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Power Grab: The States in a State of Emergency The Model Emergency Health Powers Act

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Author's Note: On December 21, 2001, the authors of the MEHPA released a second draft in their attempt to respond to some of the major criticisms leveled against the bill, including some of the concerns outlined in the following paper. While some of these changes reflect the concerns shared by groups interested in protecting and promoting civil liberties, other changes were merely cosmetic, inexplicable, or altogether nonexistent. Moreover, the release of a revised draft does not mask the original intent of the authors nor does it prevent states that have already introduced the original draft from considering the original provisions.

Since the tragic attacks of September 11, all levels of government have been forced to assess their ability to respond to future events, including chemical and biological attacks. While it is difficult to anticipate acts of terror, it is wise for states and localities to examine existing laws and procedures to determine points of weakness in rapid response scenarios.

The Centers for Disease Control and Prevention (CDC), in collaboration with a number of groups, has drafted model legislation to provide, in its words, a public health framework for future bioterrorist attacks. This legislation, innocuously titled the "Model State Emergency Health Powers Act" (MEHPA), contains a number of provisions that grant state government—governors in particular—with broad, new police powers. The legislation should raise concerns of free-market health care advocates and defenders of liberty.

The MEHPA went public on October 30, 2001, when the U.S. Department of Health and Human Services (HHS) issued a press release heralding the introduction of MEHPA. The MEHPA, according to a statement by HHS Secretary Tommy Thompson, "is an important tool for state and local officials to respond to bioterrorism and other public health emergen-

cies." (HHS Release, 10/30/01). The statement said that the goal of the MEHPA is to "develop a consensus-based model legislation to assist states that are considering new emergency public health legislation." (HHS Release, 10/30/01).

To date, the MEHPA has generated little press, largely because most state legislatures are out of session. However, the CDC-funded Center for Law and Public Health, which has taken the lead on drafting the legislation, along with the National Conference of State Legislatures, the National Governors Association, the National Association of Attorneys General, the National Association of City and County Health Officials, and the Association of State and Territorial Health Officials, is actively promoting the bill in all fifty states, and it is certain the bill will be considered in virtually every state in session next year.

The following is a discussion of the key features of the bill.

I. Declaration of Emergency.

The text of the bill is premised on the ability of the Governor to declare a state of emergency once there is a threat or an attack on the public health. Specifically, the text allows a Governor to declare such state "if the Governor finds an occurrence or imminent threat of an illness or health condition, caused by bioterrorism, epidemic, or pandemic disease, or novel and highly fatal infectious agents or biological toxins, that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability" (MEHPA, Section 301). However, words such as "substantial" and "significant" are not defined in the legislation, but "infectious disease" is defined as a disease caused by a living organism (Section 104).

There are two major problems with this section of the bill that foreshadow the problems with the remaining thirty-nine pages of text.

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First, all Governors already have the power to declare a state of emergency under existing natural disaster statutes. So the powers granted under MEHPA are duplicative and unnecessary. Moreover, once such state is declared, all existing statutes are preempted—so chaos may rule. Second, the vagueness of the language and lack of definitions of key terms leaves too many questions unanswered. Could a Governor impose a state of emergency for non-terrorism related public health outbreaks, like AIDS or chicken pox? Aren't all infectious diseases caused by living organisms?

Most unusual is the fact that there are no provisions for judicial or legislative review of the emergency declaration. In fact, the legislature is pointedly prohibited from reviewing the declaration for 60 days. After that time, the legislature can override the declaration by a 2/3 vote of both chambers. Thus, the role of the legislature—the representatives of the state's citizens—is effectively meaningless since it is only allowed to override a decision after it has been in effect for two months.

II. Reporting/Tracking/Information Sharing

One of the other more alarming aspects of MEHPA is the blatant disregard for personal privacy and individual liberties. While the Act supposedly makes an effort to provide due process and claims to protect individual rights, it actually contains a number of provisions that make privacy advocates cringe.

The MEHPA requires all health professionals to report suspected incidents of terrorism—this is typical under existing public health statutes. MEHPA further requires all pharmacists to report “unusual” prescribing practices or “unusual trends in pharmacy visits” (Section 201). While some states already require similar reporting, what is not defined is what is “unusual”. Moreover, what is dangerous about MEHPA is what is required to be reported to the public health commissioner. Instead of providing aggregate or generalized data, a pharmacist must report a patient's name, date of birth, sex, race, current address, address and name of health care provider, and “any other information needed to locate the patient for follow-up” (Section 201). It seems hard to justify the need for all of this personal information if a person simply purchases some aspirin or Kaopectate from the pharmacy, when it just so happens that “too many” others have purchased those products in the same time frame.

As noted above, personal privacy is sacrificed in the MEHPA, presumably in the interest of the common good. MEHPA requires all information gathered by health professionals and pharmacists to be reported to the public health authority, which is then charged with tracking all such information. MEHPA further allows for the disclosure of patient records to “persons who have a legitimate need” (Section 506). Again, “legitimate need” is not defined in the bill.

The bill also authorizes the sharing of information between the public health and public safety officials. It is important to take stock of the broad new powers granted to the public health officials under MEHPA. These health commissioners are unelected and therefore have little or no accountability to the public, yet they are arguably as powerful as the Governor under MEHPA. Police officers are actually placed under the authority of public health officials in MEHPA.

III. Confiscation and Rationing of Personal Property

Perhaps the most dangerous and unprecedented provisions of the MEHPA include those allowing for the confiscation and/or destruction of personal property. Section 402 of the legislation expressly provides for the procurement and/or use of facilities and materials, including health care facilities. More importantly, it includes provisions allowing the government to ration such items as “food, fuel, clothing, and other commodities, alcoholic beverages, firearms, explosives, and combustibles...” The bill authorizes compensation for the taking of any facilities or materials lawfully taken in accordance with the Act, but provides no compensation for facilities destroyed while responding to an emergency situation.

Still, the rationing of items such as food and firearms seems ludicrous, and, once again, is unjustified. It is hard to imagine a provision that more flagrantly violates our constitutional right to bear arms. In addition, the ability of the state to take over our lives in such manner presumes the ignorance of the private sector and the American people, and the superiority of the government.

IV. Mandatory Vaccines, Examinations, and Quarantines

MEHPA allows public health officials to force citizens to submit to physical examinations and testing and mandatory vaccination, under penalty of a misdemeanor. There are few exceptions to these provisions, including no religious or philosophical exemption for

opting out of vaccination. The only reason a person may be exempted from the vaccination requirement is if, in the ever-vague MEHPA language, “the public health authority has reason to know that a particular individual is likely to suffer from serious harm from the vaccination” (Section 504 (a)(2)).

Also unanswered in the MEHPA is the question of the priority of vaccination and other health care under an emergency situation. The bill allows for rationing of items and for government distribution, but gives priority to public health staff, including health care providers, disaster response personnel, and mortuary staff (Section 405).

Another key vaccine provision of the bill allows the public health authority to ration product, whether or not the public health authority has purchased that product. Further, the public health authority may “control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, price fixing, etc...” (Section 405). Once again, we see the private market and the legislative branch subverted by the state, as public health authorities may determine who gets what drugs when “without any additional legislative authorization” (Section 405 (a)).

The final major provision of concern in MEHPA is the ability of the state to quarantine individuals. While some states certainly have antiquated quarantine laws dating back to the early 1900’s, the MEHPA effectively sets up “camps” of infected and possibly infected individuals. Yes, the MEHPA establishes “due process” for determining who should be placed in these camps, but the “due process” outlined in the bill would probably impede the ability of the state to respond adequately to a real crisis.

In addition, the need for such camps is unproven and the camps envisioned in MEHPA would likely require the use of force to be established. Americans cherish their right to freedom and certainly would balk at being herded into quarantine en masse.

Currently, certain communicable diseases require quarantine either at home or in a hospital setting. Nothing would prevent such “voluntary” quarantine from occurring under a bioterrorist attack. What would be more useful than the camps envisioned in MEHPA would be thorough community education on when people should stay at home or when they should seek medical assistance. Also more useful than MEHPA’s provisions would be greater training for disaster response teams who would be able to treat a large infected population on-site rather than setting up quarantine camps.

While some may argue that the MEHPA is well intentioned, the first legislative finding listed in Section 102 of the bill summarizes the intent of the bill. The finding reads: “*The government* must do more to protect the health, safety, and well-being of our citizens.” It is clear from these first words of MEHPA that the intention of the drafters is to push Americans closer to government-run health care, and to do so in the name of the common good. The MEHPA blatantly ignores the key role of the private sector and of individuals in responding to crisis situations, and assumes Americans should rely instead on the government.

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