



Ebola & Travel Ban Legal Concerns (Nov. 2014)

By David M. Endersbee and Alexander T. Simpson

As concerns about the spread of the deadly Ebola hemorrhagic fever virus (“Ebola”) continue, various measures have been taken in the United States on the federal and state levels to neutralize the spread of the disease, including: (i) a 21-day quarantine on health workers returning from treating Ebola patients in West Africa (imposed in New York, New Jersey, and Illinois),ⁱ and (ii) requiring all travelers from Ebola-affected countries, e.g., Sierra Leone, Liberia, and Guinea, to enter the U.S. through one of five designated airports (JFK, IAD, ORD, ATL, EWR) which offer heightened Ebola screening procedures.ⁱⁱ In addition, airlines operating flights to and from the U.S. have long been vested with clear authority to deny boarding to passengers they suspect of being infected with Ebola (or other serious infectious diseases).ⁱⁱⁱ

Meanwhile, a growing cadre of politicians has advocated for the U.S. to follow other countries^{iv} which have instituted some form of travel ban in response to the Ebola outbreak.^v Those calls have persisted despite the objections of health experts that such a ban would be counterproductive.^{vi}

LEGAL BASIS FOR A TRAVEL BAN

Despite these urgings, the legal foundation for a flight ban in the U.S. has generated little public discussion. The following are among the authorities which may shape that discussion.

Article 11.2 of the U.S. Model Open Skies Agreement^{vii} (the “Agreement”) states that no party to the Agreement “shall unilaterally limit the volume of traffic, frequency, or regularity of service . . . except as may be required for customs, technical, operational, or environmental reasons under conditions consistent with Article 15 of the [Chicago] Convention [of 1944].”^{viii} Notably, one commentator has categorized the “protection of human health” – which could possibly encompass a flight ban – as a “sound environmental justification.”^{ix}

But in contrast, Article 15 of the Chicago Convention (the “Convention”, which sets forth basic international norms for commercial aviation) states, in pertinent part, that “[e]very airport in a contracting State which is open to national aircraft



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT’s rules on nondiscrimination on the basis of disability in air travel and passenger protections.

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shall . . . be open under uniform conditions to the aircraft of all other contracting states.”^x

Other articles of the Convention may also be relevant. Article 14 states, in pertinent part, that “[e]ach contracting state agrees to take effective measures to prevent the spread by means of air navigation of . . . communicable diseases . . .”^{xi} But Article 9(b) states:

Each contracting State reserves . . . the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on the condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.^{xii}

Finally, Article 2.4 of Annex 9 to the Convention states:

Recommended Practice.— In accordance with the International Health Regulations of the World Health Organization, Contracting States should not interrupt air transport for health reasons. In cases where, in exceptional circumstances, such service suspensions are under consideration, Contracting States should first consult with the World Health Organization and the health authorities of the State of occurrence of the disease before taking any decision as to the suspension of air transport services.^{xiii}

In the political arena, Rep. Bob Goodlatte (R-VA), Chairman of the House Judiciary Committee, and Rep. Trey Gowdy (R-SC), Chairman of the Subcommittee on Immigration and Border Security, recently wrote to President Obama urging him “to use authority granted to you by Congress in the Immigration and Nationality Act to prohibit foreign nationals who were recently present in an Ebola-ravaged country, from entering the U.S.”^{xiv} More specifically, the letter cites to 8 U.S.C. § 1182(f), a provision of the Immigration and Nationality Act, which states, in pertinent part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may . . . suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Another provision of the Act – not cited in the letter – classifies as “ineligible for visas or admission” any alien “who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance[.]”^{xv}

The FAA recently issued its own statement concerning Ebola with a series a “frequently asked questions.”^{xvi} Among the questions addressed by the FAA are “Under what circumstances will the FAA restrict flights to and from countries with citizens infected with Ebola?” and “What authority does the FAA have to restrict flights to and from another country?” The FAA’s broad answers to these questions involve coordination with numerous federal agencies and international bodies.

CONCLUSION

Experience suggests that the likelihood of the U.S. imposing a travel ban in response to the Ebola outbreak is slim. That said, any serious consideration of such a ban – either now or in response to a future outbreak of a deadly virus – must recognize that, while U.S. domestic law may offer clearer support for action, international treaties to which the U.S. is party contain a “mixed bag” of provisions which require careful coordination and communication with both treaty partners and international bodies.

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ⁱ *Ebola: Some U.S. States Announce Mandatory Quarantines – Now What?*,

<http://www.cnn.com/2014/10/27/health/ebola-us-quarantine-controversy/index.html> (Oct. 27, 2014).

ⁱⁱ *5 U.S. Airports Set for Travelers from 3 West African Nations*, http://www.nytimes.com/2014/10/22/us/ebola-west-africa-united-states-flights.html?_r=0 (Oct. 21, 2014).

ⁱⁱⁱ See our recent newsletter on this subject: *Ebola, Airlines, and Denying Boarding on the Basis of Safety*, http://www.zsrlaw.com/images/stories/Aviation_-_Endersbee_Simpson_Ebola_Airlines_and_Denying_Boarding.pdf.

^{iv} See Travel Restrictions, Flight Operations and Screening, https://www.internationalsos.com/ebola/index.cfm?content_id=435& (accessed Oct. 29, 2014). The nature of these travel bans vary. For example, Colombia has banned all travelers who have recently visited Ebola-affected countries, Namibia has banned all travelers coming from Ebola-affected countries, and Trinidad and Tobago, in addition to other measures, has banned all nationals of Ebola-affected countries.

^v See, e.g., *Lawmakers Ignore Experts, Push for Ebola Travel Ban*,

http://www.huffingtonpost.com/2014/10/16/congress-ebola_n_5997214.html (Oct. 16, 2014). There is also a petition on the White House website to “[h]ave the FAA ban all incoming and outgoing flights to Ebola-stricken countries until the Ebola outbreak is contained.” See <https://petitions.whitehouse.gov/petition/have-faa-ban-all-incoming-and-outgoing-flights-ebola-stricken-countries-until-ebola-outbreak/FFJHH9yX> (accessed Oct. 29, 2014).

^{vi} See, e.g., *The Ebola Travel Ban is Really Politically Popular. Here’s Why it’s not Happening*,

<http://www.washingtonpost.com/blogs/the-fix/wp/2014/10/20/the-ebola-travel-ban-is-really-popular-heres-why-its-not-happening/> (Oct. 20, 2014).

^{vii} Available at <http://www.state.gov/e/eb/rls/othr/ata/114866.htm> (accessed Oct. 31, 2014). This model is used as the basis for negotiating open skies agreements with U.S. treaty partners.

^{viii} <http://www.state.gov/e/eb/rls/othr/ata/114866.htm> (accessed Oct. 29, 2014) (emphasis added). The open skies agreements with Sierra Leone, Liberia, and Guinea all contain this same provision.

^{ix} Benedicte A. Claes, *Aircraft Noise Regulation in the European Union: The Hushkit Problem*, 65 J. Air L. & Com. 329, 379 (2000).

^x <http://www.icao.int/publications/pages/doc7300.aspx> (accessed Oct. 30, 2014).

^{xi} *Id.*

^{xii} *Id.* (emphasis added).

^{xiii} <http://www.ifrc.org/docs/IDRL/Chicago%20Convention%20Annex%209.pdf> (accessed Oct. 30, 2014) (emphasis added).

^{xiv} http://judiciary.house.gov/_cache/files/c747e860-4b70-40a4-abcb-fcba3965a38e/101614-potus-ebola-letter.pdf (Oct. 14, 2014).

^{xv} 8 U.S.C. § 1182(a)(1)(A)(i).

^{xvi} http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17375 (accessed October 31, 2014).