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EBOLA AND INADMISSIBILITY

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The United States has started Ebola screenings at 5 major airports. Will these screenings really be effective, or are they being implemented by the administration to demonstrate that it is doing something to assuage public fears? The administration has also been criticized by Republican leaders who are pushing to restrict, if not completely block off, air travel from West Africa. The tragic death of Thomas Duncan in Dallas from Ebola who had flown into the United States from Liberia has further exacerbated these fears.

While the airport screenings would apply to all travelers from affected West African countries, including U.S. citizens, non-citizens would certainly be more vulnerable. The fears stemming from the Ebola epidemic are redolent of an earlier time when immigrants who travelled to the shores of the United States were processed at Ellis Island and excluded for a host of diseases, notably including the eye infection trachoma. A Marine General recently warned about hordes of Ebola infected immigrants running for the U.S. border, stoking similar fears today. Anti-immigrant groups are using Ebola, along with ISIS, to further their argument that immigrants are dangerous to the United States, and several Republican politicians including former Massachusetts Senator and current New Hampshire Senate candidate Scott Brown, North Carolina Senate candidate Thom Tillis, and Senator Rand Paul, have cited Ebola to support increased border security along the U.S.-Mexico border.

Pursuant to section 212(a)(1)(A)(i) of the Immigration and Nationality Act (INA), aliens who are determined to have a communicable disease of public health significance are ineligible to receive visas and ineligible to be admitted in the United States. By regulation, under 42 CFR 34.2, the term “communicable disease of public health significance” includes “quarantinable communicable diseases as listed in a Presidential Executive Order,” a list which has included

Ebola and other viral hemorrhagic fevers since President George W. Bush issued Executive Order 13295 in 2003. Under the authority of INA section 232, 8 U.S.C. 1222, aliens arriving in the United States may be subjected to detention and physical and mental examination to determine whether they are afflicted with a condition that would render them inadmissible, such as Ebola.

Interestingly, however, under INA 232(b) and 42 CFR 34.8, an applicant for admission who was suspected of having Ebola and found inadmissible on that basis, who disputed the finding, could appeal to a board of medical officers. Presumably, even if one has been quarantined after showing signs of being infected but has recovered, he or she ought to be admitted into the United States. And since INA §212(a)(1) is not among the grounds which can be a basis for expedited removal under INA §235, 8 U.S.C. §1225, this would presumably all take place, even for a nonimmigrant, in the context of regular removal proceedings before an Immigration Judge, unless DHS felt it could argue with a straight face that the nonimmigrant also fell under INA §212(a)(6)(C) or §212(a)(7) and was thus amenable to expedited removal. The nonimmigrant might, for example, be said to have lied to a consular officer or DHS officer about their illness and thus become inadmissible under INA §212(a)(6)(C)(i).

A Lawful Permanent Resident (LPR), on the other hand, at least if returning from a trip of less than 180 days and not having committed any crimes or taken any other actions which would otherwise cause them to be treated as an applicant for admission, would not be regarding as seeking admission to the United States, pursuant to INA section 101(a)(13)(C), 8 U.S.C. §1101(13)(C). That is, the LPR would be considered rather as if he or she had never left the United States at all, because under section 101(a)(13)(C), becoming medically inadmissible under section 212(a)(1) doesn't cause an LPR to be regarded as seeking admission in the way that certain criminal conduct does. So the LPR would be allowed in, if perhaps under quarantine, not necessarily because he or she were admissible but because admissibility is irrelevant for someone who is not an applicant for admission. There does not appear to be any provision in INA section 237, regarding deportability, which would relate to those who become afflicted with contagious diseases after already having been admitted.

An LPR who had been out of the United States for more than 180 days could potentially be in a more troubling situation. Under INA §101(a)(13)(C)(ii), an LPR who "has been absent from the United States for a continuous period in excess of 180 days" is not entitled to the statutory protection against being regarding as seeking admission, so such an LPR could be found inadmissible under INA

212(a)(1)(A)(i) if infected with Ebola. And although a waiver of such inadmissibility is available pursuant to section 212(g)(1) of the INA, that section requires for a waiver of 212(a)(1)(A)(i) inadmissibility that the waiver applicant have a qualifying relative of one of various sorts, unless he or she is a VAWA self-petitioner. So an LPR absent from the United States for more than 180 days who does not have a spouse, parent (if the LPR is unmarried), son, or daughter who is either a U.S. citizen, or an LPR, or someone who has been issued an immigrant visa, might not be allowed back into the United States after being infected with Ebola, having become an inadmissible applicant for admission and being ineligible for a 212(g)(1) waiver.

We wonder whether such a loss of LPR status due to an infection would be constitutional, but we know that according to the Supreme Court, long-term absences from the United States can strip returning residents of some of their constitutional protections. The regrettable decision in *Shaughnessy v. Mezei*, 345 U.S. 2006 (1953), which upheld the refusal to admit a returning resident without a hearing and his resulting indefinite detention on Ellis Island, has never been overturned (though its practical effect with regard to the permissible length of detention under current statutes was limited by *Clark v. Martinez*, 543 U.S. 371 (2005)), and Mr. Mezei had lived in the U.S., apparently lawfully although before the INA of 1952 was enacted and the modern LPR status created, for many years before his 19-month absence. An LPR who is absent from the United States for more than 180 days and becomes infected with Ebola in the meantime may be at risk of becoming the modern Mezei. At the very least, however, the government should be held to the burden of showing such an LPR's alleged medical inadmissibility by clear, convincing, and unequivocal evidence, as in *Woodby v. INS*, 385 U.S. 276 (1966), just as LPRs alleged to be inadmissible on other bases have been found entitled to the protection of the *Woodby* standard in such cases as *Ward v. Holder*, 733 F.3d 601 (6th Cir. 2013). (The BIA in *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011), has acknowledged that clear and convincing evidence is required to declare an LPR an applicant for admission under INA §101(a)(13)(C), although it reserved judgment on the question whether there is a difference for these purposes between clear and convincing evidence as mentioned in INA §240(c)(3)(A) and clear, unequivocal and convincing evidence as mentioned in *Woodby*.)

As a practical matter, it is unlikely that any non-citizen found to be infected with Ebola would be turned away on the next flight home, or even paroled into the US

for a removal proceeding, as this would expose others to the Ebola virus. He or she would be quarantined in a hospital and treated in the United States. If this person fully recovers, he or she should be found admissible. Otherwise, this person will unfortunately under the current state of medical advances in the treatment of Ebola most likely not be alive.

While the United States should not be nonchalant about the spread of deadly infectious diseases such as Ebola, the question is whether screenings at airports are the right way to deal with the problem? Ebola can incubate in a person for up to 21 days before an infected person shows symptoms, as was the case with Mr. Duncan. It has recently come to light that Mr. Duncan's treatment was less than satisfactory as he was discharged from the hospital when he had a high fever. There are very few passengers who fly into the United States each day from the three countries that are at the epicenter of the Ebola epidemic – Liberia, Sierra Leone and Guinea. Blocking off flights from these countries, due to political grandstanding, will hurt these countries' economies even further, and will have an adverse impact on trade and investment. This will further hinder their efforts to stem Ebola, and one way to stem an epidemic is to keep people working and normal. In addition, perceived fears about who has Ebola can result in racial profiling of people of certain nationalities, resulting in wrongful denial of visas or admission into the United States.

As a recent editorial in the Washington Post aptly stated, "The answer to Ebola is fighting it there, at the source, not at the U.S. border. No one is protected when a public health emergency is used for political grandstanding." Centers for Disease Control and Prevention Director Thomas Frieden sensibly told reporters, "Though we might wish we can seal ourselves off from the world, there are Americans who have the right of return and many other people that have the right to enter this country." As The Economist noted in its recent article on the topic that Dr. Frieden and Dr. Anthony Fauci, head of the infectious diseases component of the National Institutes of Health, have explained, "quarantining West Africa would be unwise. It would weaken governments, trap Americans and spur travellers to move in roundabout ways that make them harder to track." If the administration believes that screening those who arrive in the United States for Ebola symptoms may be a helpful component of a broader anti-Ebola strategy, it should not taken too far. We must also be careful not to exclude from the United States people who show no real signs of being infected, and accord those who do appear to have been infected full due process to either contest or overcome inadmissibility.