many victims could remember the precise instant they knew they were sick, so suddenly that throughout the world reports were common of people who toppled off horses, collapsed on the sidewalk . . . The *Journal of the American Medical Association* carried reports of death within hours: “One robust person showed the first symptom at 4:00 p.m. and died by 10:00 a.m.”¹⁸⁴

In a pandemic like the Great Influenza of 1918, the death toll rises and the utility of quarantines decreases every day the spreading infection is left unchecked. Even if a good, mission specific RUF could be quickly drafted and disseminated, the lack of time remaining for adequate training would make that RUF practically useless.

B. Quarantine Enforcers Must Learn the Rules Before Deployment

Having a separate standing rules for the use of force during quarantines enclosure (SRUF-Q) not only eliminates the need to create a RUF prior to a short notice deployment, it provides units the opportunity to train on the rules they will actually use in advance of the deployment. Such training could make a critical difference.

As units that could actually deploy to engage in quarantine enforcement operations on short notice, the Maneuver Enhancement Brigades (MEBs) illustrate the importance of training. One of the two active duty MEBs must remain ready to deploy for domestic operations within 24 hours at all times.¹⁸⁵ SRUF training is considered so important to the readiness of those MEBs that they must receive SRUF training every six months.¹⁸⁶ Training is critical because even a unit like the 1st MEB, which specializes in domestic operations and receives three to four hours of

¹⁸³ See Jeffery K. Taubenberger & David M. Morens, *Influenza: The Once and Future Pandemic*, PUBLIC HEALTH REP. (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862331/>.

¹⁸⁴ BARRY, *supra* note 1, at 242.

¹⁸⁵ Interview with Major Joe Wheeler, U.S. Army, 62nd Judge Advocate Officer Graduate Course, Student at The Judge Advocate Gen.’s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 28, 2014) (on file with author). While assigned to FT Polk, LA, MAJ Joe Wheeler was responsible for providing SRUF training to the 1st Maneuver Enhancement Brigade (MEB).

¹⁸⁶ *Id.*

comprehensive SRUF training from a highly competent instructor every six months, makes mistakes.¹⁸⁷ While assigned to FT Polk, LA, Major Joe Wheeler was the judge advocate responsible for providing SRUF training to the 1st MEB.¹⁸⁸ During a domestic operations focused training rotation at the Joint Readiness Training Center (JRTC), MAJ Wheeler recalled, “We did well, but certainly there were Posse Comitatus violations and SRUF violations that had to be addressed and retrained.”¹⁸⁹ The reader can, undoubtedly, imagine how many more violations would occur in a unit hastily presented with a newly created, mission specific RUF for quarantine enforcement as soldiers deploy to apply those rules for the first time during an actual operation.

To ensure accessibility, the SRUF-Q must be unclassified. The typical SRUF training for MEBs takes place in forums that do not allow for the presentation of classified material.¹⁹⁰ Also, quarantine operations would require cooperation among multiple federal, state, and local agencies. Effective training programs would require the participation of such partners; participation that the use of classified rules would render difficult, if not impossible.

On a more fundamental level, DoD personnel have to know the rules exist in order to train on them. Under the right circumstances, Enclosure N to CJCSI 3121.01B could have some relevance to a domestic operation involving quarantines. Enclosure N is secret and, therefore, cannot be discussed in this paper. However, if the reader has never heard of, much less read, Enclosure N, then the point is made.

A standing, unclassified SRUF-Q enclosure would allow for classes at TJAGLCS, without the need to check security clearances, and could be incorporated into the Domestic Operational Law Handbook, maximizing familiarity among judge advocates and non-judge advocates alike. That familiarity would allow judge advocates and other key advisors to effectively assist commanders and civilian decision makers during preparation for training exercises or actual quarantine enforcement operations, increasing force readiness.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* SRUF training took place “[s]ometimes in Company or Battalion areas, but most often in Bayou Theater, Fort Polk. This was a room that held around 2,000 Soldiers and doubled as Fort Polk’s on-post movie theater/stage.” *Id.*

Conclusion

Of all the legal support judge advocates provide, advising commanders on the use of force is, arguably, the most important since “[u]se of force practice is one of the few areas in which the legal competence of judge advocates can have potential life or death consequences for service members and civilians.”¹⁹¹ Commanders want to do the right thing. They will look to judge advocates to get quarantine enforcement right.

But judge advocates will have a difficult time helping their commanders get quarantine enforcement right if they are forced to refer to the current SRUF. Even with solid judge advocate advice, the SRUF could lead to uses of force that would not withstand legal scrutiny. In contrast, the attached model SRUF-Q appropriately limits the use of deadly force, restricts RCA use, provides guidance on disease identification, includes escalation of force procedures, and facilitates due process.

Striving to develop sound quarantine enforcement rules is an endeavor which serves more than the abstract philosophical interests of liberty or the base legal interests of DoD personnel in avoiding personal liability. In a severe pandemic, rigid quarantine enforcement may be the key to survival. Voluntary compliance is the key to rigid enforcement. Analogous to Admiral Michael Mullen’s famous assertion that we will not be able to “kill our way to victory,”¹⁹² we will not be able to effectively enforce quarantines through brute force.

The 1893 shootings in Muncie, Indiana, and more recently in Monrovia, Liberia, demonstrate what happens when officials attempt to impose poorly justified, poorly administered, heavy-handed quarantines. Voluntary compliance will most likely come from citizens who are given access to information; believe the quarantine is necessary; see that it is fairly enforced; receive the necessary supplies; and understand that a process exists to contest the basis for their continued placement within the quarantine. The appendices to this paper are offered as a starting point for the adoption of an SRUF-Q designed to accomplish that end, should the need arise.

¹⁹¹ DOMOPS HANDBOOK, *supra* note 81, at 176.

¹⁹² *Admiral: Troops alone will not yield victory in Afghanistan*, CNNPOLITICS.COM (Sept. 10, 2008), <http://perma.cc/ZJJ9-YR4K>.

Appendix A. SRUF-Q¹⁹³**UNCLASSIFIED**

CJCSI 3121.01B

Date __

ENCLOSURE __

STANDING RULES FOR THE USE OF FORCE DURING
QUARANTINE ENFORCEMENT1. Purpose and Scope

a. The Standing Rules for the Use of Force During Quarantine Enforcement (SRUF-Q) provide operational guidance and establish fundamental policies and procedures governing the actions taken by Title 10 DOD forces engaged in quarantine enforcement inside the territory of the United States during a federally led mission, ordered by the POTUS, to enforce the laws of the United States to restore public order during an epidemic, pandemic, or other serious public health emergency.

b. Unit commanders at all levels must train their personnel how and when to use force consistent with the SRUF-Q.

c. DOD forces under DOD control and using the SRUF-Q, but operating in coordination with other federal, state, or local security forces, will coordinate with on-scene security force personnel to ensure common understanding of the DOD SRUF-Q. Combatant commanders shall notify the SecDef, through the CJCS, of any use of force issues that cannot be resolved.

2. Policy. Unit commanders retain the right to take reasonable actions in self-defense. However, while the need to stop the spread of a deadly contagious disease during a pandemic outbreak may require persons within certain areas to be involuntarily quarantined, that necessity must not completely overshadow the civil rights of those quarantined persons. Any

¹⁹³ This model enclosure is based on CJCSI 3121.01B, encl. L, the SRUF. In the interest of legal accuracy, it preserves appropriate language from that enclosure and incorporates language from *Tennessee v. Garner*, 42 U.S.C. § 271, DoDI 6200.03, and the CDC's website. Quotation and footnoting conventions have been omitted to preserve the character of an actual Rules for the Use of Force enclosure.

uses of force against quarantined persons must be tempered by an appreciation for the fact that quarantined persons are detained because of the risk they may spread disease rather than because of any wrongful conduct.

3. Combatant Commander Mission Specific Quarantine Enforcement RUF

a. Combatant commanders may augment the SRUF-Q as necessary by submitting a request for mission-specific RUF to the CJCS for SecDef approval. The message format for requesting approval of mission-specific RUF is contained in Enclosure P.

b. Unit commanders may further restrict mission-specific quarantine enforcement RUF approved by the SecDef. Commanders shall notify the SecDef, through the CJCS, as soon as practicable, of restrictions (at all levels) placed on Secretary of Defense-approved quarantine enforcement RUF. In time critical situations, make SecDef notification concurrently to the CJCS. When concurrent notification is not possible, notify the CJCS as soon as practicable after SecDef notification.

c. Combatant commanders will distribute the SRUF-Q, along with any subsequent augmentation and restrictions to subordinate commanders and units for implementation.

4. Definitions and Authorities

a. Cordon Sanitaire. A geographic, rather than individual, quarantine order that restricts the movement of a large group of people within a designated area. Cordon sanitaire orders are also referred to as “mass quarantines.”

b. Quarantine Enforcement. Actions taken, including appropriate uses of force, to prevent any persons from entering or departing from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge in violation of a quarantine order.

c. Quarantine Officer in Charge. Units deploying on quarantine enforcement operations will contact the Public Health Emergency Officer (PHEO) at U.S. Northern Command (NORTHCOM) to confirm the identity of the Centers for Disease Control and Prevention (CDC) officer serving as the Officer in Charge of the relevant quarantine/s.

d. Federal Quarantine Order. A written order issued by the CDC on behalf of the Department of Health and Human Services (HHS).

e. Self-defense. Unit commanders have the right to respond with reasonable force when faced with an imminent attack that could result in serious bodily injury or death. Unless otherwise directed by a unit commander, servicemembers may exercise individual self-defense.

f. Imminent. Because of the unique concerns present during quarantine enforcement, imminent will be interpreted to mean immediate or instantaneous. The determination of whether the danger of death or serious bodily harm is imminent will be based on an assessment of all facts and circumstances known by the on scene commander or individual/s preparing to exercise self-defense.

g. Mission Impediment. Force used by quarantined persons to preclude or impede the mission and/or duties of units enforcing the quarantine does not constitute an attack on those units or individual servicemembers unless the force used creates an imminent danger of serious bodily injury or death.

5. Procedures

a. De-Escalation. When time and circumstances permit, the threatening person or group should be warned and given the opportunity to withdraw or cease threatening actions. However, DoD personnel operating under these rules have no duty to retreat. See Appendix B, SRUF-Q EOF Procedures, for further guidance.

b. Disease Identification (DID). The legal authority to enforce quarantine orders rests on the government's interest in preventing the spread of deadly, contagious diseases. DoD personnel enforcing quarantines must, therefore, seek to confirm the presence or absence of the disease specified in the order they are enforcing, whenever feasible. Commanders of units enforcing quarantines must contact the CDC, through the NORTHCOM PHEO, to acquire descriptions of visually observable symptoms, if available, and to obtain field testing equipment capable of confirming the presence of the disease specified in the quarantine order to be enforced. Commanders must also ensure access to medical professionals capable of administering the field tests.

c. Due Process. Commanders of units enforcing quarantines shall, as soon as practicable, ensure that every individual or group subject to the quarantine order is provided written notice of the reason for the quarantine and plan of examination, testing, and/or treatment designed to resolve the reason for the quarantine. Quarantined persons who contest the reason for the quarantine shall be provided an opportunity to present information supporting release or exemption from the quarantine. Such information shall be reviewed, in accordance with guidance from the NORTHCOM PHEO, by

a reviewing officer who exercises independent judgment and who possesses the authority to release individuals from the quarantine. The reviewing officer should promptly render a written decision on the continued need for quarantine for the person or groups of persons.

d. Use of Non-Deadly Force.

(1) Normally, force is to be used only as a last resort, and the force used should be the minimum necessary. The use of force must be reasonable in intensity, duration and magnitude based on the totality of circumstances to counter the threat. If force is required, non-deadly force is authorized and may be used to control a situation and accomplish the mission, or to provide self-defense of DoD forces, defense of non-DoD persons in the vicinity if directly related to the assigned mission, or in defense of designated property, when doing so is reasonable under the circumstances.

(2) Peaceful Quarantine Violations. Peaceful quarantine violations describe circumstances where quarantined persons leave, or attempt to leave, the designated quarantine area in violation of the quarantine order without employing violent or dangerous means to do so. Deadly force is not authorized to prevent peaceful quarantine violations. DoD personnel enforcing a quarantine should employ all reasonable measures short of deadly force to prevent quarantine violations, including pursuit, detention, and restraint, if necessary. Once detained, persons who violate the quarantine should be tested to confirm the presence of the disease listed in the quarantine order. If the test results confirm infection, those persons should be transferred to an isolation facility in coordination with the CDC Officer in Charge.

(3) Designated Property. The following property is designated: Food stocks, water, medical supplies, generators, and fuel intended for use by quarantined persons. Submit requests to designate additional property to NORTHCOM.

(4) Non-Lethal Weapons. The use of Service-approved non-lethal weapons is authorized. The use of riot control agents, including oleoresin capsicum (OC) and CS gas is not authorized for quarantine enforcement operations.

(5) Warning Shots. Warning shots are not authorized within U.S. territory (including U.S. territorial waters), except when in the appropriate exercise of force protection of U.S. Navy and Naval Service vessels within the limits set forth in Enclosure M.

(6) Release and Transfer. Commanders of units enforcing quarantines will coordinate with the local CDC Officer in Charge, through the NORTHCOM PHEO, to identify criteria and approval authorities to release individuals when they test negative for the quarantinable disease and to transfer individuals to an isolation facility when they test positive for the disease.

e. Use of Deadly Force. Deadly force is to be used only when all lesser means have failed or cannot reasonably be employed.

(1) Violent or Dangerous Quarantine Violations. DoD personnel may use deadly force against quarantined persons who employ violent or dangerous means to accomplish an unauthorized departure from a designated quarantine area when those violent or dangerous means pose a threat of serious bodily injury or death to DoD personnel or others in the vicinity. Where feasible, a warning must be given prior to the use of deadly force. If detained, individuals who attempt violent or dangerous quarantine violations will be transferred to an isolation facility, in the custody of law enforcement officers, through coordination with the CDC Officer in Charge.

(2) Inherent Right of Self-Defense. Deadly force is authorized when DoD unit commanders reasonably believe that a person poses an imminent threat of death or serious bodily harm to DoD forces. Unit self-defense includes the defense of other DoD forces in the vicinity.

(3) Vital U.S. Government Property. Deadly force is authorized when it reasonably appears necessary to protect or recover vital U.S. Government property.

(4) Recovery of U.S. Personnel. Deadly force is authorized when it reasonably appears necessary to recover U.S. personnel.

f. Additionally, when directly related to the assigned mission, deadly force is authorized under the following circumstances:

(1) Serious Offenses Against Persons. Deadly force is authorized when deadly force reasonably appears to be necessary to prevent the commission of a serious offense that involves imminent threat of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons, where deadly force is directed against the person threatening to commit the offense. Examples include murder, armed robbery and aggravated assault.

(2) Arrest or Apprehension. Deadly force is authorized when deadly force reasonably appears necessary to arrest or apprehend a person

who, there is probable cause to believe, has committed a serious offense. Deadly force may be used only when attempts to use lesser force to arrest or apprehend have failed or cannot reasonably be employed.

Appendix B. SRUF-Q EOF Procedures

STANDING RULES FOR THE USE OF FORCE DURING
QUARANTINE ENFORCEMENT
ESCALATION OF FORCE PROCEDURES

1. Purpose. The Escalation of Force (EOF) procedures contained in this appendix are intended to implement the uses of force authorized in the SRUF-Q, to ensure all uses of force by DoD personnel during quarantine enforcement are constitutionally reasonable.

2. Escalation of Force. EOF procedures include sequential actions that begin with nonlethal force measures and may graduate to lethal force measures if necessary. At the most fundamental level, EOF consists of systematic processes designed to maximize the amount of time available to assess a situation when a potential need to use force arises. Additional time translates into greater certainty whether a need to use force exists and, if force is required, greater opportunity to control the situation with lower levels of force. However, EOF should be understood to encompass actions intended to eliminate the need to use any level of force at all (for example, distributing leaflets to quarantined persons which explain how to approach quarantine entry control points to request field testing, treatment, supplies, or to contest the basis for the quarantine).

a. The EOF Process. DoD personnel should only use the amount of force required for the duration necessary to address a threat or control a situation. The basic EOF process consists of three steps:

- (1) Identify. Commanders must establish processes, appropriate to the particular location and circumstances that help their personnel distinguish actual threats from confusion and frustrated behavior.
- (2) Warn. Warnings should be posted at fixed locations. When time and circumstances permit, DoD personnel should provide additional warnings, by the most effective means available, before using force against a threat.
- (3) Graduate. When time and circumstances permit, following an unheeded warning, DoD personnel should first use the lowest level of force available to address the threat or control the situation. If that level of force proves inadequate, DoD personnel should escalate the level of force until the threat is eliminated or the situation is brought under control.

b. EOF Procedures Specific to Quarantine Enforcement. Commanders must appreciate that, because of the fear of infection, their personnel may be inclined to use higher levels of force than necessary, at greater distances, to avoid contact with quarantined persons. But, contact with quarantined persons will be necessary to provide due process, treatment, and relief supplies. The following guidance is intended to facilitate safe, positive contact with quarantined persons in a manner that avoids the need to use force entirely.

(1) Quarantine Entry Control Points (Q-ECPs). Commanders should establish Q-ECPs at regular intervals along the quarantine perimeter, ideally at the ends of roads or foot paths. Quarantined persons will need access to DoD personnel for information, supplies, treatment, or to contest the basis for their continued presence inside the quarantine. Commanders will need to control access into and out of the quarantine. The size and configuration of each Q-ECP must be appropriate to the location and circumstances. Similarly, the number of personnel manning a particular Q-ECP must be based on the number of quarantined persons commanders expect to service at that location.

- A. Waiting Areas. Each Q-ECP should establish waiting areas some distance away from the Q-ECP itself. Some type of shelter from the elements (tents or similar structures) should be erected in these areas. The shelters should be supplied with food and water. Reasonable allowance should be provided for sanitation.
- B. Symptom Segregation. If feasible, quarantined person should be segregated by symptoms at the waiting areas and the Q-ECPs. Segregating persons who show symptoms from those who do not may protect uninfected persons from inter-quarantine contamination.
- C. Stand-Off. The distance between the waiting areas and the Q-ECPs should maximize the time DoD personnel have to identify threats and control the situation with lower levels of force. Warning devices such as megaphones, air horns, signs, laser pointers, and spotlights should be readily available.
- D. Approach Procedures. Posted signage should clearly inform any quarantined person approaching the vicinity of a Q-ECP that they are to remain in the waiting area until called forward by DoD personnel. Commanders must establish force protection

procedures appropriate to the circumstances and location of each Q-ECP. The procedures, and consequences for failure to comply with the procedures, must be clearly posted for each quarantined person to see as he moves from the waiting area to the Q-ECP.

- E. Non-Lethal Weapons. DoD personnel must be equipped to use deadly force during quarantine enforcement. However, commanders should make maximum use of non-lethal weapons (batons and shields, rubber bullets, etc.), particularly at Q-ECPs.

(2) Protective Gear. To ensuring safe interactions between DoD personnel and quarantined persons, DoD personnel must be protected from infection. To do that DoD personnel must be equipped with suits capable of protecting the wearer from contagious diseases. If there are not enough suits to equip all quarantine enforcers, then the suits should be rotated among shifts of personnel actually manning the Q-ECPs.

(3) Field Testing. If feasible, each Q-ECP should have a field testing kit capable of confirming the presence or absence of the disease listed in the quarantine order. That means each Q-ECP must also have access to personnel with the necessary expertise to administer the field tests.

(4) Information Flow. Through the use of signs, radio broadcasts, leaflets, announcements and face to face interactions, commanders should provide quarantined persons with as much information as possible: The status of ongoing treatment; when the next delivery of food and medical supplies will be available; best hours and locations to minimize wait times at Q-ECPs; how to arrange for the funeral of a deceased love one; etc. Information must flow both ways. Commanders should provide quarantined persons with the means to communicate regularly with DoD personnel. Commanders should encourage quarantined persons to provide information about conditions inside the quarantine; where services are most needed; and, most importantly, their state of mind relative to the quarantine.

Appendix C. SRUF-Q EOF Kit

SRUF-Q RECOMMENDED EOF KIT FOR EACH Q-ECP

1. Protective suits x __ personnel
2. Batons and shields x __ personnel
3. M203 w/ CTG, 40-mm M1006 nonlethal (sponge grenade) rounds
4. Symptom cards x __ personnel
5. CLS Bags x __ personnel
6. Megaphones x __ personnel
7. Siren/speaker x __ personnel
8. Air horn and green laser x __ personnel
9. Customizable signs
10. Barriers and orange traffic cones
11. Flood light set
12. Large tents for __ quarantined persons per day
13. MRE cases for __ quarantined persons per day
14. Bottled water pallets for __ quarantined persons per day
15. Quarantine specific medical treatment kits for __ quarantined persons per day
16. Field toilets for __ quarantined persons per day
17. Field desks w/folding chairs x __ personnel
18. Clip boards, paper and pens
19. Copies of the quarantine order for __ quarantined persons per day
20. The disease field testing kit