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# COMMENT

## LIBERTY OR DEATH: MARYLAND IMPROVES UPON THE MODEL STATE EMERGENCY HEALTH POWERS ACT

FRANKLIN H. ALDEN JR.\*

### I. INTRODUCTION

In today's world, one can realistically wax nostalgic about the "good old days" when nuclear annihilation was the only potentially imminent cause of millions of civilian casualties. In the wake of the attacks on September 11, 2001, the United States has confronted new and terrifying methods by which hostile parties could inflict damage on American citizens. Experts have identified three categories to describe what are ubiquitously referred to as weapons of mass destruction (WMD): nuclear, biological, and chemical (NBC) agents, against which defense planning involves governmental and civil service agencies, from local municipalities up to the federal government.<sup>1</sup>

To counter these threats, various states and the federal government have enacted legislation of varying scopes, which enable governmental entities to impose drastic health and safety measures upon citizens. Many states have adopted, in one form or another, legislation based upon the Model State Emergency Health Powers Act (MSEHPA).<sup>2</sup> This document provides for sweeping executive powers in the event of an NBC attack. Maryland adopted its

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1. *See generally* Richard T. Cupitt, Current and Future Weapons of Mass Destruction, Testimony Before the Subcommittee on International Security, Proliferation and Federal Services of the Senate Committee on Governmental Affairs (Nov. 7, 2001), <http://www.bioterrorism.slu.edu/bt/official/congress/cupitt110701.pdf> (last visited Feb. 22, 2005) (suggesting steps to address concerns surrounding weaknesses in a multilateral coordination of WMD exports); Donald E. L. Johnson, *Hospitals and Country Are 'Woefully Unprepared' for Bioterrorism Attacks*, HEALTH CARE STRATEGIC MGMT., Oct. 1, 2001, at 14; Peter Chalk, *Misguided Assumptions*, SAN DIEGO UNION-TRIB., Sept. 21, 2001, at B9.

2. MODEL STATE EMERGENCY HEALTH POWERS ACT (MSEHPA) (Ctr. for Law and the Public's Health 2001), <http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf> (last visited Feb. 22, 2005) [hereinafter MSEHPA].

own version of the Model Act legislation in 2001.<sup>3</sup> Both the MSEHPA and the Maryland Emergency Powers Acts raise concerns over the amount of judicial recourse available to an affected citizen. This article explores both documents in this regard, and argues that the protective measures implemented in the Maryland statute improve upon the MSEHPA, but should be regularly reviewed to preserve, inasmuch as it is possible during an NBC attack, the basic civil liberties protection that judicial recourse offers to vulnerable citizens.

## II. BACKGROUND

Planning prospectively for contingencies in this realm necessitates potential governmental action on a massive scale, which is at a minimum tangential to constitutional due process issues.<sup>4</sup> These activities may include the suspension of habeas corpus rights, a policy implemented by President Abraham Lincoln in Baltimore, Maryland, during the United States Civil War.<sup>5</sup> Governmental action may also extend to the taking and destruction of private property without compensation<sup>6</sup> and forced vaccination or quarantine without adequate notice and opportunity for access to legal counsel.<sup>7</sup>

Justifications for such drastic and far-reaching powers have always been formidably persuasive. Under some possible vectors of a biological attack, such measures, however unthinkable drastic, may not be sufficient to prevent deaths in

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3. MD. CODE ANN., art. 41 §§ 2-201 to 2-204 (West 2003) (repealed 2004). This legislation was recodified in 2004 and is now located at MD. CODE ANN., PUB. SAFETY §§ 14-3A-01 to 14-3A-05 (Supp. 2004).

4. Those activities with due process considerations represent the scope of constitutional issues addressed in this article.

5. ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 279 (1988). Brugger describes how Lincoln, deciding that Baltimore would likely lead Maryland into a secession that would leave Washington D.C. isolated within the Confederacy, ordered federal troops into the city, occupying it. *Id.* Officially suspending the writ of habeas corpus on April 27, 1861, General Benjamin F. Butler proceeded under Lincoln's directive to arrest and imprison the publishers of all Baltimore newspapers of Confederate sympathy. *Id.* The publishers were imprisoned in Fort McHenry without hearing or access to legal counsel. *Id.* at 281. Chief Justice Roger Brook Tancy of the Maryland Federal Circuit Court protested in the famous letter to Lincoln, *Ex Parte Merryman*, arguing "the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found." *Id.* at 283. Lincoln did not respond to the letter, and most of the imprisoned remained so for the balance of the War. *Id.*

6. See MSEHPA, *supra* note 2, § 506 ("Compensation shall not be provided for facilities that are closed, evacuated, decontaminated or destroyed when there is reasonable cause to believe that they may endanger the public health.").

7. *Id.* § 603.

the hundreds of millions,<sup>8</sup> if not more.<sup>9</sup> The cultural perception of the likelihood of such grave threats to national security have typically imposed a political force affecting the balance between national security concerns and civil liberties.<sup>10</sup>

Historically, in times of war or other contexts viewed by the federal government as a national security threat, the three branches have adjusted the balance between liberty and security like a barometer – tightening restrictions on certain basic freedoms and relaxing them as times and perceptions change.<sup>11</sup>

Since September 11th, the legislatures of the 50 states have severally passed statutes designed to optimize governmental response and planning for anti-biotic<sup>12</sup> countermeasures to a possible domestic biological attack.<sup>13</sup> Many states have based their legislative structure and text, to varying degrees, on the MSEHPA.<sup>14</sup>

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8. See, e.g., RODOLFO ACUNA-SOTO ET AL., U.S. CENTER FOR INFECTIOUS DISEASES (CID), CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), MEGADROUGHT AND MEGADEATH IN 16TH CENTURY MEXICO, 8 EMERGING INFECTIOUS DISEASES BULLETIN 360, (April 1, 2002), <http://www.cdc.gov/ncidod/EID/vol8no4/pdf/01-0175.pdf> (last visited Feb. 22, 2005) (recounting the catastrophic series of epidemics that infected native Mexican peoples during the sixteenth century, following the arrival of Europeans). The introduction of multiple infectious disease vectors into a culture, whose immune systems had not previously encountered such biological agents, resulted in the deaths of an estimated five to 15 million people in three years. *Id.* Eighty percent of the native Mexican population is estimated to have fallen victim to these plagues. *Id.*

9. Biological agents against which humanity has not had an effective medical countermeasure have, in the form of plagues, killed up to thirty percent of the afflicted population group, in a historical period when the vectors of a biological agent inherent in jet-age human transport did not yet exist. Susan Scott & Christopher F. Duncan, *Yersinia Pestis: A Case of Mistaken Identity?*, THE LANCET, June 23, 2001, at 2061. (Vector, here, holds the same meaning as it does in physics – speed in a direction. Unlike the application of the term in pure physics, however, the object in motion is a biological agent and speed references the rate at which the agent is transmitted throughout a population group.) Witness the trans-continental spread of SARS in the winter of 2002-2003. See M.A.J. McKenna, *Toronto Reports 20 New Cases of SARS; CDC Reinstates Alert for Travelers*, J-CONST. (Atlanta), May 24, 2003, at 3A.

10. See *Patriot Act: Follow-up Condemned as 'Assault on Civil Liberties'*, TORONTO STAR, Feb. 23, 2003, at F04 (referring to strong criticisms by the American Civil Liberties Union et al., of the conflict between the proposed “Domestic Security Act of 2003” and civil liberties).

11. *Compare* Shenck v. U.S., 249 U.S. 47 (1919) (affirming the conviction of an anti-war pamphleteer, holding that the distribution of anti-war materials during time of war constituted a “clear and present danger”), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding the right of a Ku Klux Klansman to advocate violence, holding *per curiam*, that for such advocacy to constitute a “clear and present danger” it must be “likely to incite or produce such action”).

12. In this article, the words “anti-biotic” and “antibiotic” mean different things. “Anti-biotic” refers to any medical countermeasure to a biological agent, introduced into the person. “Antibiotic” refers strictly to medicines with an anti-bacterial effect. Thus, an antibiotic is necessarily an anti-biotic, but an anti-viral anti-biotic substance would not necessarily be an antibiotic. Countermeasures such as quarantine control a biological agent vector, and involve the containment and isolation of an afflicted person. Such physical countermeasures are not anti-biotic.

13. See e.g., FLA. STAT. ANN. § 381.00315 (West 2002 & Supp. 2004); ARIZ. REV. STAT. § 36-2002 (West 2003 & Supp. 2004); GA. CODE ANN. § 31-12-2.1 (Michie 2001 & Supp. 2004).

14. MSEHPA, *supra* note 2.

Maryland's statutory text clearly reflects the influence of the MSEHPA, yet portions of the Maryland statute differ greatly from the MSEHPA, particularly in sections where the definition and placement of specific governmental powers bears directly on constitutional due process considerations concerning the taking of life, liberty, and property.<sup>15</sup> In reaction to these sections, the MSEHPA has received much criticism from various policy advocates.<sup>16</sup>

Both statutes define the extent of state police powers in a public health emergency; however, an analysis of the language in both texts relating to acquisition of private property by the state,<sup>17</sup> and compulsory vaccination and/or quarantine,<sup>18</sup> reveals procedural requirements in the Maryland statute providing enhanced access to legal representation, as well as compensatory restitution for property damage resulting from the exercise of state police powers in the event of a declared emergency.<sup>19</sup>

### III. SEPTEMBER 11TH AND IMPLEMENTATION OF THE MSEHPA

The collection of values that composes the American political will underwent a radical transformation in the aftermath of the terrorist attacks of September 11th, 2001, and the subsequent anthrax and ricin incidents.<sup>20</sup> Legislators heard an

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15. Compare MD. CODE ANN., PUB. SAFETY, §§ 14-3A-04 to 14-3A-05 (Supp. 2004) (detailing requirements and procedures for isolation and quarantine during an emergency), with MSEHPA, *supra* note 2, art. V (same).

16. See generally AMERICAN CIVIL LIBERTIES UNION (ACLU), Q & A ON THE MODEL STATE EMERGENCY HEALTH POWERS ACT, at <http://www.aclu.org/Privacy/Privacy.cfm?ID=13471&c=27> (last visited Feb. 22, 2005) (describing the MSEHPA as "replete with civil liberties problems"); AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC), HOW WILL NEW PUBLIC HEALTH MEASURE AFFECT CIVIL LIBERTIES, <http://www.alec.org/viewpage.cfm?id=2150&versid=2651&xsectionid=101&dorsrch=1> (last visited Feb. 22, 2005) (stating that the MSEHPA would grant governors "unchecked" power to declare an emergency). But see Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 627 (2002) (arguing against criticisms of the MSEHPA).

17. Compare MD. CODE ANN., PUB. SAFETY, §§ 14-308 (2003) ("The State shall repair or replace any equipment, facilities, or property that is damaged while being used in accordance with the proclamation of a state of emergency."), with MSEHPA, *supra* note 2, § 506 ("Compensation shall not be provided for facilities or materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger public health . . .").

18. Compare MD. CODE ANN., PUB. SAFETY, §§ 14-3A-05(b)(1)(vi) (Supp. 2004) ("The directive shall specify . . . the availability of a hearing to contest the directive."), with MSEHPA, *supra* note 2, § 605(a)(2) ("The directive shall specify . . . a copy of Article 6 and relevant definitions of the Act."). The section of the Maryland statute is entitled "Directive for isolation and quarantine – Contents and notice," while the MSEHPA § 605(a) title is "Temporary isolation and quarantine without notice." *Id.*

19. See *supra* notes 15-16 and accompanying text.

20. See Editorial, *Ricin As a Weapon*, N.Y. TIMES, Feb. 4, 2004, at A24 (commenting that ricin attacks are a "sobering reminder" that the United States remains vulnerable); Todd S. Purdum & Robin

unprecedented call from the polity for governmental action to enhance national security.

State and federal legislators immediately began the process of drafting legislation.<sup>21</sup> Concurrently, non-governmental, academic, and policy think-tank organizations began analyses on the issues of how to best contain, control, and supply assistance to an affected population in response to a domestic terrorist biological attack.<sup>22</sup>

Largely in response to the events of 2001, the Center for Law and the Public's Health (CLPH)<sup>23</sup> appointed professor Lawrence Gostin to produce a draft of Model Emergency Powers legislation, which defines and grants specific police powers in the executive branch of a bicameral model state government.<sup>24</sup> These powers include, *inter alia*, the power to appropriate, control, decontaminate, and if deemed necessary, to destroy private property,<sup>25</sup> and to involuntarily quarantine individuals or groups of persons without notice.<sup>26</sup> The MSEHPA explicitly states

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Toner, *A Day of Terror: The Federal Government; Driven Underground, Administration and Congressional Officials Stay on the Job*, N.Y. TIMES, Sept. 12, 2001, at A5 (quoting Senator Sam Brownback of Kansas as stating, "It's just shocking," following the September 11th attack); Shankar Vedantam, *N.J. Case Could Be Linked to Spores in Mail; If Cross Contamination Is Cause, Thousands of Mail Recipients Could Be at Risk of Exposure*, WASH. POST, Nov. 3, 2001, at A15 (quoting Bradley Perkins of the CDC as stating, "We will remain on high alert, high vigilance").

21. *E.g.*, S. 5841, Reg. Sess. (N.Y. 2001) (New York bill proposing state emergency powers); *see also* Press Release, ACLU, ACLU Says Congress Should Treat Administration Proposal Carefully; Says Many Provisions Go Far Beyond Anti-Terrorism Needs (Sept. 20, 2001) (detailing legislation that was introduced following the September 11th attack), at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9757&c=24> (last visited Feb. 22, 2005); Press Release, ACLU, ACLU Says Safety and Freedom Compatible; Calls on Congress to Reject Bills that Go Far Beyond Anti-Terrorism Needs (Oct. 2, 2001) (detailing provisions of "compromise" legislation that was introduced following the September 11th attack), at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9779&c=24> (last visited Jan. 27, 2005).

22. *E.g.*, Joseph Barbera et al., *Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences*, 286 JAMA 2711, 2713-15 (2001); ACLU, *supra* note 16 (surveying, *inter alia*, intra- and extra-governmental responses to the attacks).

23. Under the auspices and authorization of the federally administered Centers for Disease Control and Prevention (CDC), the Center for Law and the Public's Health (CLPH) was founded in 2000 as an information clearing house for health law information. CENTER FOR LAW AND THE PUBLIC'S HEALTH (CLPH), WELCOME TO THE CENTER FOR LAW AND THE PUBLIC'S HEALTH, at <http://www.publichealthlaw.net/> (last visited Feb. 22, 2005).

24. MSEHPA, *supra* note 2, at 1; *see also* Jason W. Sapsin, *Introduction to Emergency Public Health Law for Bioterrorism Preparedness and Response*, 9 WIDENER L. SYMP. J. 387, 387 (2002) (noting that the MSEHPA, or Model State Emergency Health Powers Act, was submitted in draft form on December 21, 2001); Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622 (2002) (explaining the various powers assigned to governors and their executive agencies under the MSEHPA). Many states passed legislation based largely on the language of the initial draft. *Id.* at 622 (stating that thirty-four states have introduced legislation based on the MSEHPA).

25. MSEHPA, *supra* note 2, art. V.

26. *Id.* art. VI.

as a policy goal the proper attention that such a statute must give to questions of due process.<sup>27</sup> The MSEHPA tries to balance the preservation of civil liberties with the need for rapid, overwhelming governmental response to contain the damage of a catastrophic public health event, such as an NBC attack.

For example, in an attempt to address due process concerns, Gostin explains the MSEHPA language regarding takings:

Coercive powers are the most controversial aspects of any legal system. Nevertheless, they may be necessary to manage property or protect persons in a public health emergency. There are numerous circumstances that might require management of property in a public health emergency - e.g., shortages of vaccines, medicines, hospital beds, or facilities for disposal of corpses. It may even be necessary to close facilities or destroy property that is contaminated or dangerous. Even in the case of a relatively small outbreak, such as the recent anthrax attacks, the government considered the need to compulsorily license proprietary medications and destroy contaminated facilities. The law must provide authority, *with fair safeguards*, to manage property that is needed to contain a serious health threat.<sup>28</sup>

Gostin agrees that there needs to be a balancing of apposite interests, explaining: "Provided [governmental] powers are bounded by legal safeguards, individuals should be required to yield some of their autonomy, liberty or property to protect the health and security of the community."<sup>29</sup> But, despite such analysis, an important question remains unanswered: What constitutes a "legal safeguard" in the MSEHPA for those three species of constitutionally protected interests—autonomy, liberty, and property?

Before the government takes a person's life, liberty or property, it must provide due process of law. This requirement is enshrined in the Fifth Amendment to the United States Constitution.<sup>30</sup> The amendment requires that the taking be for public use,<sup>31</sup> and that any such taking be justly compensated.<sup>32</sup> These protections were specifically extended to the states via the Fourteenth Amendment in some of the earliest United States Supreme Court cases where such an application was at

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27. *Id.* § 102 (finding that individual rights "must be respected to the fullest extent possible consistent with maintaining and preserving the public's health and safety."); *see also* Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 31 (2003) (quoting and discussing the question of due process in the MSEHPA).

28. *Id.* at 13 (emphasis added).

29. *Id.*

30. U.S. CONST. amend. V.

31. *Id.*

32. *Id.*

issue.<sup>33</sup> The MSEHPA dictates what process is due for the taking of liberty through state police powers of mass quarantine; bodily autonomy through state police powers of coercive mass vaccination; and property via the taking of, and possible destruction of, privately owned property without any compensation or judicial recourse.<sup>34</sup> A due process analysis of the MSEHPA provisions for the governmental taking of property and liberty in a declared emergency requires an initial examination of the role of the judiciary provided in the MSEHPA.

#### IV. OVERVIEW OF THE MSEHPA AND THE MARYLAND EMERGENCY POWERS ACT

The police powers defined in the MSEHPA have been widely criticized from various policy advocates<sup>35</sup> because the powers extend to the limits of personal property, liberty and bodily integrity interests.<sup>36</sup> Similarly, the Maryland catastrophic emergency statute vests extraordinary coercive power in the Governor.<sup>37</sup> Both documents attempt to balance and preserve the vital interests protected by the Fifth and Fourteenth Amendments, while protecting citizens from a catastrophic attack.

Initially, the MSEHPA establishes the power to quarantine a citizen forcibly once the governor has declared the Emergency Powers Act effective.<sup>38</sup> The declaration may only be overturned by a majority vote of both houses of the legislature.<sup>39</sup> Significantly, no provision is made for judicial review of the declaration.<sup>40</sup> Non-governmental policy organizations have criticized the absence of such a review, without which the state executive could impose the full police

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33. *E.g.*, *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). The Court in this opinion held:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

*Id.* at 241.

34. MSEHPA, *supra* note 2, §§ 602-05, 402.

35. *See infra* note 41 and accompanying text.

36. *See infra* notes 86-104 and accompanying text.

37. *See infra* notes 138-43 and accompanying text.

38. MSEHPA, *supra* note 2, §§ 401-403, 604.

39. *Id.* § 405(c).

40. *Id.* art. IV.



powers of the MSEHPA.<sup>41</sup> Specifically, with reference to the citizen's right to a hearing in the event of a forcible quarantine, that citizen can be quarantined without notice, "through a written directive if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease to others."<sup>42</sup> Such an example of extreme police power is strengthened in the MSEHPA because a legislature may only overrule an executive invocation of MSEHPA police powers by a majority vote of each house of a bicameral legislature.<sup>43</sup>

The provisions for confiscating property under the MSEHPA have been criticized as lacking sufficiently timely judicial oversight.<sup>44</sup> The MSEHPA grants the executive the power to confiscate, decontaminate, and even destroy property and human remains, without compensation, during a declared emergency.<sup>45</sup> Judicial recourse, again, is not provided in the MSEHPA until 10 days after the taking has occurred.<sup>46</sup> At that point, the public health authority must apply for a court order justifying the taking.<sup>47</sup> Certainly the state can make a convincing argument that property rife with contagion affects a compelling governmental interest in preventing and controlling an epidemic, regardless of any causative ill intent. This prevention and control would, under this line of reasoning, constitute a "public use."

Maryland enacted legislation in 2001 that was based in part on the MSEHPA.<sup>48</sup> The Maryland statute substantially differs from the MSEHPA with respect to specific due process considerations of quarantine, confiscation, and destruction of private property, as well as the apportionment of executive power – specifically the level within the executive branch that declares and manages a "catastrophic health emergency."<sup>49</sup> The balance of this article examines the takings, coercive vaccination, and quarantine provisions of both the MSEHPA and

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41. *E.g.*, ACLU, *supra* note 16 (decrying the MSEHPA for its failure to supply checks on the grant of power to the executive).

42. MSEHPA, *supra* note 2, § 605(a)(1).

43. *Id.* § 405(c). Nebraska, which has a unicameral legislature (colloquially called the 'Unicam'), would thus require a structural modification of the model. NEB. CONST. art. III, § 1. Nebraska's current emergency management statute was passed in 1996. NEB. REV. STAT. § 81-829.36 *et seq.* (1996).

44. *E.g.*, ACLU, *supra* note 16.

45. MSEHPA, *supra* note 2, art. V.

46. *Id.* § 605(a)(4).

47. *Id.*

48. MD. CODE ANN., art. 41 §§ 2-201 to 2-204 (West 2003) (repealed 2004). This legislation was recodified in 2004 and is now located at MD. CODE ANN., PUB. SAFETY, §§ 14-101 to 14-3A-08 (2003 & Supp. 2004).

49. *Id.* § 14-3A-02(a). The Maryland Secretary of Health and Mental Hygiene (DHMH) makes primary administrative decisions, while the governor retains power above the commissioner throughout the "catastrophic health emergency" to overrule the commissioner's decisions. *Id.* § 14-3A-03.

the Maryland emergency powers statutes, and compares constitutional “takings” and due process analyses of the Maryland law to the MSEHPA. The scope of this comparison encompasses contemporary considerations of substantive due process, as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution, and as shaped by case law.

#### V. MODEL STATE EMERGENCY HEALTH POWERS ACT ANALYSIS

State governmental action in defense and furtherance of the public welfare is a substantive exercise of a state’s police power.<sup>50</sup> It has been generally understood that the police power is an ‘inherent power’ to regulate, existing in a state government.<sup>51</sup> The federal constitutional limits to a state’s ability to exercise its police power are, as the United States Supreme Court’s holdings have addressed, governed by the following factors:

- 1) Does the regulation amount to an unconstitutional “taking?”<sup>52</sup>
- 2) Does the regulation violate constitutional substantive due process guarantees?<sup>53</sup>
- 3) Does the regulation violate constitutional guarantees of equal protection?<sup>54</sup>
- 4) Does the regulation violate the constitutional protections of freedom of speech?<sup>55</sup>
- 5) Does the regulation violate the constitutional protections of freedom of religion?<sup>56</sup>

The first two questions are relevant to the issue under consideration. In *Lucas v. South Carolina Coastal Council*,<sup>57</sup> the United States Supreme Court recognized only two circumstances of categorical unconstitutionality under the takings clause: 1) a regulation that compels physical invasion of the property; and 2) a regulation that denies “all economically beneficial or productive use of the

50. *Mugler v. Kansas*, 123 U.S. 623, 658-59 (1887); *Vill. of Euclid v. Ambler Realty, Co.*, 272 U.S. 365, 387 (1926).

51. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY*, § 9.2, at 519 (3d ed. 2000).

52. U.S. CONST. amend. V. The “takings clause” states, “[N]or shall [1] *private property* be [2] taken for [3] public use without [4] just compensation.” *Id.* (ordinal divisions and emphasis added).

53. U.S. CONST. amend. XIV, § 1, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” *Id.*

54. *Id.*, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

55. U.S. CONST. amend. I.

56. *Id.*

57. 505 U.S. 1003 (1992).

land.”<sup>58</sup> Commentators have interpreted these holdings to effectuate a subordination of the “takings” clause within the analysis of due process: “Governments may exercise their police powers only to preserve the public health, safety and welfare.”<sup>59</sup> The unresolved constitutional issue regarding the taking of property in the MSEHPA is: What constitutionally protected interests should prevail when a public use intended to preserve public health, safety and welfare, namely the uncompensated destruction of contaminated property, requires physical invasion and defeats all economic benefit and production attendant to that property?

The Fifth Amendment to the United States Constitution guarantees that, “No person shall . . . be deprived of life, liberty, or property without due process of law.”<sup>60</sup> This amendment imposes both substantive and procedural requirements upon the federal government that must be met before a “taking” can occur.<sup>61</sup> The Fifth Amendment Due Process Clause, echoed in the Fourteenth Amendment, states, “[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”<sup>62</sup> The Supreme Court held that, “Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the state and federal governments.”<sup>63</sup>

Thus, state action is governed by due process restrictions imposed by the Fourteenth Amendment.<sup>64</sup> In practice, these restrictions have varied widely in their effects throughout their history. For example, the forced removal of Japanese-Americans from freedom to internment camps during World War II stands as tragic evidence of the willingness of the government to undermine or ignore basic constitutional protections during times of national duress.<sup>65</sup> Former United States Supreme Court Justice Thomas C. Clark referred to this incident when he stated:

The truth is – as this deplorable experience proves – that constitutions and laws are not sufficient of themselves . . . . Despite the unequivocal language of the Constitution of the United States that the writ of habeas corpus shall not be suspended, and despite the Fifth Amendment’s

58. *Id.* at 1015.

59. STOEBUCK & WHITMAN, *supra* note 51, § 9.4, at 528.

60. U.S. CONST. amend. V.

61. See STOEBUCK & WHITMAN, *supra* note 51, § 9.2, at 521 (discussing that the limitations to the federal and state powers to regulate land use are found in the Fifth and Fourteenth Amendments and are “namely the guarantees against eminent domain ‘takings’ without compensation, against denial of ‘due process of law,’ and of equal protection of law.”).

62. U.S. CONST. amend. XIV, § 1.

63. *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

64. U.S. CONST. amend. XIV.

65. See Tom C. Clark, *Epilogue to MAISIE & RICHARD CONRAT, EXECUTIVE ORDER 9066 110-111* (1972) (discussing constitutional provisions that were denied to Japanese-Americans during World War II through Executive Order 9066).

command that no person shall be deprived of life, liberty or property without due process of law, both of these constitutional safeguards were denied by military action under Executive Order 9066.<sup>66</sup>

More recently, during the administration of President William Jefferson Clinton, scientist Wen Ho Lee was arrested and imprisoned in solitary confinement while administration attorneys attempted to deny Lee judicial recourse, purportedly for reasons of national security.<sup>67</sup> Similarly, in 2004 the Supreme Court heard the case of Jose Padilla, an American citizen held as an enemy combatant since 2002, under suspicions that he was involved in a plot to detonate a radioactive “dirty bomb” in the United States.<sup>68</sup> Padilla was held without a hearing, without access to counsel, and without being indicted or charged with a crime for almost two years before the United States district court overruled the executive actions and restored his basic constitutional right to the counsel that then pursued his case to the Supreme Court.<sup>69</sup> Still in custody almost three years after his arrest, Mr. Padilla met with his counsel for the first time in January, 2005.<sup>70</sup> Padilla’s case may represent the strongest example yet of the conflicts of interest at the due process balance point.

The government interest in preventing anyone from detonating a dirty bomb is surely “provid[ing] for the common defense” of its citizens, to quote a primary purpose of American constitutional government listed in the preamble to the Constitution.<sup>71</sup> Yet the government is also rightly restricted by the scope of its police powers under the Constitution, and is especially limited by the Fifth and Fourteenth Amendments in ways that may materially impair its ability to prevent the detonation of dirty bombs. Which constitutional interest should prevail: providing for the common defense or due process? And, how should legislation prospectively avoid creating multiple constitutional crises resulting from unresolved conflicts such as those in Mr. Padilla’s case? Avoidance of such constitutional conflicts is crucial, for they may arise not during such relatively sedate contexts as a presidential election, but during the context of an unfolding

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66. *Id.*

67. WEN HO LEE & HELEN ZIA, *MY COUNTRY VERSUS ME* (2001) (account by the Los Alamos scientist who was falsely accused of being a spy for a foreign government).

68. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). The Court did not reach the due process question, remanding the case to the district court for reasons of jurisdictional technicalities. Specifically, the Court held that the habeas petition filed on Mr. Padilla’s behalf by his counsel was filed in a court lacking personal jurisdiction over Mr. Padilla’s immediate custodian, the commander of the Brig on which he had been held since his arrest on May 8, 2002. *Id.* at 2715.

69. *Id.*

70. Joan Ryan, *Not All Citizens Have Rights*, *SAN FRAN. CHRON.*, Jan. 13, 2005, at B1.

71. U.S. CONST. pmbl.

national catastrophe. Creating a model that avoids these conflicts was among the core considerations involved in the drafting of the MSEHPA.<sup>72</sup>

## VI. THE STRUCTURE AND PROVISIONS OF THE MODEL STATE EMERGENCY HEALTH POWERS ACT

In its preamble, the MSEHPA states:

During a public health emergency, state and local officials are authorized to use and appropriate property as necessary for the care, treatment, and housing of patients, and to destroy contaminated facilities or materials. They are also empowered to . . . separate affected individuals from the population at large to interrupt disease transmission.

At the same time, the Act recognizes that a state's ability to respond to a public health emergency must respect the dignity and rights of persons."<sup>73</sup>

The preamble of the MSEHPA concludes by asserting that, aside from the importance of optimizing response during a health emergency, a goal of the Model Act is the overall improvement of the public health system.<sup>74</sup>

The MSEHPA contains a preamble and eight articles.<sup>75</sup> Certain sections of the Act provide for emergency governmental powers to acquire, condemn, destroy, or otherwise utilize private property in the course of addressing a public health emergency.<sup>76</sup> Several of the legislative findings and definitions included in the opening sections of the model statute bear directly upon the due process analysis of the Model Act. Article I, section 102(b) states the legislative finding that, "[n]ew and emerging dangers – including emergent and resurgent infectious diseases and incidents of civilian mass casualties – pose serious and immediate threats."<sup>77</sup> Article I, section 102(i) finds that, "[t]he rights of the people to liberty, bodily

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72. See Gostin, *supra* note 27, at 20-21 (expressing the desire for the MSEHPA not to "contain radical new powers that posed a threat to civil liberties").

73. MSEHPA, *supra* note 2, pmb1.

74. *Id.*

75. The MSEHPA consists of the Preamble; Art. 1, Title, Findings Purposes, and Definitions; Art. 2, Planning For A Public Health Emergency; Art. 3, Measures To Detect and Track Public Health Emergencies; Art. 4, Declaring A State Of Public Health Emergency; Art. 5, Special Powers During A State Of Public Health Emergency: Management of Property; Art. 6, Special Powers During A State of Public Health Emergency: Protection of Persons; Art. 7, Public Information Regarding Public Health Emergency; Art 8, Misc. MSEHPA, *supra* note 2, at 2-5.

76. See MSEHPA, *supra* note 2, § 501-507 (discussing special powers during a public health emergency pertaining to the management of property).

77. *Id.* § 102(b).

integrity, and privacy must be respected to the fullest extent possible consistent with maintaining and preserving the public's health and security.<sup>78</sup> The structure of the previous finding reflects the relationship between rights of liberty and property on the one hand, and providing for the common defense on the other. Liberty, and even bodily integrity, is clearly subject to the predicated need to preserve public health – a core aspect of any common defense. Section 102(j) declares the legislation necessary to protect the safety of the citizens of the state.<sup>79</sup> The MSEHPA, through the doctrine of necessity, establishes the primacy of common defense interests of the state over the due process rights of citizens in the event of a health emergency.

The MSEHPA also defines the types of emergencies that warrant an invocation of the Emergency Powers. Article 1, Section 104(m) defines the term “public health emergency” as follows:

A “**public health emergency**” is an occurrence or imminent threat of an illness or health condition that:

- (1) is believed to be caused by any of the following:
  - (i) bioterrorism;
  - (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; and
- (2) poses a high probability of any of the following harms:
  - (i) a large number of deaths in the affected population;
  - (ii) a large number of serious or long-term disabilities in the affected population; or
  - (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.<sup>80</sup>

When one of these triggering events occurs, the governor of the state can declare a “State of Public Health Emergency,” under Article IV, section 401.<sup>81</sup> A proper execution of the order under the direction of section 402 invokes broad and comprehensive executive powers. Under a state of Public Health Emergency, a governor may suspend any regulatory statute prescribing procedures for conducting state business,<sup>82</sup> or any order, or rule of a state agency, limited by the provision that such power may be invoked only to the extent that such an exercise prevents the regulation or order from hindering the public health response.<sup>83</sup>

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78. *Id.* § 102(i).

79. *Id.* § 102(j).

80. MSEHPA, *supra* note 2, § 104(m).

81. *Id.* § 401.

82. *Id.* § 403(a)(1).

83. *Id.*

The MSEHPA provides three methods of terminating an executive order: 1) explicit termination by the Governor; 2) automatic termination after thirty days unless the governor renews under the identical terms set forth for the original declaration; or 3) a majority vote of both chambers of the state legislature.<sup>84</sup> Legislative termination may occur at any time after the original declaration upon a finding that the public health emergency no longer exists.<sup>85</sup>

When the governor makes the declaration, extensive special powers vest in the public health authority.<sup>86</sup> That authority may close, evacuate, decontaminate, or destroy any material “of which there is reasonable cause to believe that it may endanger the public health.”<sup>87</sup> The public health authority may procure, “by condemnation or otherwise,”<sup>88</sup> any material and/or facility “reasonable and necessary”<sup>89</sup> to respond to the public health emergency, with the right to take immediate possession.<sup>90</sup>

Similar taking powers apply to actions pursuant to disposal of waste, because the MSEHPA grants the public health authority the power to immediately confiscate disposal facilities, landfills, private businesses involved in waste disposal, and to compel storage or use of facilities for disposal or storage of contaminated materials.<sup>91</sup> Again, this power is limited by the requirement that these takings be reasonable and necessary in order to respond to the emergency.<sup>92</sup> The MSEHPA mandates that takings be justly compensated, but that provision expressly excludes compensation “for facilities or materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger the public health . . . .”<sup>93</sup> Section 507 provides that civil proceedings be instituted in relation to the destruction of property, “[t]o the extent practicable consistent with the protection of public health . . . .”<sup>94</sup>

With respect to the liberty and autonomy of persons, the MSEHPA vests in the public health agency powers of coercive quarantine and vaccination, with lack of cooperation constituting a misdemeanor.<sup>95</sup> The public health authority may immediately institute temporary quarantine without notice, by written directive.<sup>96</sup>

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84. *Id.* § 405(a)-(c).

85. *Id.* § 405(c).

86. MSEHPA, *supra* note 2, §§ 501-507.

87. *Id.* § 501.

88. *Id.* § 502(a).

89. *Id.*

90. *Id.*

91. *Id.* § 503(b)-(c).

92. MSEHPA, *supra* note 2, § 503(c).

93. *Id.* § 506. As an uncompensated, destructive taking is most certainly a permanent taking, such a construction is contrary to U.S. CONST. amend. V.

94. *Id.* § 507.

95. *Id.* §§ 603, 604(a) and (c).

96. *Id.* § 605(a)(1).

The individual or group quarantined gets a copy of the directive.<sup>97</sup> To continue the quarantine, the public health authority must file a petition for a court order within ten days after first instituting the quarantine.<sup>98</sup> This process is called “temporary isolation and quarantine without notice.”<sup>99</sup>

While the quarantined person may file a petition for an order to show cause why that person should not be released,<sup>100</sup> a hearing on this petition can be delayed indefinitely.<sup>101</sup> To justify a delay, the state must show that there is good cause for the delay, and that the circumstances are extraordinary.<sup>102</sup> Persons and groups do have the right to court-appointed counsel, but multiple claims may be consolidated.<sup>103</sup> The public health authority may also gain access to protected health information, “to . . . conduct epidemiologic research, or . . . investigate causes of transmission.”<sup>104</sup> Such statutory provisions illustrate the broad scope of the MSEHPA’s power to deprive persons of liberty and property.

## VII. REACTIONS

Commentary and criticism about the MSEHPA appeared almost immediately subsequent to its release in December 2001.<sup>105</sup> Tellingly, criticism emanated with

97. *Id.* § 605(a)(3).

98. MSEHPA, *supra* note 2, § 605(a)(4).

99. *Id.* § 605(a).

100. *Id.* § 605 (c)(1).

101. *Id.* § 605 (c)(3). It is unclear how “extraordinary circumstances” could not be present in the context of a declared emergency.

102. *Id.* Compare the sequence of events described here (quarantine, followed by a possible hearing) with the due process requirements attendant to involuntary commitment (for medical treatment) of a convicted felon established in *Vitek v. Jones*:

[A]mong the historic liberties protected by the Due Process Clause is the ‘right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.’ We conclude that a convicted felon [is] entitled to the benefit of procedures appropriate in the circumstances *before* he [is] transferred . . . . These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for the determination of the preconditions to adverse official action.

445 U.S. 480, 492-93 (1980) (citations omitted) (emphasis added). It is unreasonable to assume that the liberty due process interests of the ordinary citizen do not reach those of the convicted felon.

103. MSEHPA, *supra* note 2, §605(d)(1)-(2).

104. *Id.* § 607(a).

105. *E.g.*, Sharon Lerner, *A New Health-Emergency Law Raises Concerns for the Immune Compromised: Round Up the Unusual Suspects*, VILLAGE VOICE, Jan. 2, 2002 (arguing that the MSEHPA provides insufficient consideration of the potential for harm to immune-suppressed persons, that the percentage of persons in the United States that are immune-suppressed is ever-increasing, and that, historically, forced vaccination has resulted in disproportionate harm to such persons), <http://www.villagevoice.com/issues/0201/lerner.php> (last visited Feb. 22, 2005); JENNIFER KING,



comparable fervor from non-governmental policy advocacy organizations on both the left and the right of the traditional political spectrum. Jennifer King, in a policy critique written for the conservative American Legislative Exchange Council, criticized the MSEHPA as being impermissibly vague in its definitions for a statute that grants such plenary power to the executive: “. . . words such as ‘substantial’ and ‘significant’ are not defined in this legislation, but ‘infectious disease’ is defined as a disease caused by a living organism.”<sup>106</sup> King also criticizes the statute as unnecessary and duplicative, explaining that “governors already have the power to declare a state of emergency . . . .”<sup>107</sup> Definitions of such breadth arguably could subject precedent executive emergency powers to new and wholly unpredictable judicial interpretation.

King expresses her greatest alarm about the provisions of the MSEHPA concerning confiscation and rationing of personal property, calling these provisions, “Perhaps the most dangerous and unprecedented provisions of the M[S]EHPA.”<sup>108</sup>

Sharon Lerner, writing for *The Village Voice*, recounts the 1947 New York City smallpox outbreak, during which the vaccination program caused more deaths than the smallpox.<sup>109</sup> Her article quotes Donna Lieberman of the New York Civil Liberties Union, who described the MSEHPA as, “[A] recipe for discriminatory application . . . . We are concerned that emergency powers will be used to target minority groups, whether they be gays or people of color or those perceived to be most at risk of infection.”<sup>110</sup> Lieberman’s harshest criticisms assert that the very policy of quarantine as a method of infectious disease control has been discredited by MSEHPA author Gostin himself.<sup>111</sup>

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AMERICAN LEGISLATIVE EXCHANGE COUNCIL, POWER GRAB: THE STATES IN A STATE OF EMERGENCY: THE MODEL HEALTH EMERGENCY POWERS ACT, (Jan. 2002) (arguing, *inter alia*, that the unlimited power of the executive branch is not sufficiently checked by judicial oversight), <http://www.alec.org/meSWFiles/pdf/0202.pdf> (last visited Feb. 22, 2005); Julie Bruce, *Bioterrorism Meets Privacy: An Analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule*, 12 ANNALS HEALTH L. 75 (2003) (raising concerns about conflicts between federal medical privacy statutes and the MSEHPA provision for the public health authority’s access to protected medical information).

106. King, *supra* note 105, at 1.

107. *Id.* at 2.

108. *Id.*

109. Lerner, *supra* note 105.

110. *Id.*

111. *Id.*; see also Barbera et al., *supra* note 22, at 2711. In Barbera’s article, co-authored by Professor Gostin, the main thesis is: “Imposition of large-scale quarantine – compulsory sequestration of groups of possibly exposed persons or human confinement within certain geographic areas to prevent spread of contagious disease – should not be considered a primary public health strategy in most imaginable circumstances.”

Furthermore, critics charge that coercive vaccination under the MSEHPA would prove fatal to a large portion of the immune-deficient population.<sup>112</sup> Lerner quotes Tanya Ehrmann, Director of Public Policy for AIDS Action in Washington D.C., regarding the prospect of group quarantine and forced vaccination: "This isn't a situation in which people are unwilling to comply with a requirement . . . . It's that the vaccine would kill us. What are we supposed to do?"<sup>113</sup>

Lerner's critique of the effectiveness of quarantine also cites the primary drafter of the MSEHPA, Professor Gostin himself, as providing the most cutting criticism of the plausibility of a quarantine procedure: "It is probable that a population exposed to a biological weapon will have dispersed well beyond any easily definable geographic boundaries before the infection becomes manifest and any disease containment measures can be initiated."<sup>114</sup> The evaluation of inflicted harm through vaccination, to be a complete analysis, must consider the alternative of a large disease vector in the absence of vaccination.<sup>115</sup> Such analysis is not found in Lerner's article.

Professor Wendy Parmet has strongly criticized the quarantine powers and the vague, broad domains of their potency.<sup>116</sup> Under Parmet's reading of the MSEHPA, the Model Act potentially grants the power to quarantine persons with HIV, for an indeterminate period of time, in a smallpox based attack, without any prior notice.<sup>117</sup> Parmet surmises that the inability of immune-deficient persons to be immunized for smallpox could, in such an event, be argued as a reasonable basis for such wholesale quarantine of a sizeable class of citizens.<sup>118</sup> Exposure of immune-deficient persons to persons infected but not presenting symptoms could present a high probability of infection, by virtue of their deficiency of resistance to

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112. Lerner, *supra* note 105.

113. *Id.*

114. *Id.* (quoting Barbara et al., *supra* note 22, at 2714).

115. See *infra* notes 143-152 and accompanying text (discussing the 1947 Smallpox outbreak).

116. Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85, 111 (2003).

117. *Id.* at 93-97. Parmet constructs her hypothetical around MSEHPA art. VI, § 604, allowing for the indefinite quarantine of "an individual or groups of individuals." This includes individuals or groups of individuals "who have not been vaccinated, treated, tested, or examined . . ." *Id.* § 604(a). § 605(a) continues, "The public health authority may temporarily isolate or quarantine an individual or groups of individuals . . . if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease to others." The thrust of Parmet's argument is that, under the foregoing language, it is reasonable that persons with HIV could be construed as a group warranting quarantine, because these persons would not be vaccinated due to the vaccine's tendency to attack their weak immune systems; thus, they would be contagious. See *id.*

118. *Id.* at 93-94.

infection. Quarantine, therefore, could foreseeably cause the deaths of quarantined immune-deficient persons, that might not have been otherwise.<sup>119</sup>

Perhaps most chilling is a direct quotation from a 1987 article by MSEHPA drafter Gostin, who wrote:

There is some public support for restricting the liberty and autonomy of HIV-infected people. In five national public opinion polls conducted between September 1985 and November 1986, 28 to 54 percent of the respondents favored 'quarantine' of people with AIDS in 'special places to keep them away from the general public.'<sup>120</sup>

Criticism and analysis of the MSEHPA in academic journals has reflected similar concerns, focusing mainly on privacy concerns.<sup>121</sup> These criticisms seem to have had little effect on adoption of the Model Act as the basis for actual legislation. In the months following the release of the MSEHPA, several state legislatures considered the Model Act in their deliberations on Emergency Health Powers legislation.<sup>122</sup> By July 2002, seven states had passed portions of the MSEHPA, including Maryland.<sup>123</sup> Eleven states had rejected or shelved the legislation, while most of the remaining states had passed legislation intended to deal with a catastrophic health emergency that had no connection to the Model.<sup>124</sup>

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119. Lerner, *supra* note 105. Immune-deficient persons are also necessarily contra-indicated for vaccination, as vaccination, *a priori*, is an intrusion upon and leveraging of the immune system to prevent infection. Such prophylaxes hold the high probability of accelerating the deaths of immune-deficient.

120. Parmet, *supra* note 116, at 95-96 (quoting Larry Gostin & Andrew Ziegler, *A Review of AIDS-Related Legislative and Regulatory Policy in the United States*, 15 L. MED. & HEALTH CARE 5, 11 (1987)).

121. *E.g.*, Bruce, *supra* note 105, at 79-88 (posing numerous hypothetical concerns regarding the interaction of the MSEHPA provision for medical information access and the federal HIPAA provisions); *see also* Lorena Matei, *Quarantine Revision and the Model State Emergency Health Powers Act: "Laws for the Common Good,"* 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 433 (2002) (detailing the origins of the MSEHPA and examining the problems attendant to quarantine, while presenting the standardization of quarantine procedures through the MSEHPA as ineffective).

122. *See generally* Memorandum from Andrew Schlafly, General Counsel, Association of American Physicians and Surgeons (outlining the first seven states to enact portions of the MSEHPA) <http://www.aapsonline.org/testimony/emerpowers2.htm> (last visited Feb. 22, 2005); *see also* THE CENTER FOR LAW & THE PUBLIC'S HEALTH (CLPH), THE MODEL STATE EMERGENCY HEALTH POWERS ACT: STATE LEGISLATIVE ACTIVITY (July 1, 2004) (noting that forty-three states have introduced or passed legislation based in whole or in part on the MSEHPA), [http://www.publichealthlaw.net/MSEHPA/MSEHPA\\_Legis\\_Activity.pdf](http://www.publichealthlaw.net/MSEHPA/MSEHPA_Legis_Activity.pdf) (last visited Feb. 22, 2005).

123. Memorandum from Andrew Schlafly, *supra* note 122.

124. *Id.*

### VIII. THE RELATION OF THE MARYLAND EMERGENCY POWERS LEGISLATION TO THE MSEHPA

The Maryland legislation dealing with the subjects addressed by and partially derived from the MSEHPA became law in the state of Maryland on April 9, 2002 – less than five months after the release of the amended draft of the MSEHPA.<sup>125</sup> The Maryland Act differs from the MSEHPA in three crucial aspects: 1) the structure of the definitions attempts to address concerns of vagueness in the MSEHPA; 2) the structural modifications in the Maryland Act incorporate existing Maryland emergency management agency planning systems; and 3) procedures and explicit limitations of term and scope of the executive powers of taking and quarantine are far more detailed and thorough in their drafting.<sup>126</sup>

The Maryland Act, even with these enhancements, has been the subject of criticism. Center for Health and Homeland Security Director and University of Maryland School of Law Professor Michael Greenberger offered this comment on the Maryland statute: “I don’t think anybody understands just how draconian it could be if put in the wrong hands.”<sup>127</sup> Yet the due process safeguards written into the Maryland law are substantially more secure than those drafted in the MSEHPA.

The initial clue to the differences between the MSEHPA and the Maryland statute is that the state of emergency declared in each is labeled in very different ways. Whereas the MSEHPA labels such a state as a “public health emergency,”<sup>128</sup> the Maryland statute labels it as a “catastrophic health emergency.”<sup>129</sup> The MSEHPA defines a “public health emergency” as “an occurrence or imminent threat of an illness or health condition.”<sup>130</sup> Maryland defines “catastrophic health emergency” as an imminent threat of extensive loss of life or of serious disability caused by exposure to a deadly agent.”<sup>131</sup> “Deadly

125. Letter from Karl S. Arno, Executive Director, Md. Dep’t of Leg. Servs., to the Members of the (Maryland) General Assembly (2002) (listing the bills signed and vetoed by Governor Parris N. Glendening following the 2002 Session of the General Assembly. This letter lists S.B. 234, Catastrophic Health Emergencies – Powers of the Governor and the Secretary of Health and Mental Hygiene, as the first bill signed by the governor), *available at* <http://mlis.state.md.us/2002rs/Signings/signed.htm> (last visited Feb. 22, 2005).

126. *Compare* MD. CODE ANN., PUB. SAFETY, § 202(c)(1) (2003) (“The Governor shall rescind a proclamation issued under this section whenever the Governor determines that the catastrophic health emergency no longer exists”), *with* MSEHPA, *supra* note 2, § 402(d) (requiring the term of the emergency to be included in the initial declaration: “A state of public health emergency shall be declared by an executive order which specifies . . . the duration of the state of the public health emergency, if less than 30 days . . .”).

127. Brian M. Schleiter, *Public Safety, Civil Liberties Often at Odds in Terror War*, THE CAPITAL (Annapolis, Md.), Sept. 6, 2002, at A1.

128. MSEHPA, *supra* note 2, § 104(m).

129. MD. CODE ANN., PUB. SAFETY, § 14-3A-01(b) (Supp. 2004).

130. MSEHPA, *supra* note 2, § 104(m).

131. MD. CODE ANN., PUB. SAFETY, § 14-3A-01 (Supp. 2004).

agent” in the Maryland statute occupies the same position as “bioterrorism” in the MSEHPA. The MSEHPA definition includes a general and comprehensively inclusive list of agent-categories, while the Maryland definition provides detailed guidance regarding what agents are included in the scope of the statute.

“Bioterrorism” is defined in the MSEHPA as, “the intentional use of any microorganism, virus, infectious substance, or biological product that may be engineered . . . in order to influence the conduct of government or to intimidate or to coerce a civilian population.”<sup>132</sup> Maryland’s definition of “deadly agent” makes no reference to intent and defines it in terms of specific varieties of nuclear, biological, and chemical materials.<sup>133</sup> For example, the MSEHPA definition includes “any microorganism, virus, infectious substance, or biological product . . . .”<sup>134</sup> In contrast, the Maryland definition of “deadly agent,” provides a more explicit enumeration of subject conditions:

“Deadly agent means . . . (1) anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability; (2) mustard gas, nerve gas, or other chemical agent capable of causing extensive loss of life or serious disability; or (3) radiation at levels capable of causing extensive loss of life or serious disability.”<sup>135</sup>

The lack of reference to intent in the Maryland statute is, in the absence of a detailed legislative historical record, likely to be the result of the necessary integration of the emergency powers into a pre-existing statutory opus. This omission of the intent requirement present in the MSEHPA definition of bioterrorism provides more flexibility in the executive ability to invoke the powers granted in section 14-3A-03 of the Maryland statute, which enumerates the extent and nature of the health commissioner’s police powers under the act.<sup>136</sup> The triggering event in the Maryland statute merely requires the presence of a deadly agent regardless of the presence of intent. The powers granted to the governor under Section 14-3A-03 parallel the powers granted in the MSEHPA.<sup>137</sup>

Under the Maryland statute, the governor makes a proclamation that then vests power in the Maryland Emergency Management Agency (MEMA) secretary, “or other designated official.”<sup>138</sup> Acquisition, rationing, stockpiling, coerced cooperation of health care providers, price fixing, taking, quarantine, and coerced

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132. MSEHPA, *supra* note 2, § 104(a).

133. MD. CODE ANN., PUB. SAFETY § 14-3A-01(c) (Supp. 2004).

134. MSEHPA, *supra* note 2, § 104(a).

135. MD. CODE ANN., PUB. SAFETY § 14-3A-01(c) (Supp. 2004).

136. *Id.* § 14-3A-03 (Supp. 2004).

137. *Id.*

138. *Id.*

medical examination and vaccination are all discussed in the Maryland Act.<sup>139</sup> In the Maryland Act, special provisions are present with respect to vaccination that differ both in structure and in content from the MSEHPA: “If medically necessary and reasonable to treat, [the secretary or other designated official can] require the individual to submit to vaccination or medical treatment.”<sup>140</sup> In the MSEHPA, the language limiting the power of coercive vaccination requires only “necess[ity] to address the public health emergency” regardless of any connection to medical necessity.<sup>141</sup> The Maryland Act specifically requires, before coercive vaccination is allowed, that a medical necessity exist in order to “. . . treat, prevent or reduce the spread of the disease or outbreak.”<sup>142</sup> The medical necessity language in the Maryland Act addresses concerns of immune-deficient persons for whom a smallpox vaccination could likely be far more deadly than for the general population. Of course, the exception addressed in both provisions – the lack of power to vaccinate all persons – raises equally serious concerns. If, in the modern age of unprecedented personal mobility, the efficacy of quarantine is even lower than its already suspect level, mass vaccination – even with substantial casualties among the vaccinated population – may be the only possible method of stemming a contagion. A strong argument can be made that the decisions regarding who must be vaccinated are decisions that should not be prospectively restricted.

The efficacy of mass vaccination is evident when comparing historical instances of mass vaccination and the resulting mortality rates with probable mortality rates in a population where the contagion proceeds unchecked. In the same 1947 New York City outbreak discussed above, the rapid and comprehensive blanket vaccination program, which did in fact cause several vaccination-related deaths, most likely prevented the deaths of tens of thousands of people.<sup>143</sup> The span of that outbreak was roughly one calendar month.<sup>144</sup> The disease vector formed when a single smallpox carrier arrived from Mexico in late March 1947.<sup>145</sup> The first three subsequent cases were reported on April 5.<sup>146</sup> Within 48 hours, hospitals in all five boroughs were vaccinating people 24 hours a day.<sup>147</sup> There was no reported coercion.<sup>148</sup> By May 3, the outbreak was declared controlled.<sup>149</sup>

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139. *See id.* § 14-3A-03(b)(2).

140. *Id.* § 14-3A-03(b)(3).

141. MSEHPA, *supra* note 2, § 603(a).

142. MD. CODE ANN., PUB. SAFETY, § 14-3A-03(b)(3) (Supp. 2004).

143. Lerner, *supra* note 105; *see also* N. Gayed, *Notes on an epidemic of smallpox in New York City – 1947 and the ensuing mass vaccination* (Aug. 30, 2000), at <http://www.med.uic.edu/m2/epidemiology/smallpox.htm> (last visited Feb. 22, 2005).

144. *See id.* (reporting on events from April 5 to May 3, 1947).

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* Gayed, *supra* note 143.

149. *Id.*

In that time-span, over 6.3 million people had been vaccinated.<sup>150</sup> Of these, there were four to eight vaccine related deaths,<sup>151</sup> producing a vaccination fatality rate of 0.016%. Smallpox, when unchecked, kills approximately thirty percent of those afflicted, with most of the rest horribly disfigured.<sup>152</sup> The 1947 smallpox vaccination program demonstrates how an effective statutory scheme of coercive treatment can effectively balance the potential for curtailment of contagion offered by mass vaccination with the imminent risks of harm attendant to the same strategy.

The Secretary of DHMH, being subject to the governor's oversight, subordinates the execution of the emergency powers within a well-established statutory scheme concerning emergency management.<sup>153</sup> This integration preserves a level of executive review over and above the practical actions of the Secretary.<sup>154</sup> In itself, this constitutes a system of checks on the exercise of these powers that does not exist under the MSEHPA. But the most sweeping divergence between the MSEHPA and the Maryland statute occurs in the procedures invoked when a person is quarantined or isolated in the event of a declared catastrophic health emergency.

If the DHMH secretary needs to isolate or quarantine one or more persons, she or he must provide written notice (unless it is somehow the case that written notice is impracticable, whereby the secretary must then strive to give notice in the best way that is possible).<sup>155</sup> This notice must include who is to be quarantined, where they are to be quarantined, the term of the quarantine, the suspected deadly agent, why the quarantine is justified, and, most relevant to this examination, the notice must inform the affected person of the availability of a hearing to contest the directive.<sup>156</sup>

In contrast, the provision for notice of the opportunity for a hearing in the MSEHPA procedural specifications requires only that the affected person be supplied with a copy of the statute.<sup>157</sup> The availability of a hearing under MSEHPA must be gleaned not from the directive itself, but rather from a reading of the statute. In the MSEHPA these specifications appear under the heading, "Temporary isolation and quarantine without notice."<sup>158</sup>

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150. *Id.*

151. *Id.*

152. *SBIR Grant Awarded to Develop Anti-Smallpox Therapeutics*, MED. LETTER ON THE CDC & FDA, Oct. 12, 2003, at 46.

153. MD. CODE ANN., PUB. SAFETY, § 14-3 (2003).

154. *See* MD. CODE ANN., PUB. SAFETY, § 14-3A-03(b) (Supp. 2004) (listing the orders the Governor can issue to the Secretary).

155. *Id.* § 14-3A-05.

156. *Id.* § 14-3A-05(b)(1).

157. MSEHPA *supra* note 2, § 605(a)(2)(v).

158. *Id.*

Under the Maryland Act the hearing to contest the quarantine directive, once requested, must take place within seventy-two hours of the receipt of the request.<sup>159</sup> The Maryland statute provides no formal guidance as to what constitutes a request, but unlike the MSEHPA, which specifies two different scheduling requirements – one for petitions for release,<sup>160</sup> and another for petitions alleging a breach of conditions<sup>161</sup> – the Maryland Act provides a unified procedural timeline regardless of the nature of the request.<sup>162</sup> The bifurcation of procedural requirements in the MSEHPA increases the burden on the affected person, requiring him or her to comprehend the language of the statute provided in the quarantine directive. This stands in stark contrast to the notice of the availability of a hearing, with a single procedural schedule, provided with the Maryland directive.

The seventy-two-hour time frame specified in the Maryland Act may be extended, but the change must come from the court.<sup>163</sup> In considering whether to extend the time for the hearing, the statute directs the court to consider, “the rights of the affected individual . . . the protection of the public health, the severity of the catastrophic health emergency, and the availability of any necessary witnesses and evidence.”<sup>164</sup>

The Maryland statute also provides detailed guidance to the judiciary regarding how the hearing is to be conducted, given the likelihood that the individual affected is not available to personally appear in the court.<sup>165</sup> Such due process considerations do not appear to extend to individuals from whom property has been appropriated, with existing civil due process procedures allowing an affected individual to pursue relief, restoration, or restitution.<sup>166</sup>

Under the Maryland Act, the quarantine must be both “necessary” and “reasonable to prevent or reduce the spread of the disease or outbreak . . . caused by exposure to the deadly agent.”<sup>167</sup> If the executive has failed to meet these two criteria, the court “shall” grant the request for relief.<sup>168</sup> This mandatory, plain language directive is not found, directly or by analogy, in the MSEHPA.

Also under the Maryland statute, a quarantine or isolation order is effective for a maximum of thirty days, but the secretary may extend the quarantine in

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159. *Id.* § 14-3A-05(c)(3).

160. MSEHPA *supra* note 2, § 605(c)(1).

161. *Id.* § 605(c)(2).

162. MD. CODE ANN., PUB. SAFETY, § 14-3A-05(c) (Supp. 2004).

163. *Id.* § 14-3A-05(c)(4).

164. *Id.* § 14-3A-05(c)(4)(ii).

165. *Id.* § 14-3A-05(e).

166. *See* MD. CODE ANN., PUB. SAFETY § 14-206 (2003) (providing for an administrative hearing to determine whether a taking of property during an emergency is justified).

167. *Id.* § 14-3A-05(c)(5)(i).

168. *Id.*



thirty-day periods, each subject to the notice and procedural requirements initially imposed.<sup>169</sup>

A comparison of the Maryland Act with the MSEHPA reveals language and provisions in the Maryland Act which enhance the assurance of actual notice to the affected person. Additionally, the simplified procedural scheme for challenges to an order for isolation or quarantine relieve the interpretative burden both on the affected person and his or her counsel. Finally, the Maryland Act gives clear and unambiguous direction to the judiciary mandating release as a remedy when warranted.

### IX. CONCLUSION

Both the MSEHPA and the Maryland statute attempt to balance the values of life, liberty, and property with the necessity of a viable defense against an NBC attack. Both documents implicitly acknowledge that these fundamental aspects of being fully human are logically dependant on the life that possesses the property or that lives in freedom. The Maryland statute, adopted without much debate or public notice,<sup>170</sup> was considered during a period when, as William Safire recently wrote, "The right to be let alone had to be balanced against the right to stay alive."<sup>171</sup>

In comparison to the MSHEPA, the Maryland statute provides greater and more detailed guidance as to how the state may attempt to control the damage of a large-scale terrorist attack precipitating a health emergency. These provisions provide enhanced protections for persons for whom MSHEPA measures could be fatal. Although predicting the optimal combination of public health policy and civil liberties protection is an uncertain endeavor, the Maryland Act is a more reasonable initial formulation than the MSHEPA.

169. *Id.* § 14-3A-05(d).

170. *The (Baltimore) Sun* coverage of the statute is quoted here, in its entirety:

The proposals for responding to a chemical or biological attack would clarify the governor's ability to declare a catastrophic health emergency. If an emergency was declared, the health secretary could quarantine people if they were exposed to a deadly communicable disease. [Governor Glendening's Communications Director, Mike] Morrill said such authority would be used sparingly and only as a last resort. But [ACLU attorney David] Roach said the bill 'raises potential civil liberties concerns.' Del. Joseph F. Vallario Jr., chairman of the House Judiciary Committee, said legislators would safeguard civil liberties. 'We are going to do our best to make sure the bill protects the liberties of our state, but protects the public,' said the Prince George's County Democrat.

Tim Craig, *Governor, Assembly Leaders Agree on Anti-terrorism Bills; Package Would Allow Broader Investigation; ACLU Has 'Concerns'*, BALT. SUN, Jan. 23, 2002, at 1B.

171. William Safire, *Privacy in Retreat*, N.Y. TIMES, Mar. 10, 2004, at A27.

As time lengthens the perspective of the legislature, the measures that the Maryland statute allow should be carefully reviewed in light of current social needs, while keeping ever mindful that the rights and values at stake could not be more interdependent and fundamental.