Everything Old is New Again

Federal Quarantine Regulations
42 C.F.R. Parts 70 & 71
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The U.S. cannot allow EBOLA infected people back. People that go to far away places to help out are great—but must suffer the consequences!

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Ebola is much easier to transmit than the CDC and government representatives are admitting. Spreading all over Africa—and fast. Stop flights

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Monrovia, Liberia, 5 October 2014
Pushed to the Limit and Beyond
Medicins Sans Frontiers
© John Moore/Getty Images
Executive Orders list “Quarantinable Diseases”
Ex. Or. No. 13674 (July 1, 2014)

- Cholera
- Diphtheria
- Plague
- Smallpox
- Yellow Fever
- Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named)
- infectious Tuberculosis [added 2003]
- Severe Acute Respiratory Syndrome (SARS)[added 2005]
- Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic [added 2005]
Why New Rules?

Official Explanation:

• *Ebola! MERS! Measles!*
• *Transparency:* To let public know CDC practices in more detail
• *Benefits:* Avoid potential litigation costs
• *Costs:* No new costs, because CDC was already doing this

Translation:

• *TB*
• *CYA:* CDC was already doing this without clear legal authority?
• *Benefits:* Avoid getting sued for acting without legal authority
• *Costs:* Please don’t cut the CDC budget
What do the New Rules do?

- Require airlines to report possible cases of illness (faster and with more data)
- Authorize examining and detaining individuals to find communicable diseases
- Protect HHS from paying for detention, treatment
- Impose penalties of up to 1 year in prison and/or $100,000 fine ($250,000 in case of death)
What’s to criticize?

1. Confusing regulatory drafting
2. Possible regulatory overreach
3. Inadequate due process protections
4. No assistance to people who need help
5. Mostly useful for data collection
6. Unlikely to matter in a real epidemic
Who is subject to federal quarantine?

42 U.S.C. § 264

Together, §§ 264(b) and (c) say that the federal government can only apprehend, detain, examine, or place restrictions on:

(1) an individual who *is coming into* the US from a foreign country, and

(2) only for the purpose of preventing the introduction, transmission, or spread of a *communicable disease listed in an Executive Order of the President* [Quarantinable Diseases]
Process for Detention – Foreign Quarantine – 42 CFR Part 71

1. Person arrives in US
2. Interview and inspect the person
3. Apprehend, isolate anyone exposed to or infected with QD
4. Within 72 hours after apprehension, CDC Director serves first Federal Order (FO1) authorizing quarantine
   – Possible medical exam, with consent
5. 72 hours after FO1, Director reassesses
6. Serve FO2 to continue, modify or end FO1
7. Person can now request “medical review” of whether official’s belief was reasonable
   – Medical reviewer can require medical exam
8. Medical reviewer issues written report (no time stated)
9. Director issues FO3 to continue, modify or end FO2 (no time stated)
10. Person can now request Director to rescind FO3 on grounds of new or changed medical evidence (no time stated)

* No judicial review
* No consideration of likelihood of transmission
## Standards for Civil Commitment

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<thead>
<tr>
<th>Contagious Disease</th>
<th>Mental Illness</th>
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| 1. Serious contagious disease (not annual flu, pink eye) **AND**
| 2. Probability that an individual will transmit infection to others by his/her specific actions if not confined |
| 1. Mental illness (or disorder) **AND**
| 2. Probability that an individual will harm others (because of difficulty in controlling her/her own behavior) |
Appears to apply to anyone in the country who:

• Might reasonably be believed to be infected with a Quarantinable Disease
• Whether or not the person is just arriving in the US
§264(c) – limiting quarantine to foreign arrivals – is subject to an exception in §264(d)(1)

A person can be apprehended or examined if the person is:

(1) Reasonably believed to be infected with a communicable disease in a qualifying stage, and

(2) either:
   a) Moving from one State to another State, or
   b) Likely to infect someone else who will be moving to another State

(3) But, no detention unless the person “is found to be infected”

* Yet interstate quarantine rules do include detention without a finding of infection
The rules are likely to be relevant only in isolated instances of QDs
- Not measles

This means they should be models of fairness
What will help prevent the spread of communicable diseases?

• A resilient, informed population
• Resources to enable people to stay healthy
  – Access to medical care, social support, food, water, housing
  – Access to communication and transportation
  – Income protection
• Health officials who can be trusted to:
  – be knowledgeable
  – engage communities in planning
  – communicate honestly with the public
  – act fairly
  – accept accountability
• To have a resilient population, focus on human rights – the foundational determinants of health
Conclusion: Perpetual Emergencies and the Rule of Law

- Emergencies are *exceptions* to the *norm*
- Laws designed for emergencies are *exceptions* to the rule
- Indefinite or long term emergencies become the norm
  - E.g., terrorist threats, risk of epidemics
- In indefinite/long-term emergencies, laws designed as *exceptions* become the *rule*
  - The rule of law is suspended indefinitely
Thank you!