

Quarantine Camps In New York?

New York's Appellate Court recently upheld a regulation ("Rule 2.13") which would allow the Governor significant, additional power **to quarantine New Yorkers in a declared "public health emergency."**¹ Rule 2.13 was enacted in the wake of the Covid-19 Pandemic.

To some, Rule 2.13 is a necessary adaptation in light of our experience with Covid-19. To others, it represents government overreach, and would provide a dangerous tool giving essentially unlimited power to the State to quarantine (effectively incarcerate) any person or group of persons deemed a threat to "public health."

Rule 2.13 was **previously found unconstitutional, and overturned**², in a July 8, 2022 decision by Justice Ploetz. Judge Ploetz found that the regulation violated the New York State Constitution, giving **excessively broad, undefined powers** to the State to incarcerate citizens, without trial, for undefined periods of time. His opinion also faulted the Rule for apparently giving broad powers to confine citizens without specifying means for individuals quarantined to appeal their confinement:

[W]hile Rule 2.13 provides that isolation and quarantine must be done 'consistent with due process of law' and the detainee has the right to seek judicial review and the right to counsel, these protections are after-the-fact, and would force a detainee to exercise these rights at a time when he or she is already detained, possibly isolated from home or family, and in a situation where it may be difficult to obtain legal counsel in a timely manner.

We would also note that **one, notable feature of the Covid response was shutting down the Courts.** When Courts did (partially) re open, there were significant delays in all hearings. Therefore, if a person were forcibly quarantined Rule 2.13, it's a fair question to ask whether, in such circumstances, a person would be likely to find a Court able to hear an appeal of their confinement on an expedited basis.

Judge Ploetz, in striking down Rule 2.13, also found the regulation impermissible in granting excessive discretion to authorities to quarantine, without requirement to show that a person was actually infected with an illness constituting a public health threat.³

The New York Governor and Attorney General appealed that ruling. On November 17, 2023, the Appellate Court reversed Judge Ploetz, and has now allowed Rule 2.13 to stand.

¹ <https://www.nycourts.gov/courts/ad4/Clerk/Decisions/2023/1117T1500/PDF/0722.pdf>

² New York's initial court of general jurisdiction is called "New York State Supreme Court" -- though it is not the appellate Court. Our Appellate Courts are known as the "Appellate Division." And the next, and highest level of appeals Court in New York is the "Court of Appeals."

³ See note 2 ("Supreme Court" in relation to "Appellate Division").

The Appellate court did not, as the court below, discuss or decide whether the Rule would grant too much discretion or government power to "quarantine" (effectively incarcerate) individuals in the name of a public health emergency. Rather, the Appellate court issued a narrow, procedural ruling, that those who had brought suit to invalidate Rule 2.13 **did not have legal "standing"** so as to have brought the legal case.

"Standing" is a legal principle that a plaintiff in a lawsuit must have a real and tangible interest in order to bring a case. This is typically invoked to prevent people who have no real interest in a matter from suing others on the basis of hypothetical harms.

In this recent case, the "standing" doctrine was used by the Appellate court to find that the individuals who brought the case against Rule 2.13 (State legislators and associated public interest groups) **lacked sufficient showing that they were likely to suffer a real or imminent harm from the Rule.**

However, **the Appellate court left open the issue** of whether if the governor were ever to invoke broad public health emergency powers to quarantine individuals that affected persons could then bring a suit against the governor and regulation. As the Court stated:

However, inasmuch as there exists a large pool of potential challengers to the regulation who could assert a concrete and particularized harm [if Rule 2.13 were invoked], we conclude that this is not a case where to deny standing to these [petitioners] would insulate government action from judicial scrutiny.

Therefore, for now **our Governor has theoretical legal authority to quarantine essentially any individual deemed a threat to public health under Rule 2:13.** However, the courts have indicated that should the governor choose to invoke such authority, suit could be brought, and the Courts will review the actual exercise of that power in light of the circumstances actually obtaining at the time. This result is not satisfactory to many who feel that the "standing" doctrine was improperly used to allow a regulation to continue to exist that seems an extremely broad grant of authority to the Executive branch of the State to effectively "quarantine now, ask questions later" for any circumstance deemed a threat to "public health."

After the recent court ruling, **members of the New York State Legislature who had been named Plaintiffs in the suit, seeking to strike down Rule 2.13 as unconstitutional, issued a public statement:**⁴

We are deeply disappointed in the Appellate Division's ruling The court did not address the merits of the case which were outlined by Judge Ploetz in his original decision. Instead, they shamefully reversed and dismissed the case on

⁴ <https://www.nysenate.gov/newsroom/press-releases/2023/george-m-borrello/statement-congressman-mike-lawler-senator-george>

a technicality, claiming that we, the petitioners, somehow lacked standing to bring the case in the first place.

We strongly disagree with their ruling and are concerned about the widespread implications of this erroneous decision. They have not only paved the way for ... [the Governor] to re-issue this heinous Rule, but they have set a precedent to preclude citizens from rightfully challenging government overreach in court, and they've effectively unconstitutionally empowered the Executive Branch to overreach into policymaking, which is a decision that could open the door to further abuses of power.

We would note that **use of "standing," to dismiss a Constitutional challenge, has not been as strictly applied in other contexts.** For example, concerning challenges to laws under the First Amendment, as infringing on free expression, Courts have often dispensed with the need for an individual to show "standing" in terms of imminent, personal harm if the law or regulation being challenged was unconstitutional "on its face" (plainly unconstitutional) or could be deemed to potentially "chill" (intimidate or discourage) otherwise lawful behavior.⁵

But as things stand, we have a rule on the books that theoretically gives the New York Governor (via Public Health Commissioner) broad authority to "quarantine" individuals if there is a declared "public health emergency."

Does this mean "Quarantine Camps" are in New York's future? It appears this will depend on a number of factors: whether the governor will choose to invoke these Rule 2.13 powers, whether a future legislative session limits them, the circumstances in which the Rule is invoked, and how the courts would react under the facts of a particular case of a quarantined individual. And it remains to be seen if the Appellate court ruling will be appealed to New York's highest Court, the Court of Appeals.

In other words: only time will tell.

--Laurence M. Deutsch (11/24/23)

⁵ See, e.g. *Uzuegbunam v. Preczewski* (U.S. Supreme Court, 3/8/21): https://www.supremecourt.gov/opinions/20pdf/19-968_8nj9.pdf