We, the undersigned, are public health legal scholars and organizations who are committed to protecting global and public health while respecting the rights of individuals by ensuring that restrictive public health measures are founded on science rather than fear. Several of us are leading experts on public health law with considerable experience researching and advising on the use of quarantines. Others of us have provided legal representation to individuals who were subject to Ebola quarantines in 2014 despite the fact that they were asymptomatic and many had never been in contact with infected individuals. The overwhelming consensus among public health experts is that these individuals posed no risk to public health, making these quarantines both unjustified and counterproductive. Our experiences representing these individuals and studying the historic uses of quarantine have provided us with important insights into the danger—for both individuals and public health—of policies that sacrifice individuals’ due process rights in the name of political expediency.

The below signatories also include the Liberian Community Association of Connecticut (LCAC), a non-profit organization that experienced firsthand the extreme stigma directed towards members of the West African American community in the wake of the 2014 Ebola quarantines. The 2014 quarantines—which in Connecticut were imposed upon individuals who had merely travelled to the region—have had lasting effects on the daily lives of LCAC members, even those who were never subject to quarantine, who still face public ridicule and discrimination as a result of their community being needlessly labeled a public health threat. Signatories have also gained an understanding of the need for a transparent public record of the extent of and justifications for quarantine restrictions, so that when the next public health crisis emerges, both state actors and the public have a clear understanding of how to protect public health while upholding individual rights.

The 2014-2015 Ebola epidemic was the disease’s largest and most serious outbreak in history, resulting in more than 28,000 infections and over 11,000 deaths as of March 2016.1 This epidemic primarily affected people in Guinea, Liberia, and Sierra Leone, but American health care workers played an important role in bolstering the overwhelmed local health care systems in these countries. When these health care workers returned to the United States, they were subject to medically unnecessary quarantines motivated by misinformation and fear. These quarantines discouraged health care workers from contributing to public health efforts in West Africa and infringed on the constitutional rights of those who did contribute. They also impinged on the rights of immigrants from West Africa, who were subject to similarly unjustified quarantines and inadequate quarantine conditions upon their arrival in the United States.

The profiling of West African immigrants during the Ebola crisis continues the discriminatory legacy of quarantine law in the United States.2 Regrettably, quarantine power has

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at times been used to target vulnerable groups based on racism and xenophobia. Although the most infamous incidents of discriminatory quarantine occurred over one hundred years ago, burdens associated with public health interventions continue to fall disproportionately on socially and economically marginalized populations. Without adequate checks on the government’s ability to impose quarantines, fear and prejudice during times of crisis can lead to inequitable and discriminatory outcomes.

Quarantine, isolation, and other movement restrictions involve significant limitations on fundamental constitutional rights, including the right to be free from restraint, the right to free association, and the right to travel. When the federal government acts to restrict individuals’ fundamental rights, it is required by the Due Process Clause of the Fifth Amendment to the U.S. Constitution to abide by various procedural and substantive requirements. Specifically, the government may impose quarantine, isolation, or other movement restrictions only when the necessity for doing so is backed by scientific evidence and there are no less restrictive alternatives that would adequately protect public health. Furthermore, the federal government must provide individuals with timely notice of the nature and basis for any restrictions it imposes, the right to be heard before a neutral decisionmaker, and appointed counsel for individuals who cannot otherwise afford counsel. Finally, the Fourth Amendment to the U.S. Constitution applies to any search or seizure of a person by the government, including the apprehensions contemplated in the proposed rule. While a detailed exegesis of the proposed rule’s Fourth Amendment deficiencies is beyond the scope of this comment, signatories urge the CDC to undertake a full analysis of how Fourth Amendment protections apply to such apprehensions before promulgating this rule.

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3 See, e.g., Jew Ho v. Williamson, 103 F. 10, 11-12 (C.C.N.D. Cal. 1900) (striking down San Francisco ordinance imposing movement restrictions solely on Chinese residents as violation of equal protection); Howard Markel, Quarantine! East European Jewish Immigrants and the New York City Epidemic of 1892 2-3 (1997) (describing New York City health officials’ quarantine of 1200 largely unexposed Russian Jewish immigrants in response to four cases of typhoid fever in 1892).


5 Cf. Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (“[A]n acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.”).

6 Foucha v. Louisiana, 504 U.S. 71, 72 (1992) (finding that a Louisiana statute that allowed continued confinement of insanity acquittee despite absence of evidence of mental illness violated due process, and noting that a person subject to confinement is “entitled to constitutionally adequate procedures to establish the grounds for his confinement”); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (“In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that person cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”); see also Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969) (“A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.”) (internal quotation marks omitted).
Further, a rights-respecting quarantine regime will promote the CDC’s policy aims of protecting public health and maintaining public trust during times of crisis. The Ebola quarantines imposed needless restrictions on the liberty of individuals returning from disease-affected countries, and deterred medical professionals from traveling abroad to stop outbreaks at the source. Additionally, the scientifically unjustified and unconstitutional Ebola quarantines exacerbated the stigma directed towards West African American communities and undermined efforts by public health officials to reassure the public that asymptomatic individuals could not transmit Ebola.

We commend the efforts of the Department of Health and Human Services (HHS) and the Centers for Disease Control and Prevention (CDC) to codify protections for quarantined persons that flow from the due process rights of individuals under the Fifth Amendment to the U.S. Constitution. We believe this Notice of Proposed Rulemaking is an important step towards ensuring that future responses to public health crises are grounded in science. However, we understand the proposed rules to give the CDC very broad power to engage in quarantines within the territory of the US, overlapping with the powers of the states. Yet, the proposed rules impose very few of the explicit protections that have been incorporated into many state laws. Constitutional due process requires additional safeguards beyond those contemplated by the proposed rule. These added safeguards would promote public health by maintaining public trust and by freeing health care workers from the fear that their humanitarian contributions will be met with politically motivated quarantines. We outline these requirements in this comment.

Overview of CDC’s Proposed Rulemaking and Signatories’ Suggested Improvements

As understood by signatories, the proposed amendments build out the domestic quarantine regulations in several ways. Most significantly, the regulations attempt to clarify the circumstances under which the CDC may authorize the apprehension, quarantine, isolation, or conditional release of individuals believed to have quarantinable communicable diseases. 42 C.F.R. § 70.6. They also authorize the CDC to undertake measures to detect communicable disease, 42 C.F.R. §§ 70.10, 70.12, and establish new procedures for issuing, assessing, and challenging Federal orders of quarantine, isolation, and conditional release, 42 C.F.R. § 70.14-70.16. Other notable changes include 42 C.F.R. § 70.5, which modifies existing requirements relating to travelers subject to Federal isolation, quarantine, or conditional release orders; 42 C.F.R. § 70.17, which establishes relevant administrative recordkeeping requirements; and 42

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8 In keeping with the language conventions used in the regulatory scheme, signatories will occasionally employ the term “quarantine” in its general sense, as an umbrella term that encompasses a variety of movement-restricting measures in addition to confinement.
9 For the purposes of this comment, signatories limit their analysis to the proposed revisions to the interstate quarantine regulations, 42 C.F.R. §70, and take no position as to the adequacy of the proposed amendments to the foreign quarantine regulations, 42 C.F.R. §71. However, where the proposed provisions of 42 C.F.R. § 71 are identical to the proposed provisions of 42 C.F.R. § 70, our comments should be read as applicable to both.
10 For clarity, we refer to each proposed rule by its proposed location in the Code of Federal Regulations, rather than its current location in the Federal Register.
C.F.R. § 70.19, which authorizes penalties for violation of the regulation. Taken together, these proposed amendments create a much more robust framework for regulating the use of interstate quarantine than does the current regulatory scheme.

As stated above, although signatories strongly support the CDC’s efforts to ensure that its domestic quarantine regulations incorporate necessary procedural protections, the current iteration of the rule falls short of constitutional requirements. Most significantly, whereas the proposed rule outlines post-deprivation due process procedures, any constitutionally acceptable domestic quarantine regime will require the CDC to conduct a due-process hearing prior to the imposition of restrictive measures except in exigent circumstances. That is, the “mandatory reassessment” and “medical review” contemplated by §§ 70.15-70.16 should be combined into a single pre-deprivation due-process hearing where possible. If exigent circumstances necessitate immediate isolation or quarantine, the CDC must arrange for a post-deprivation hearing within 48 hours, unless the affected individual requests additional time to prepare for their hearing. Similarly, when the CDC “apprehends” individuals whom it reasonably believes to be infected with a quarantinable communicable disease in accordance with § 70.6, it may not detain them for more than a brief period without providing a formal public health order and a hearing that comports with due process requirements. Due-process hearings must take place before a neutral decisionmaker from outside the agency, and individuals potentially subject to restrictive measures should be afforded access to counsel, including government-appointed counsel for indigent individuals where necessary. Finally, the burden of showing, by clear and convincing evidence, that a proposed order is the least restrictive alternative necessary to preserve public health must rest squarely with the government.

In addition to providing for constitutionally-mandated review procedures, signatories call on the CDC to strengthen the notice provisions contained in § 70.14; revise § 70.5 to afford additional due process protections for interstate travelers seeking travel permits; modify § 70.17 to make records of Federal orders issued pursuant to these regulations available to Congress and the public; impose reasonable time limitations on quarantine and isolation periods; and stipulate that food and other necessities be afforded to all individuals subject to isolation or quarantine. These modifications will help to bring the domestic quarantine regulations into full compliance with constitutional imperatives. They will also facilitate the CDC’s own objectives of protecting public health and fostering trust in public health officials.

Suggested Improvements to the Proposed Rulemaking

Overview of Recommended Quarantine Frameworks

The CDC must revise its quarantine scheme to comport with constitutional requirements under the Fourth and Fifth Amendments. The Constitution grants state actors varying levels of discretion depending on the level of exigency in any given situation. As a result, the signatories recommend two quarantine frameworks, one for the CDC to follow during non-exigent circumstances and the other for the CDC to implement during exigent circumstances.

Overview of Quarantine Framework During Non-Exigent Circumstances
I. The government bears the burden of initiating a due-process hearing prior to the imposition of quarantine.
   a. At the hearing, the government bears the burden of showing by clear and convincing evidence that quarantine is necessary and the least restrictive alternative to protect public health.
   b. The hearing should be held orally whenever practicable, even if over videoconferencing.
   c. The quarantined individual must have the opportunity to seek the assistance of legal counsel and the opportunity to hire a medical representative, and the government shall appoint legal counsel and a medical representative to individuals who cannot otherwise afford them.

Overview of Quarantine Framework During Exigent Circumstances

I. If the government has a reasonable belief that an individual has a communicable disease, the government may briefly apprehend the individual to ask questions to determine whether quarantine is necessary.

II. The government may issue an order for immediate quarantine and must provide quarantined individuals with notice of their right to be heard at a due-process hearing, which must be held within 48 hours.

III. The government bears the burden of initiating a due-process hearing within 48 hours of the imposition of quarantine.
   a. At the hearing, the government bears the burden of showing by clear and convincing evidence that quarantine is the least restrictive alternative necessary to protect public health.
   b. The hearing should be held orally whenever practicable, even if over videoconferencing.
   c. The quarantined individual must have the opportunity to seek the assistance of legal counsel and the opportunity to hire a medical representative, and the government shall appoint legal counsel and a medical representative to individuals who cannot otherwise afford them.

42 C.F.R. § 70.6: Apprehension and Detention

Currently, the proposed rulemaking places no restriction on the number of hours or days an individual may be apprehended pending a formal quarantine order, effectively sanctioning indefinite apprehension. The proposed rulemaking states that “HHS/CDC does not expect that the typical public health apprehension will last longer than 72 hours,” but then explains that this timeframe is “merely offered as guidance.” The proposed rulemaking goes on to say it is not the agency’s “intent through this definition to allow for extended apprehensions absent the issuance of a Federal order.” But the language in the proposed rulemaking would allow for exactly this result: indefinite detention without a formal order.

Under this framework, the federal government could conceivably apprehend an individual for so long that the apprehension becomes the functional equivalent of a quarantine. This is unconstitutional under the Fourth Amendment “reasonable belief” standard, which is
designed for brief apprehensions. Indeed, a federal District Court recently confirmed the applicability of the Fourth Amendment in the context of quarantine while evaluating a claim for damages related to New Jersey’s quarantine of Kaci Hickox during the most recent Ebola epidemic. We urge the CDC to undertake a full analysis of how the Fourth Amendment applies to the measures contemplated here, particularly given the intrusive nature of the powers implied by the apprehension provisions.

Moreover, under this framework, the apprehension could occur without any of the procedural protections that the agency recognizes are needed when quarantines are ordered. This violates the Fifth Amendment by imposing a lengthy restraint on individuals’ liberty without affording a pre-deprivation due-process hearing in which the government bears the burden of showing, by clear and convincing evidence, that the deprivation of liberty is necessary and the least restrictive alternative for protecting public health. The CDC must revise its section on apprehension to avoid the prospect that an apprehension becomes the functional equivalent of a quarantine, thereby violating the Fourth and Fifth Amendments.

42 C.F.R. §§ 70.14–70.16: Requirements Related to Notice, Due-Process Hearing, and the Review of Medical Evidence

The Fifth Amendment to the U.S. Constitution requires much more stringent due process requirements than those currently described in §§ 70.14-16. Here we lay out eight changes that we believe are necessary.

1. A pre-quarantine due-process hearing, absent exigent circumstances. The CDC should modify §70.15 to require the CDC to initiate a due-process hearing before a neutral decisionmaker prior to imposing an order for quarantine, or, where exigent circumstances require, to initiate a hearing within 48 hours for administrative review of the order imposing quarantine. The proposed § 70.15(a) currently states, “The CDC shall reassess the need to continue the quarantine, isolation, or conditional release of an individual no later than 72 hours after the service of the Federal order.” As written, the proposed rule allows the CDC to deprive individuals of their liberty for three days without presenting any justification to a neutral decisionmaker and without offering quarantined individuals the opportunity to present their own

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12 A number of states provide for both a non-emergency, pre-deprivation hearing route and an emergency, post-deprivation hearing route to quarantine. See, e.g., ALASKA STAT. § 18.15.385 (“Before quarantining or isolating an individual, the [D]epartment [of Public Health] shall obtain a written order from the superior court authorizing the isolation or quarantine.”) However, if the Department “has probable cause to believe that the delay involved in seeking a court order imposing isolation or quarantine would pose a clear and immediate threat to public health and isolation and quarantine is the least restrictive alternative and is necessary to prevent the spread of a contagious or possibly contagious disease, a state medical officer . . . may issue an emergency administrative order to temporarily isolate or quarantine an individual or group of individuals.”); N.J. STAT. ANN. § 26:13-15(e)(4), 26:13-15(e)(4) (providing for an emergency and non-emergency route); OR. REV. STAT. §§ 433.121, 433.123 (providing for an emergency and non-emergency route); MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(a)-(b) (CENTER FOR LAW AND THE PUBLIC’S HEALTH, 2001) (providing for an emergency and non-emergency route).
cases. The proposed rule contravenes the constitutional requirement under the Due Process Clause of the Fifth Amendment that the government may not deprive individuals of liberty without first affording them notice and the opportunity to be heard before a neutral decisionmaker.\(^\text{13}\) In *Hickox v. Christie*, the District Court judge considered Ms. Hickox’s due process rights, explaining that “[t]he Supreme Court has recognized that ‘civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection’”\(^\text{14}\) and must be “accompanied by minimum procedural safeguards, including some form of notice and a hearing.”\(^\text{15}\) Where a pre-quarantine hearing is not possible due to exigent circumstances, the CDC should provide a hearing as soon as practicable, with an upper limit at 48 rather than 72 hours, inclusive of non-business days.\(^\text{16}\)

In the civil context, the Fifth Amendment requires a hearing prior to the deprivation of a fundamental right absent exigent circumstances, including, according to the Supreme Court, civil commitment.\(^\text{17}\) Applying this requirement, the Supreme Court held in *Mathews v. Eldridge*, demands consideration of three factors: 1) the private interest, 2) the risk of erroneous deprivation of such interest, and 3) the Government’s interest.\(^\text{18}\) First, in this case, the private interest is exceptionally high because it involves restrictions on liberty and implicates fundamental constitutional rights including the right to be free from restraint, the right to free association, and the right to travel. Second, when an individual is apprehended without an official due-process hearing, the risk of erroneous deprivation of the individual’s liberty interest is high. Third, signatories believe the Government’s ability to issue a quarantine order and then initiate a due-process hearing within 48 hours when there are exigent circumstances is sufficient to accommodate the Government’s interest in protecting the public health without burdening the individual’s liberty interest. In reviewing the constitutionality of Ms. Hickox’s quarantine in *Hickox v. Christie*, the court relied on the *Mathews* factors, confirming the applicability of the *Mathews* balancing test to the quarantine context.\(^\text{19}\) Moreover, the Supreme Court has found the 48-hour limit reasonable in the criminal context, holding that an arrestee cannot be held for more than 48 hours without a judicial determination of probable cause.\(^\text{20}\)

2. Combine the medical review and due-process review into a single hearing before a neutral decisionmaker. Second, the Fifth Amendment requires that a neutral decisionmaker weigh the medical evidence as soon as practicable to ensure that the CDC does not quarantine an individual without scientific or medical justification. As such, the CDC should combine the

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\(^{\text{14}}\) *Hickox v. Christie*, 2016 WL 4744181 at *12 (internal citation omitted).

\(^{\text{15}}\) Id. at *16 (internal quotation marks and citation omitted).

\(^{\text{16}}\) Given the great private interest and the high risk of erroneous deprivation at stake, no individual should be quarantined for more than 48 hours without review by a neutral decisionmaker, under the *Mathews* balancing test. *Mathews*, 424 U.S. 319 (1976). Some states have appropriately imposed even more stringent time limits: Alaska, for example, requires the state to file a petition with the superior court within 24 hours of issuing an emergency quarantine order. ALASKA STAT. § 18.15.385.

\(^{\text{17}}\) *Addington v. Texas*, 441 U.S. 418, 427 (1979) (“We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.”)

\(^{\text{18}}\) 424 U.S. 319, 335 (1976).


medical review described in § 70.16 with the due-process hearing that occurs prior to the imposition of an order for quarantine. The proposed medical review process under § 70.16 empowers a medical reviewer, who may be an HHS or CDC employee, as the neutral decisionmaker. To secure fairness, neutrality, and appearance thereof in such quasi-judicial determinations, the decisionmaker should be a non-agency employee or an administrative law judge. Furthermore, the quarantined individual must not bear the burden of requesting a hearing, as contemplated by § 70.16(a). Rather, the CDC must initiate the due-process hearing, where it should be required to present medical and other relevant evidence and quarantined individuals should be afforded the opportunity to present their own medical and other evidence. As such, signatories urge the CDC to reconsider the current bifurcation of the mandatory reassessment hearing and the medical review.

3. Notice requirements. Third, the CDC must revise the notice requirements under §70.14 to comport with the Due Process Clause of the Fifth Amendment. When there are no exigent circumstances and therefore the CDC initiates a pre-quarantine hearing, the CDC must serve notice on individuals before their hearings describing their constitutional right to be heard. In addition to the provisions already articulated in §70.14, this notice must provide information about the time and place of the hearing, the individual’s constitutional right to counsel, and the individual’s right to receive appointed counsel if he or she is indigent. When there are exigent circumstances and therefore the CDC serves the individual with an order of quarantine prior to the hearing, the order must also contain these same provisions describing the hearing that will take place within 48 hours. Finally, the Director’s written order, which constitutes final agency action, must describe the quarantined individual’s right to appeal the decision to federal court.

4. Clarify service requirements for groups. Fourth, the CDC must update its service requirements under § 70.14 to comport with the Due Process Clause of the Fifth Amendment. As written now, the rule requires that a quarantine order be promptly served on an individual, but does not require personal service “if the Federal order is applicable to a group of individuals, and individual service would be impracticable.” This language is vague, and leaves to the CDC’s discretion whether there are so many individuals quarantined that serving all of them with their quarantine orders would be too difficult. However, the Supreme Court has made clear when the names and addresses of individuals affected by a proceeding or order are known, publishing or posting a notice does not satisfy due process. In Mullane v. Central Hanover Bank & Trust Co.,

21 See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and . . . the appearance and reality of fairness . . . .”).

22 In a number of states, the state bears the burden of initiating a quarantine hearing, regardless of whether it is a pre-deprivation or post-deprivation hearing. See, e.g., ME. REV. STAT. ANN. tit. 22, § 811(2); OR. REV. STAT. §§ 433.121, 433.123; MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(a)-(b). Furthermore, because a government-ordered quarantine greatly stigmatizes those quarantined, such individuals cannot be expected to bear the burden of bringing the state’s order before a court. See GHJP & ACLU, Fear, Politics, and Ebola, at 4, 29-30.

23 The Administrative Procedure Act requires that “final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. Although § 70.16(n) specifies that the Director’s issuance of a federal order constitutes final agency action, the CDC should require that the order contain an explanation of the individual’s right to appeal to federal court.
the Court explained that “[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.” 24 We therefore urge the CDC to recognize that, when constructing procedures for service, impracticability is more akin to impossibility than inconvenience. The CDC should clarify in its rules that the only time when individual service is not required, and posting will suffice, is when the location of the quarantined individual is unknown, and cannot be discovered through reasonable effort.

5. **Provide for an oral hearing.** Fifth, signatories urge the CDC to provide for an oral hearing whenever practicable, even if over videoconferencing. Neither the 70.15 “reassessment” nor the 70.16 medical review currently contemplates such a hearing. Under 70.15, an individual appears to have no right of participation at all. As written now, § 70.16 provides for a review “conducted through written submission, by telephone, or through any other means that the medical reviewer determines to be acceptable.” While this rule, as written, would allow for the medical reviewer to determine that a live or video hearing is acceptable, it would also allow the examiner to issue medical decisions about quarantined individuals without ever speaking with them. When a deprivation of liberty as severe as quarantine is at issue, individuals should be given an opportunity to address the decisionmaker directly and explain why the quarantine is inappropriate.

6. **Provide for the assistance of counsel.** Sixth, the Fifth Amendment to the U.S. Constitution requires that the quarantined individual be given an opportunity to seek the assistance of legal counsel for any review of the quarantine in addition to the opportunity to hire a medical representative. We commend the CDC for proposing to provide indigent quarantined individuals with a medical representative, as well as the opportunity to present medical and other evidence to the decisionmaker as to why they should not remain quarantined. However, while the review of a quarantine invariably requires the use of medical expertise by both the decisionmaker and anyone representing the quarantined individual, it also concerns a deprivation of liberty implicating the constitutional principle of due process of law. All quarantined individuals should have the opportunity to seek the assistance of legal counsel in their quests to regain their freedom, and—just as with a medical representative—if they cannot afford an attorney, counsel should be appointed for them. 25

7. **Require establishment of least restrictive means.** Seventh, the Fifth Amendment to the U.S. Constitution demands that the government bear the burden of establishing, by clear and convincing evidence, that the individual poses a danger to others, that quarantine of the individual is necessary, and that it is least restrictive means of protecting public health. 26

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25 See, e.g., CONN. GEN. STAT. § 19a-131b (requiring the quarantine order to state the individual’s “right to be represented by counsel, [and] that counsel will be provided at the state’s expense if such individual is unable to pay for such counsel”); accord MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 605(e).
26 The federal government may not fight outbreaks of infectious disease “by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” Shelton v. Tucker, 364 U.S.
Although the Supreme Court has never addressed this question in the context of quarantine restrictions, the Supreme Court has addressed it in the analogous context of civil commitment.  

Signatories note that the CDC already compels an inquiry into whether “less restrictive alternatives would adequately serve to protect the public health” under the “mandatory reassessment” contemplated under § 70.15. However, the proposed rules do not appear to require the CDC to engage in a least-restrictive means analysis prior to imposing a quarantine. The CDC must engage in such an analysis prior to imposing a quarantine, and prove to a neutral decisionmaker that this standard is met either at a pre-deprivation hearing, or at a hearing conducted within 48 hours due to exigent circumstances. If the CDC is unable to produce sufficient evidence to prove that quarantine is necessary to safeguard the public health, and that there are no less restrictive means available to adequately protect the public health, the rules must mandate that the agency release the individual.

8. Constrain the CDC director’s discretion. Eighth, signatories emphasize that the final rule must constrain the CDC Director’s unfettered discretion to overturn a decision by a neutral decisionmaker. Because public fear and misinformation are common when public health crises emerge, it is important to insulate the neutral decisionmaker’s exercise of medical and legal judgment from political pressure. Indeed, courts have held that political interference is grounds for invalidation of agency adjudications and that some improper political intrusions in administrative adjudications violate procedural due process under the Fifth Amendment.

We propose that the Director’s ability to reject the neutral decisionmaker’s determination be limited to instances in which the Director finds that the initial determination is unsupported by substantial evidence, a standard with roots in case law.

479, 488 (1960); see also Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969) (“A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.”) (internal quotation marks omitted). A number of states mandate the clear and convincing evidence standard in the context of quarantine orders. See, e.g., 20 ILL. COMP. STAT. ANN. 2305/2 (West 2009); ME. REV. STAT. ANN. tit. 22, § 812(1) (“If, based upon clear and convincing evidence, the court finds that a public health threat exists, the court shall issue the requested order . . . as may direct the least restrictive measures necessary to effectively protect the public health.”).


28 As proposed, § 70.16(m) permits the Director to reject the recommendation of the medical reviewer for any reason or none at all. As discussed above, signatories believe that the § 70.15 hearing and § 70.16 reassessment should be combined into a single due-process hearing. We nonetheless address this specific deficiency in § 70.16 in order to emphasize that the final rule should limit the discretion of the CDC Director with respect to quarantine determinations.

29 See Tummino v. Hamburg, 936 F.Supp.2d 162 (E.D.N.Y. 2013) (holding that an informal adjudication of the FDA was arbitrary and capricious agency action where the Secretary of Health and Human Services introduced “improper political influence” in overruling the FDA’s initial decision).

30 See Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966) (invalidating an FTC adjudication where congressional questioning of the neutral decision-makers within the FTC “intervene[ed] in the agency’s . . . judicial function,” denying “the right of private litigants to a fair trial and . . . to the appearance of impartiality”).

31 See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) (where an agency head taking final agency action overturns the determination of an initial decision-maker, the reviewing court will consider
**42 C.F.R. § 70.17: Administrative Records**

Signatories commend the CDC for incorporating administrative recordkeeping provisions into its domestic quarantine regulations, as detailed administrative records are crucial to ensuring meaningful administrative and judicial review. § 70.17 contemplates the creation of comprehensive administrative records associated with Federal public health orders and allows individuals subject to such orders to obtain their records upon request. Although this represents an important improvement upon quarantine-related recordkeeping practices currently employed at the state level, signatories urge the CDC to adopt a requirement of reporting to Congress cumulative data on the number, location, duration, and bases of Federal public health orders issued pursuant to these regulations. Ideally, such congressional reports would be made on a quarterly basis and would facilitate transparency and effective oversight. An independent reporting requirement is consistent with the CDC’s practice of making cumulative, de-identified data related to infectious diseases publicly available and would further the Agency’s goal of fostering trust in public health officials.

**42 C.F.R. § 70.5: Requirements Related To Interstate Travelers**

The right to interstate travel is a fundamental constitutional right that citizens may not be deprived of without due process of law under the Fifth Amendment. As currently written, § 70.5 prohibits individuals under a Federal, state, or local order—or voluntary agreement—of isolation, quarantine, or conditional release from traveling across state borders absent a “travel permit” from the CDC. The provision requires individuals to apply for a permit to exercise this fundamental right of travel, states no timeframe in which the CDC must respond to the application, and provides no standard for granting or denying the application. Signatories imagine circumstances in which an individual arrives at an airport in a non-home state and is issued a conditional release order, or enters into an agreement with the CDC for conditional release, so long as he or she complies with electronic or internet-based monitoring of symptoms. Under the current travel permit scheme, the individual would have to apply for a separate permit

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32 See GHJP & ACLU, Fear, Politics, and Ebola, at 4, 27-28 (documenting the absence of state Ebola quarantine reporting requirements and the resultant inability to accurately reconstruct and account for states’ responses to the 2014 Ebola crisis).


34 See, e.g., Memorial Hospital v. Maricopa Cty, 415 U.S. 250, 254, 262 n.21 (1974) (noting that “[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom” and applying “[s]trict scrutiny . . . because the challenged classification impinges on the right of interstate travel”); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (“This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”).
to travel home, with no sense of how long the CDC will take to review the application or what standard it will apply in its review. Applying the *Mathews* test, given the exceptionally high private interest in the right to travel, the CDC must seek a travel restriction order from a neutral decision-maker, before whom the individual must be afforded the opportunity to present his or her case and the CDC must bear the burden of showing by clear and convincing evidence that prohibition of any form of interstate travel (private and public transport) is the least restrictive alternative for protecting public health. This evaluation may be combined with the pre-deprivation hearing outlined above in response to proposed §§ 70.14-70.16, and like the §§ 70.14-70.16 hearing, may be delayed for a maximum of 48 hours due to exigent circumstances. As such, a travel restriction order will not normally require a separate hearing.36

Furthermore, signatories find § 70.5(d) problematically vague. As written, it suggests that the CDC may restrict an individual’s right to travel absent any federal or state order of quarantine, isolation, or conditional release. In effect, this means that the CDC can restrict an individual’s right to travel without any individual assessment, legal basis, or due process whatsoever, so long as the state or local health authority requests it or the Director determines that local control is “inadequate” and the measure is “needed.” If this is indeed what § 70.5(d) contemplates, it is an unconstitutional restriction on the right to travel under the Fifth Amendment; if it is not, the section must be clarified.

**Conditions of Quarantine**

Signatories urge the CDC to promulgate an additional rule providing that those subject to a quarantine be provided with sufficient food, medical care, means of communication, and other necessities while subject to any quarantine or other agency-imposed restriction on their movement. Federal agencies have a duty to ensure humane conditions for confinement. In the carceral context, the withholding of food and medical care is a violation of the Eighth Amendment prohibition on cruel and unusual punishment.37 And “[p]ersons in nonpunitive detention have a right to reasonable medical care.”38 “At a minimum, due process forbids governmental conduct that is deliberately indifferent to the medical needs of non-convicted detainees.”39 Additionally, people in government custody have a due process right to adequate food and shelter.40 The CDC, while detaining those it believes could be ill, should ensure that those

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35 *Aptheker v. Sec’y of State*, 378 U.S. 500, 520 (Douglas, J., concurring) (“[F]reedom of movement is the very essence of our free society . . . Like the right of assembly and the right of association, it often makes all other rights meaningful . . . Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.”).

36 Signatories also urge the CDC to contemplate and develop rights-protective protocols to address hypothetical scenarios in which the CDC might seek to restrict an individual’s travel while that individual is subject to monitoring or movement restrictions imposed by the state. In such a circumstance, the CDC should ensure that the individual receives an opportunity to challenge the travel restriction order before a neutral decisionmaker.


39 *Id.*

people’s constitutional right to due process is protected, as well as ensure that their health is not risked by severe detention conditions. To do otherwise would not only be unconstitutional, but counterproductive to the CDC’s mission to protect the public health and safety. Additionally, signatories recommend that the CDC establish guidelines that specifically address proper treatment of and provisions for dependents and children of individuals under public health orders, as well as guidelines for scenarios in which minor children are themselves quarantined. Such guidelines must ensure that every effort is undertaken to make sure that quarantined children are allowed to remain in close proximity to family members.

Medical Examinations

As written, § 70.12 allows the CDC to perform any examination, no matter how invasive, without the individual’s consent, so long as the testing is “reasonably necessary to diagnose or confirm the presence or extent of infection.” In fact, nowhere in the section concerning medical examinations does the CDC address issues of consent: if a bone marrow biopsy—an incredibly invasive and painful procedure—were necessary to confirm the presence of a disease, § 70.12 would allow the CDC to forcibly perform a biopsy against the individual’s will, even though voluntary isolation in lieu of an invasive diagnostic procedure would equally protect the public health against any risk of communicable disease. Informed consent is a fundamental principles of medical ethics and should not be violated absent extraordinary circumstances where no other alternatives exist. Because isolated detention will always be an alternative to a non-consensual, invasive medical examination, signatories can imagine no circumstances in which contemplated violation of informed consent § 70.12 would be warranted.

Conclusion

Signatories applaud the CDC's efforts to create a quarantine regime that provides greater protections for civil liberties. Now that the Ebola outbreak has passed, the CDC is wise to take stock of how to ensure that future quarantines are guided by scientific necessity and protections for civil liberties, rather than public fear or political expediency. The CDC’s rule will likely influence states seeking to review their own quarantine laws in light of mistakes they made in 2014, so it is especially important that the CDC’s rule complies with constitutional requirements and promotes the policy objectives of facilitating trust in public health officials and encouraging medical professionals to travel abroad to stop future outbreaks of infectious disease at the source. However, the CDC's regime, as currently outlined in their Notice of Proposed Rulemaking, does not go far enough. To fully comport with the Fifth Amendment to the U.S. Constitution, the

41 See, e.g., CONN. GEN. STAT. § 19a-131b-b (providing that “the needs of individuals quarantined or isolated shall be addressed in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter, means of communication with those in quarantine or isolation and outside those settings, medication and competent medical care”); MODEL STATE EMERGENCY HEALTH POWERS ACT art. VI, § 604(b)(6) (identical to Conn. Gen. Stat. § 19a-131b-b) & § 604(b)(7), (b)(8) (requiring that quarantine and isolation premises “be maintained in a safe and hygienic manner” and that “cultural and religious beliefs should be considered in addressing the needs of individuals” subject to quarantine or isolation).

CDC must add the safeguards for individuals' procedural and substantive due process rights outlined above. The reforms described above are not only required by the Constitution; they are also smart policy. A quarantine regime that is grounded in science and respect for constitutional rights will lead to greater public confidence in the government, and as a result, a greater willingness to work alongside the government to contain outbreaks of infectious disease.

Respectfully submitted,

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