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Bioterrorism Meets Privacy: An Analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule

Julie Bruce

INTRODUCTION

Every state has acknowledged power to pass[,] and enforce, health and inspection law[s], to prevent the introduction of disease, pestilence, or unwholesome provisions; such law[s] interfere with no powers of Congress or treaty stipulations; they relate to internal police[,] and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution. . .¹

In April 2000, the Centers for Disease Control (hereinafter “CDC”) published “Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response.”² In its report, the CDC concluded, “terrorist incidents in the United States and elsewhere involving bacterial pathogens, nerve gas and lethal plant toxins have demonstrated that the United States is vulnerable to biological and chemical threats.”³ As the CDC predicted less than two years ago, bioterrorism is no longer something Americans can discuss in the future tense. After the terrifying events of September 11, 2001 and the anthrax attack that followed, citizens of the United States of America realize that bioterrorism is no longer just a looming threat, but rather a new reality.

1. *Holmes v. Jennison*, 39 U.S. 540, 616 (1840). In this case, George Holmes, the petitioner, appealed the Supreme Court of Vermont’s remand of his writ of habeas corpus. The Supreme Court took this case on a writ of error. The Supreme Court found the issues presented to be questions that, under § 25 of the Judiciary Act of 1789, were left to the states to decide. Therefore, the Supreme Court dismissed the writ of error for lack of jurisdiction. In its decision, the Supreme Court discussed the powers granted to the state and national governments, stating that “the states may severally act upon [a] subject until the national government shall have acted.” *Id.* at 551. The states cannot act “where there is a grant of power to the national government exclusive in its terms.” *Id.* at 549.

2. *Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response*, MORBIDITY AND MORALITY WEEKLY REPORT (CDC, Atlanta, GA), Apr. 21, 2000, available at <http://www.bt.cdc.gov/Documents/BTStratPlan.pdf>.

3. *Id.*

The United States government has also recognized this.⁴ In a statement late last year regarding bioterrorism, the Secretary of the Department of Health and Human Services, Tommy Thompson, said, "We need not only a strong health infrastructure and a full stockpile of medical resources, but also the legal and emergency tools to help our citizens quickly."⁵

Part of the response to the challenge of creating an environment that can quickly respond to a public health emergency is the Model State Emergency Health Powers Act (hereinafter "MSEHPA").⁶ The MSEHPA was written by the CDC in conjunction with the Center for Law and the Public's Health at Georgetown University and Johns Hopkins University. It is intended to serve as a basis for further collaboration with other interested parties, including the National Governors Association, the National Conference of State Legislatures, the National Association of Attorneys General, the Association of State and Territorial Health Officials, and the National Association of City and County Health Officers. The MSEHPA is intended to create a "renewed focus on the prevention, detection, management, and containment of public health emergencies."⁷

In efforts to create a framework for states to work within during a public health emergency, the MSEHPA has taken strong blows of criticism from individuals and groups who oppose the Act's "sweeping powers" that some feel are "draconian,"⁸ and reminiscent of "the old Soviet model of public health—lots of power and no standards for applying it."⁹ The provisions of the

4. DEP'T OF HEALTH & HUM. SERVS., *HHS Announces \$1.1 Billion in Funding to States for Bioterrorism Preparedness*, HHS NEWS, Jan. 31, 2002, available at <http://www.hhs.gov/news/press/2002press/200201316.html>. Tommy Thompson, Secretary of the Department of Health and Human Services, announced a plan to distribute funds to the states in order to ensure that the states can "building strong public health systems for responding to bioterrorism attack[s]" and to illustrate that the federal government is "do[ing] everything [it] can to ensure that America's ability to deal with bioterrorism is as strong as possible." *Id.*

5. DEP'T OF HEALTH & HUM. SERVS., *Statement by HHS Secretary Tommy G. Thompson Regarding the Model State Emergency Health Powers Act*, HHS NEWS, Oct. 30, 2001, available at: www.hhs.gov/news/press/2001pres/20011030.html.

6. THE MODEL STATE EMERGENCY HEALTH POWERS ACT, (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

7. THE MODEL STATE EMERGENCY HEALTH POWERS ACT PREAMBLE (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

8. Jon Dougherty, *Bill Would Give Governors Absolute Power*, WORLD NET DAILY, Jan. 2002, available at <http://www.vaccinationnews.com>.

9. Marcia Coyle, *States Urged to Update Antiquated Public Health Laws*, Nat'l L. J., Nov. 2, 2001, available at <http://www.law.com>.

MSEHPA instill broad emergency powers in the states.¹⁰ This is part of the effort to facilitate the early detection of health emergencies, and the advanced preparation of comprehensive plans to provide a coordinated response to the health emergency. As written, the MSEHPA grants the governor of the state enormous power,¹¹ including the “ability to arrest, transport, quarantine, drug and vaccinate anyone suspected of carrying a potentially infectious disease.”¹² It is this vast inclusion of future scenarios coupled with the concentration of power created by the MSEHPA that has generated criticism and hesitation from so many individuals.

In sharp contrast to the MSEHPA is the Privacy Rule of the Health Information Portability and Accountability Act of 1996 (hereinafter “HIPAA”).¹³ HIPAA was promulgated in part to protect the private health information of Americans.¹⁴ Privacy is one of the bedrock principles in federal and state constitutional law.¹⁵ Where HIPAA attempts to create a system of padlocks on protected health information (hereinafter “PHI”), the MSEHPA creates a system of disclose now, obtain consent later. Under certain circumstances, the MSEHPA gives designated officials liberal access to PHI without the obligation of adhering to privacy regulations until after they have obtained, utilized, and possibly even released PHI.

10. *Id.*

11. Thomas W. Washburne, *Review of the Model State Emergency Health Powers Act*, Nat’l Ctr. for Home Educ., available at <http://www.hslda.org/docs/nche/000010/200112201.asp>.

12. News Release, Tetrahedron LLC, *CDC Advances Totalitarian Legislation Under Guise of “Public Health”: Forced Drugging and Injections are on the Horizon*, Nov. 9, 2001, available at <http://www.tetrahedron.org/news/NR011109.html>.

13. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

14. The Office for Civil Rights, *Standards for Privacy of Individually Identifiable Health Information*, available at <http://www.aspe.hhs.gov/admsimp/final/pvcguide1.htm>. The HIPAA privacy rule “provides the first comprehensive federal protection for the privacy of health information.” *Id.*

15. Peter Olson, *Pickup Basketball*, 16 CONST. COMMENT. 39 (Spring 1999).

The First Amendment, in every of its terms, stands on the foundational principle that there is a penumbra or zone of privacy surrounding everyone entitled to its protection against governmental intrusion. Beyond the First Amendment’s right of assembly, for example, there is the Third Amendment’s prohibition against the quartering of soldiers, the Fourth Amendment’s right to be free from unreasonable searches, and the Fifth Amendment’s right against self-incrimination. A citizen’s right to privacy is much older than the Bill of Rights, and is unquestionably embodied in it. To argue otherwise is to exalt semantics over substance.

Id. at 44.

The reality of bioterrorism and the need for a rapid response plan when there is an attack, in conjunction with strong demands for privacy of PHI, has created a very perplexing problem. This article will focus on the current struggle in society that is reflected through the MSEHPA and HIPAA: the need to be prepared for and defend against a bioterror attack, and the desire to maintain very important Constitutional liberties. This article will argue that these two seemingly contradictory ideals can co-exist, although with modifications. Part I begins by outlining the MSEHPA, as well as the applicable provisions of HIPAA. In Part II, the MSEHPA and the HIPAA provisions will be analyzed in light of their relation to historical public health law holdings, illustrating that the powers granted by these two laws are not new, but rather premised on long standing precedent. In the course of this analysis, Part II also illustrates how the two laws affect the Constitutional liberties of Americans. The article concludes by discussing the struggle to maintain privacy and build safety, in light of the analysis presented, and the criticisms of the MSEHPA and the HIPAA Privacy Rule.

I. THE MSEHPA AND HIPAA PROVISIONS

A. *Overview of the Model State Emergency Health Powers Act*¹⁶

The MSEHPA is intended to provide order and safety during a bioterror attack because it authorizes the use of power to gain control of an epidemic disease outbreak. The MSEHPA is not necessarily intended to be adopted in its draft form by every state legislature. Rather, it is designed to provide a framework from which each state may draw the provisions it feels will be most beneficial to its citizens, in order to create a final result that is uniquely tailored to each individual state.¹⁷ The discus-

16. This overview is not intended to be a complete description of the MSEHPA, but rather only an outline of its key provisions. The full Act can be found at www.publichealthlaw.net. For purposes of this article, the MSEHPA is assumed to remain in the form written Dec. 21, 2001, and is not analyzed under any adaptations made by state legislatures.

17. *Biological and Chemical Terrorism*, *supra* note 2 at 1. The CDC states that:

[t]his draft, adapted from existing state statutory provisions, has been rapidly designed to help start the collaborative process to develop consensus-based model legislation to assist states that are considering new emergency public health legislation in light of recent events. States may adopt any or all of the resulting model legislation, as well as tailor it to meet their individual state's needs, as they deem appropriate.

Id.

sion below highlights the nine key provisions of the MSEHPA in order to provide a broad understanding of the governmental powers granted by the Act. A fair reading of the Act indicates that these powers are broad indeed. A commentary follows the summary of each of the key provisions.

1. Planning

The MSEHPA begins by explaining how to plan for a public health emergency.¹⁸ The Act calls for the governor to create a Public Health Emergency Planning Commission (hereinafter “Commission”), which shall be charged with “deliver[ing] to the governor a plan for responding to a public health emergency.”¹⁹ The Commission is to be comprised of “state directors, or their designees, from state agencies the governor deems relevant, a representative group of state legislators, members of the judiciary and any other members deemed appropriate by the governor.”²⁰ These members of the Commission must deliver the plan to the governor within six months of the creation of the Commission, and they must review the plan annually.²¹

Comments on the Planning section of the MSEHPA

The charge of the Commission is very broad. In order for the Commission to accomplish this task in a comprehensive manner and in the short six-month period of time allowed, it must be staffed with the most knowledgeable people from a variety of different fields. For this reason, the governor should not be the sole official in charge of appointing individuals to the commission. With the input of others, the governor will be better able to ensure that the broad range of disciplines necessary are represented through the commission. In addition, members of the Commission must have the liberty to consult non-member experts, in order to access information required to accomplish their task. This will enable the commission to complete its task in a thorough and timely manner because it allows the members to call on other knowledgeable people for assistance, with the end result an emergency plan that will effectively protect the public.

18. THE MODEL STATE EMERGENCY HEALTH POWERS ACT Art. II (Proposed Official Draft Dec.21, 2001), *available at* <http://www.publichealthlaw.net>.

19. *Id.*

20. *Id.*

21. *Id.* § 202.

2. Reporting

The MSEHPA has a broad reporting requirement. Under the MSEHPA, health care providers are required to report to public health authorities “all cases of persons who harbor any illness or health condition that may be potential causes of a public health emergency.”²² Further, under the Act, pharmacists are required to report any “unusual or increased prescription rates, unusual types of prescriptions, or unusual trends in pharmacy visits that may be potential causes of a public health emergency.”²³ Also, the MSEHPA calls for the sharing of information between public health and law enforcement authorities when the information concerns “suspicious events that may be the cause of a public health emergency.”²⁴

Comments on the Reporting section of the MSEHPA

The broad reporting requirements of the MSEHPA allow for effective communication between necessary authorities in the case of the proliferation of any suspicious conditions or illnesses. Although the reporting requirements are extensive, they are necessary to catch a bioterror attack that could affect thousands of Americans. Without the free exchange of these important indicators of a potential bioterror attack, the devastation and human toll could possibly be much greater than necessary. By opening the channels of communication between the public health authority, pharmacists, health care providers, and law enforcement officials, the MSEHPA creates a first line of defense against a bioterror attack. These communication channels may provide enough information to experts to enable them to recognize an outbreak as a bioterror attack before it gains momentum, therefore thwarting a potentially devastating situation.

3. The Power of the Governor

Under the MSEHPA, the governor of the state declares a state of public health emergency.²⁵ It is the sole power of the

22. *See id.* § 301.

23. *See id.*

24. *See id.* § 303.

25. *See id.* § 401.

The MSEHPA defines a public health emergency as:

- 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; (iii) [a natural disaster]; (iv) [a chemical attack or acci-

governor to declare the public health emergency and, importantly, he or she may “act alone to declare a public health emergency without consulting with the public health authority . . . when the situation calls for prompt and timely action.”²⁶ However, “by a majority vote in both chambers, the state legislature may terminate the declaration of a state of public health emergency at any time from the date of original declaration.”²⁷

The effect of a declaration of a public health emergency is great. Once an emergency is declared, the disaster response mechanisms set in place by the Commission, and any other local response systems, are activated.²⁸ The governor has broad powers during the emergency, including the ability to suspend any regulatory statutes, transfer personnel in order to facilitate a more effective response, mobilize the militia, and seek aid from other states and the federal government.²⁹ The state executive’s power also encompass: planning and executing public health emergency assessment, mitigation, preparedness response and recovery; coordinating activities between the state and local levels; collaborating with other state or federal authorities; coordinating activities after the public health emergency; and informing the public about the emergency response.³⁰ Finally, a declaration of a state of public health emergency can be terminated by an executive order from the Governor, or will automatically terminate after thirty days if the Governor does not renew the declaration. As described above, the state legislature may terminate the emergency as well.³¹

Comments on the Power of the Governor section of the MSEHPA

Critics have highlighted the enormous power given to the governor by this section, claiming that the power is too expansive

dental release; or] (v) [a nuclear attack or accident]; 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.

§ 104(m).

26. *See id.*

27. *See id.* § 405.

28. *See id.* § 403.

29. *See id.* § 403.

30. *See id.*

31. *See id.* § 405.

and therefore dangerous to grant to one individual.³² Instead, critics call for the Act to engage a greater number of people in the decision making process during an emergency. Although it is the common governing practice in the United States that the majority rules, circumstances arise under which the normal rules do not apply. A public health emergency will create chaos. During a public health emergency, Americans will need leadership, just as they did after the terror attacks on September 11, 2001.

This section of the MSEHPA gives the governor the power to be a strong leader by granting her the ability to make quick and necessary decisions that range from mobilizing necessary forces to suspending laws. This broad authority enables the governor to coordinate all levels of activities between state and federal authorities. It is important to recognize that, although this section grants these powers to the governor, the Act does not bar the governor from consulting with advisors or delegating some decisions to other officials.

Therefore, this section provides wide latitude for the governor to act in the manner that she sees most fit, either with or without assistance. Further, the Act does provide a balance to the governor's power, allowing the legislature to override or terminate a declaration of a public health emergency.

4. The Power of the Public Health Authority

When the governor declares a public health emergency, it is the duty of the public health authority to coordinate all matters pertaining to state's response. The MSEHPA grants the public health authority the power to close and compel the evacuation or decontamination of any facility, which is believed to endanger the public.³³ During an emergency, the public health authority also has the authority to require a health care facility to provide services or the use of its facility, if the services or uses are reasonable and necessary for emergency response.³⁴ Additionally, the public health authority has the power to transfer management and supervision of the facility to itself for a limited

32. Jon Dougherty, *Bill Would Give Governors Absolute Power*, WORLDNET DAILY, Jan. 2002, available at <http://www.vaccinationnews.com>.

33. See THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 501 (Proposed Official Draft Dec.21, 2001), available at <http://www.publichealthlaw.net>.

34. See *id.* § 502.

or unlimited period of time, although the period cannot exceed the termination of the state of public health emergency.³⁵

If a shortage of a needed and necessary pharmaceutical exists, the public health authority is empowered to ration the remaining drugs, regardless of whether it owns the products.³⁶ This means that during a state of public health emergency, when a shortage in pharmaceuticals is encountered, the public health authority may restrict or regulate through rationing, quotas, price fixing, or any other methods the products it feels necessary to protect the public.³⁷

Comments on the Power of the Public Health Authority section of the MSEHPA

Critics of the powers granted to the public health authority by the MSEHPA have identified these powers as intended to create a “public health ‘police state’ that could spur people to panic and flee.”³⁸ Some groups have even called on Americans to “[avoid] vaccination; avoid large public areas; be prepared to self-quarantine; obtain survival food and equipment; move to the country; and put up a fence with a locked gate.”³⁹ These arguments have little merit. If the public health authority does not have the power necessary to effectively wage a battle against a bioterror attack, there is little use in having any power to act during an emergency at all. The public health authority needs extensive power in order to effectively eradicate the highly contagious diseases that are used in a bioterror attack. It will be ineffective to vaccinate only portions of the population against a highly contagious disease, allowing the remainder to continue to transmit the disease and increase the number of casualties.

35. *See id.*

36. *See id.* § 505.

37. *Regulatory Issues Related to Bioterrorism: The Model State Emergency Powers Act and Disclosure of Identifiable Health Information*, HEALTH LAW, Dec. 2001, available at <http://www.Dechert.com>.

38. Bernadette Tansey, *Health Bill Endangers Civil Rights: Bush Pushes Plan to Expand Control in Bioweapon Attack*, S. F. CHRON., Nov. 25, 2001, available at <http://www.sfgate.com>.

39. Press Release, Take Action Network, *Health Powers Act = Loss of Rights*, Feb. 5, 2002, available at <http://www.takeactionnetwork.com>.

5. Compensation for Facilities and Materials Taken by the State

The MSEHPA provides that the state shall pay “just compensation” to the owners of any facilities or materials that are lawfully taken or appropriated by a public health authority for its temporary or permanent use during a state of public health emergency.⁴⁰ The Act requires the public health authority to “institute appropriate civil proceedings against the property to be destroyed in accordance with existing state law” if “practicable and consistent with the protection of public health.”⁴¹ A citizen may bring an action against the public health authority for compensation in state courts.⁴² The amount of the compensation must be calculated in the same way as compensation due for taking of property under non-emergent eminent domain proceedings.⁴³ However, the state is not required to compensate the owners of facilities or materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger the public health pursuant to the MSEHPA.⁴⁴

Comments on the Compensation for Facilities and Materials Taken by the State section of the MSEHPA

This section of the MSEHPA is in accordance with the takings clause of the Fifth Amendment, except for one provision.⁴⁵ The exception is in the case of an emergency, where the public health authority may destroy, evacuate, or close a facility that is believed to be a threat to public health, without providing just compensation to the owner. The MSEHPA should break this provision into two separate terms. The Act must first discuss the destruction of property, which is likely a *per se* taking under

40. See THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 506 (Proposed Official Draft Dec.21, 2001), available at <http://www.publichealthlaw.net>.

41. *Id.* § 507.

42. See *id.* § 805(b).

43. See *id.* § 805(c).

44. See *id.* § 506.

45. The Fifth Amendment of the Constitution of the United States prohibits governmental taking of a private citizen's property for a public purpose without just compensation, regardless of whether the acquisition is a result of condemnation proceedings or physical appropriations. However, the Fifth Amendment also provides a basis for drawing a distinction between physical takings and the regulation of private property. The private citizen does not necessarily have to be compensated for the regulatory action. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 (2002).

the Fifth Amendment because all economic value is drained from the property, providing just compensation to the property owner where appropriate. In the second provision, the MSEHPA should discuss the state actions that may constitute regulation of the private property, because the property will retain some economic value, including the evacuation or closure of a facility.

According to the Supreme Court holding in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, when the government interferes with a property right due to a “public program adjusting the benefits and burdens of economic life to promote the common good,” the governmental action must be balanced against the burden it places on the private citizen.⁴⁶ Therefore, when the state action under the MSEHPA is not a *per se* taking, the Act must allow for all factors to be balanced in order to determine whether the property owner must be compensated. The MSEHPA’s blanket approach of permitting a wide range of governmental actions that may constitute a taking, without any compensation, should not stand.

6. Control of Persons

During a state of emergency, the MSEHPA allows the state public health authority to compel an individual to submit to examination, testing, and treatment.⁴⁷ Included in this power is the public health authority’s right to “vaccinate persons as protection against infectious disease and to prevent the spread of

46. *Id.* at 1480-89. The Petitioners asserted that the respondent’s moratoria prohibiting development on the Lake Tahoe Basin for thirty-two months constituted a taking of their property, for which they were not justly compensated. The District Court found that the respondent’s moratoria to be a taking under the categorical rule, because the petitioners were denied all economically viable use of their land. On appeal, the issue was whether the categorical rule applied to the circumstances presented, given the fact that the moratoria only temporarily affected the land. The Court of Appeals held that the categorical rule did not apply because the regulation only affected the petitioner’s land for a short period of time. The issue taken to the Supreme Court was whether the moratoria constituted *per se* takings, requiring compensation under the Fifth Amendment. In its discussion, the Supreme Court identified the distinctions between acquisitions of property for public use and regulations prohibiting private use. The Court concluded that the moratoria in question constituted regulation, not taking, which was best examined by weighing all of the relevant circumstances that the Court recognized in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Supreme Court held that the petitioners were not entitled to compensation under the Fifth Amendment.

47. See THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 603 (Proposed Official Draft Dec.21, 2001), available at <http://www.publichealthlaw.net>.

contagious or possibly contagious disease.”⁴⁸ If an individual refuses to abide by rules, orders, or provisions pertaining to isolation and quarantine, he may be charged with a misdemeanor.⁴⁹ If an individual refuses vaccination during a public health emergency “for reasons of health, religion, or conscience, the public health authority may isolate or quarantine” the individual.⁵⁰

The MSEHPA establishes guidelines for isolation and quarantine. The public health authority may isolate and quarantine individuals who have not been vaccinated, treated, tested, or examined.⁵¹ Generally, the public health authority must obtain a written, *ex parte* court order before isolating or quarantining a person, unless a delay in isolation or quarantine would pose an immediate threat to the public health.⁵² However, an individual may be isolated or quarantined without a court order in the event that “delay would significantly jeopardize the public health authority’s ability to prevent or limit the contagious or possibly contagious disease.”⁵³ If a person is quarantined without a court order due to an immediate threat to public health, a court order must be obtained within 10 days of the quarantine.⁵⁴ Any person isolated or quarantined may request relief from detention by application to the trial court for an “order to show good cause why the individual or group of individuals should not be released.”⁵⁵ Any refusal to obey isolation or quarantine requirements constitutes a misdemeanor.⁵⁶

Comments on the Control of Person Section of the MSEHPA

This section of the MSEHPA threatens individual autonomy. Although this section grants the public health authority sweeping powers over an individual’s right to self-determination, it is not necessarily an inappropriate provision. This provision works very closely with the Power of the Public Health Authority section, to ensure that the public health authority has all of the tools necessary to effectively fight a bioterror attack. Americans have never been confronted with a bioterror attack that

48. *See id.* § 603(a).

49. *See id.* § 604.

50. *See id.* § 603(a)(3).

51. *See id.* § 604(a).

52. *See id.* § 605.

53. *See id.* § 605(a)(1).

54. *See id.* § 605(a)(4).

55. *See id.* § 605(c)(1).

56. *See id.* § 604(a) and (c).

affected the population to the degree of smallpox, or any other exceptionally contagious pathogen. Therefore, the possibility that the public health authority may have to exercise the powers granted by this section might, at first blush, seem outrageous to the public. Unfortunately, it is not.

The powers described here are those that may, with little alternative, be required in such emergency. The most difficult possibility for Americans to accept is the idea of losing freedom, which is what is presented here, to a degree.⁵⁷ However, in the process of realizing that a bioterror attack may be the next interface with terrorists, Americans must also understand that the powers described here will be critical in combating such an attack.

7. Access to and Disclosure of Protected Health Information

The MSEHPA addresses access to PHI of individuals who have participated in medical testing, treatment, vaccination, isolation, or quarantine programs.⁵⁸ The Act allows persons who have a “legitimate need to acquire or use the information” to have access to PHI for the purposes of treating the individual who is the subject of the PHI, conducting epidemiological research, or investigating the cause of the transmission.⁵⁹ Before a public health authority can disclose PHI, the individual must give written “specific informed consent.”⁶⁰ However, the PHI may be released without a specific consent when the disclosure is (i) to the individual who is the subject of the PHI or to his family; (ii) to the appropriate federal authorities; (iii) to health care personnel where there is a need to protect the health or life of the individual who is the subject of the PHI; (iv) pursuant to a court order to avert a clear danger to an individual or the public health; or (v) to identify a deceased individual or determine the manner or cause of death.⁶¹

57. See Jesse Berney, *The Beginning of the End for the Constitution?*, WAGE SLAVE J., Nov. 1, 2001, available at <http://www.wage-slave.org/20011121.constitution.html>.

58. See THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 607 (Proposed Official Draft Dec.21, 2001), available at <http://www.publichealthlaw.net>.

59. See *id.* § 607(a).

60. See *id.* § 607(b).

61. See *id.* § 607(b)(1-5).

Comments on the Access to and Disclosure of Protected Health Information Section of the MSEHPA

Although this section permits liberal release of PHI, it is in line with the disclosures permitted in emergency situations under HIPAA.⁶² The two Acts' agreement on the level of disclosure of PHI during an emergency does not necessarily indicate these disclosure allowances are correct. However, two independent bodies reaching similar conclusions is evidence that it will be necessary to allow for disclosure of PHI under such circumstances.

What constitutes an adequate level of PHI disclosure during an emergency cannot be completely determined in an accurate manner until such a public health emergency actually occurs. However, providers and authorities must have access to all necessary PHI in order to act quickly and avert a dangerous situation from threatening a greater number of individuals. If the health care providers or public health authorities do not have access to the PHI necessary to treat individuals, they may be forced to make a decision between doing their job ineffectively and breaking the law to obtain all of the necessary tools to allow them to act in accordance with the recognized standards. This is an unfair burden to place on these workers.

8. Licensing and Appointment of Health Personnel/ Liability

During a state of public health emergency, the public health authority has the ability to require in-state healthcare providers to assist with various medical services and to "appoint and prescribe the duties of out-of-state emergency health care providers as may be reasonable and necessary to respond to the public health emergency."⁶³ This power includes the ability to waive all licensure requirements, permits, and fees for health care providers from other jurisdictions to practice in the state.⁶⁴

While granting public health authorities these powers, the MSEHPA provides that, except in cases of gross negligence or willful misconduct, neither the state nor its political subdivisions

62. See 45 C.F.R. §§ 164.506(a)(3) (2002), 164.510(a)(3) (2002), 164.508(a) (2002), 164.512(a) (2002), 164.512(b) (2002), 164.512(f) (2002), 164.512(f)(6) (2002), 164.512(g) (2002), 164.512(j) (2002), 164.512(k) (2002). These HIPAA provisions allow for certain disclosures of protected health information.

63. See THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 608 (a)-(b) (Proposed Official Draft Dec.21, 2001), available at <http://www.publichealthlaw.net>.

64. See *id.* § 608(b)(2).

may be held liable for the death or injury to any person or property damage that occurs as a result of complying with or attempting to comply with the MSEHPA or regulations promulgated thereunder.⁶⁵ This immunity also applies to the state, the public health authority, and any other state or local official who is “referenced” under the Act.⁶⁶ However, any of these authorities can be held liable for “gross negligence or willful misconduct” in relation to any power delegated to them under the MSEHPA.⁶⁷ Additionally, the Act states that except in cases of gross negligence or willful misconduct, any private person, corporation, or firm that renders advice or assistance at the request of the state during a public health emergency may not be held liable for causing the death of or injury to a person, or for any property damage.⁶⁸

Comments on the Liability and Appointment of Health Personnel Sections of the MSEHPA

Although these two sections do not focus solely on out-of-state public health workers who work in a different state during a public health emergency, the ease with which this section allows the state to recruit workers who may not be adequately trained provides little chance of the workers being held accountable for any mistake and stands out as disconcerting. However, it is also unsettling that fully licensed state public health workers, as well as many other categories of individuals, are shielded in the same manner.

Additionally, these sections do not answer the question of whom, if anyone, is liable for bad outcomes from vaccinations, or other medical procedures conducted under the MSEHPA, whether by in-state or out-of-state workers. The failure to provide for liability at a lower level of injury occurrence (when an action is damaging, but not one of gross negligence or willful misconduct) leads to the conclusion that the authors of this Act and the government believe that the effort to save a life that was in peril as a result of a bioterror agent is compensation enough for any injury that comes from the attempt, because without this system established by the MSEHPA, the individual may not have received treatment at all.

65. *Id.*

66. *See id.* § 804(a).

67. *See id.*

68. *See id.* § 804(b)(3).

Although it is important that all Americans cooperate during an emergency in order for the situation to be effectively addressed, the government cannot expect individuals to obey every order of the public health authority and then have no means of recourse against harmful activity, except under extreme circumstances. Provision of liability at a lower level must be added to the MSEHPA, especially when the public health authority is knowingly recruiting workers who may not be licensed in accordance with state standards. It will be impossible to provide compensation for every mistake made during an emergency; however, the MSEHPA must provide for liability under a greater number of situations.

B. The Health Insurance Portability and Accountability Act of 1996

Americans are deeply concerned that health information is not private.⁶⁹ Breaches of health information privacy take many forms. For example, recently a hacker downloaded the medical records, health information, and social security numbers of more than five thousand patients at the University of Washington Medical Center—the University conceded that its privacy and security safeguards were not adequate.⁷⁰ In yet another illustration of a breach of privacy of health information, an FBI agent was forced into early retirement after the government learned that he had sought treatment for a mental health condition.⁷¹ The agent's mental health information was uncovered during a fraud investigation against the psychiatrist who was treating him.⁷²

Americans have responded to concerns of privacy breaches by demanding protection of medical information. The American public has recognized that the right to privacy does not end

69. *Making Patient Privacy a Reality: Does the Final HHS Regulation Get the Job Done?: Hearing Before the Senate Committee on Health, Education Labor & Pensions*, Feb. 8, 2001, at 4 (statement of Janlori Goldman, Director of Health Privacy Project, Georgetown University Institute for Health Care Research and Policy) [hereinafter Goldman Testimony], available at http://www.healthprivacy.org/usr_doc/48751.pdf. According to recent reports, one out of every six people engages in some form of privacy-protective behavior to shield themselves from the misuse of their health information, including withholding information, providing inaccurate information, doctor-hopping to avoid consolidated medical records, paying out of pocket for procedures covered by insurance, and avoiding health care altogether.

70. Goldman Testimony, *supra* note 69, at 4.

71. *Id.* at 5.

72. *Id.*

where PHI begins. Recent reports and public opinion surveys suggest that 85% of the polled public believe that protecting the confidentiality of medical records is “absolutely essential” or “very important” in health care reform. Additionally, 86% of polled public favor creating a “national medical privacy board” to “hold hearings, issue regulations and enforce standards” for protecting medical information privacy.⁷³ This concern reflects the significant changes in the nation’s health care system, including the shift to electronic medical records, the daily transfer of highly sensitive patient information between employers, managed care organizations, other health care entities, and the great advances in genetic research that reveal a large amount of information about future health conditions.⁷⁴ HIPAA provides the “first systematic nationwide privacy protection for health information”, reaching almost every person and entity who touches medical and financial information in the health care system.⁷⁵ Through HIPAA, Congress has attempted to create a “national standard of privacy protection.”⁷⁶

In the event of a public health emergency, numerous provisions of HIPAA allow for the release of PHI, without the protections required by the Act under most other circumstances.⁷⁷ Supporters who believe that the standardization and security provided by HIPAA will play an important role in homeland security have praised these exceptions.⁷⁸ These advocates believe that standardization and ease of transmission of health information during a bioterror attack will be a key component in

73. See Harris Equifax, *Health Information Privacy Survey*, 1993, available at <http://www.epic.org/privacy/medical/polls.html>.

74. Lawrence O. Gostin, *National Health Information Privacy, Regulations, Under the Health Insurance Portability and Accountability Act*, JAMA, Vol. 285, No. 23, June 20, 2001, at 3015.

75. Gostin, *supra* note 74, at 3016.

76. Bill Bysinger, *Homeland Security: The Need For HIPAA*, MILLENIUM HEALTHCARE NEWS, Oct. 24, 2001, available at <http://www.healthleaders.com/news/feature1.php?contentid=28855>.

77. 45 C.F.R. §§ 164.508 (2002), 164.502 (2002), 164.506 (2002), 164.510 (2002), 164.512 (2002). The HIPAA privacy rule restricts access to PHI. Access is restricted through the implementation of more stringent guidelines for the use and disclosure of PHI. The HIPAA provisions discussed in this article do not follow the general rule promulgated by HIPAA. Instead, these provisions allow for the use and disclosure of PHI, without adhering to the HIPAA privacy rule requirements. These provisions are not written as exceptions to the general privacy rule; however, they do function as exceptions because they explain situations under which the general privacy rule does not have to be followed in the same manner that is required by the bulk of the Privacy Rule.

78. Bysinger, *supra* note 76.

protecting citizens.⁷⁹ It has also been theorized that through HIPAA's standardization and security, PHI may be kept out of terrorists' hands, and therefore, prevent them from targeting specific groups of Americans who may be most susceptible to a bioterror attack.⁸⁰ The groups that support HIPAA recognize that "nothing is beyond the scope of the opportunity for terrorists, [and that] we must make our data sources secure," and work vigilantly to maintain the security that HIPAA provides.⁸¹

The provisions of HIPAA that do not require the same strict regulation of PHI as the rest of the Act give health care providers and the public health authority considerable leeway during public health emergencies. The exceptions facilitate an easy flow of necessary PHI during a public health emergency; however, there are limits to the amount of disclosure permitted. Below is a summary of the HIPAA provisions that permit the disclosure of PHI without the standard consent regulations during a public health emergency.

1. Consent for Treatment, Payment and Health Care Operations (45 C.F.R. § 164.506(a)(3))

During an "emergency treatment situation,"⁸² a health care provider may release PHI without a signed treatment, payment, and operations consent as long as the health care provider attempts to obtain consent as soon as "reasonably practicable" after the treatment is given.⁸³ Additionally, the provider must document his attempts to obtain consent, and if consent is not obtained, document the reasons why.⁸⁴

Comments on Consent for Treatment, Payment and Health Care Operations

This provision is logical. Most health care providers follow this policy everyday on the job. Under these circumstances patients are, presumably, grateful that the health care providers did not delay in order to obtain consent for treatment, because the delay of a few minutes may change the outcome of a situation. There is little difference between this daily occurrence and this HIPAA provision. When a patient requires immediate

79. *Id.*

80. *Id.*

81. *Id.*

82. *Note:* An "emergency treatment situation" is not defined by HIPAA.

83. 45 C.F.R. § 164.506(a)(3) (2002).

84. *Id.*

treatment, the more information that the health care provider has, the better able she will be to treat the patient. For example, if a patient must be vaccinated and his doctor has his history of allergies, it is to both the patient's benefit, and the benefit of the public health worker who gives the vaccinations for the doctor to release the information to the worker. This prevents the patient from receiving any treatment that he is known not to tolerate.

2. Directories: Disclosures concerning victims who have been treated (45 C.F.R. § 164.510(a)(3))

Normally under HIPAA, a patient must be given the opportunity to opt out of having his PHI disclosed in a facility directory.⁸⁵ If an individual does not choose to opt out, information including his name, location of the facility, his condition described generally, and his religious affiliation may be recorded in a facility directory that is available to the public.⁸⁶ However, if a patient's opportunity to opt out of having his information disclosed "cannot be practicably provided because of incapacity or the emergency treatment circumstances", the patient's PHI may be disclosed in the facility directory.⁸⁷ Before disclosing the PHI, the provider must confirm that disclosure is in the patient's best interest, and that disclosure is consistent with previously expressed preferences of the patient.⁸⁸ If a patient's PHI is disclosed in the facility directory under these circumstances, the provider must give the patient an opportunity to object to the disclosure as soon as practicable.⁸⁹

Comments on Directories

This provision establishes safeguards over PHI. If the patient does not have the opportunity to opt out of having her information disclosed in the facility directory, the health care provider either must act in accordance with the patient's previous wishes

85. 45 C.F.R. § 164.510 (2002). A facility directory is a log of patients that is maintained by the health care facility. The facility directory contains the patient's name, location in the facility, condition, and religious affiliation. Under normal circumstances, if the patient does not opt out of having her information listed in the facility directory, all of the information in the directory may be disclosed to a clergy member, and all of the information except the patient's religious affiliation may be disclosed to any individual who asks for the patient by name.

86. 45 C.F.R. § 164.510(a)(i)(A)-(D) (2002).

87. 45 C.F.R. § 164.510(a)(3) (2002).

88. 45 C.F.R. § 164.510(a)(3)(A)-(B) (2002).

89. 45 C.F.R. § 164.510(a)(3)(ii) (2002).

or in the best interest of the patient. If the health care provider is not the patient's regular physician or nurse, which is likely under emergency conditions, the provider should be guided by the patient's best interest.⁹⁰ Health care providers handle sensitive information on a daily basis and, therefore, are aware of the importance of confidentiality. These factors lead to the conclusion that if the health care provider cannot determine the patient's previous wishes pertaining to the disclosure of his information in the facility directory, the health care provider will act in a discrete and respectful manner.

3. Disclosures for Public Health Activities (45 C.F.R. § 164.512(b))

Under this provision, a covered entity may disclose PHI in order to facilitate a public health activity.⁹¹ Public health activities include the following actions: "preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, the conduct of public health surveillance, public health investigations, and public health interventions."⁹² Under this section, a covered entity may also disclose PHI to individuals who may have been exposed to a communicable disease, or who may be at risk of contracting or spreading a disease, if the covered entity is permitted to do so by law.⁹³

Comments on Disclosures for Public Health Activities

This section permits extremely broad disclosure of PHI for public health activities. Although broad disclosure may be necessary to facilitate a public health activity, this section needs to better define what PHI can be disclosed, and what degree of disclosure is allowed. For example, pursuant to this section PHI may be disclosed for "public health intervention." A public health intervention activity can range from handing out flyers to placing individuals under quarantine. The level of PHI that is necessary for these activities is as diverse as the activities them-

90. However, this provision provides another solid argument for the liberal release of PHI under emergency circumstances. If the treating provider has access to the patient's PHI, he will be able to determine what the patient's previous wishes were in relation to the release of his information in the facility directory and then act in accordance.

91. 45 C.F.R. § 164.512(b) (2002).

92. 45 C.F.R. § 164.512(b)(i) (2002).

93. 45 C.F.R. § 164.512(b)(iv) (2002).

selves. It is obvious that no PHI need be disclosed for the first activity, but that a great deal will be released when an individual is under quarantine. Additionally, by providing more rigid guidelines, a check will be created for the public health authority's activities. These definitions will give the public health authority a more substantial framework to operate within, therefore reducing the likelihood of releasing unnecessary information.

4. Disclosures Required by Law (45 C.F.R. § 164.512(a))⁹⁴

This section allows a covered entity to use or disclose PHI without consent from the patient and without giving the patient the opportunity to object to the disclosure.⁹⁵ Under this provision, a covered entity may use or disclose PHI to the extent required by law, as long as the disclosure complies with the law, and it is limited to the relevant requirements of the law.⁹⁶

5. Disclosures for Law Enforcement Purposes (45 C.F.R. § 164.512(f))

As long as certain conditions are met, covered entities may disclose PHI for law enforcement purposes, in accordance with the stated process and as otherwise required by law.⁹⁷ The approved circumstances allow covered entities to release PHI in response to a court order or a court ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative request, including a subpoena or summons, a civil or an authorized investigative demand, or another similar process that is authorized by law.⁹⁸ Any of these disclosures are allowed, as long as the information sought is relevant and material to a legitimate law enforcement inquiry,⁹⁹ the request is specific and limited in scope to what is practicable for the purpose of the inquiry,¹⁰⁰ and there was no reasonable way that de-identified information could have been used.¹⁰¹

94. Comments on this section are provided collectively after a review of the following sections on the Disclosures Required by Law, Disclosures for Law Enforcement Purposes, and Permitted Disclosures: Reporting Crimes in an Emergency.

95. 45 C.F.R. § 164.512 (2002).

96. 45 C.F.R. § 164.512(a) (2002).

97. 45 C.F.R. § 164.512(f)(1) (2002).

98. 45 C.F.R. § 164.512(f)(1)(ii)(A)-(C) (2002).

99. 45 C.F.R. § 164.512(f)(ii)(C)(1) (2002).

100. 45 C.F.R. § 164.512(f)(ii)(C)(2) (2002).

101. 45 C.F.R. § 164.512(f)(ii)(C)(3) (2002).

Generally, disclosure to law enforcement officials must be done at the request of the official.¹⁰² In most cases, a covered entity is not permitted to actively solicit a law enforcement official in order to alert him to a patient's suspect status or PHI, with the exception that, if there is a state mandatory reporting law, a covered entity may disclose the PHI to a law enforcement official, at its own initiative, without the patient's consent.¹⁰³

This provision also allows for disclosure of PHI in response to a law enforcement official for the "purpose of identifying or locating a suspect, fugitive, material witness, or missing person."¹⁰⁴ In this situation, the covered entity may release the name and address, date and place of birth, social security number, blood type and Rh factor, type of injury, date and time of treatment, date and time of death (if applicable), and a description of distinguishing characteristics.¹⁰⁵ Such a disclosure would be necessary in a public health emergency when an individual who is either diagnosed with a communicable disease or suspected of carrying a communicable disease flees a treatment facility. The release of this permitted information could be of great assistance to law enforcement officials tracking the individual in order to prevent him from spreading the illness to others. According to the preamble to the final HIPAA privacy rule, "a request by a law enforcement official or agency" includes a request broadcast through the media for assistance in identifying a suspect, including "wanted" posters, and other types of public announcements.¹⁰⁶

Further, this provision permits the disclosure of PHI, with the agreement of the patient, in response to a law enforcement official's request for information about a person who is the victim of a crime, or who is a suspected victim of a crime.¹⁰⁷ Under this exception, the patient must agree to the disclosure by the covered entity.¹⁰⁸ However, if the covered entity is unable to obtain the patient's consent due to either an emergency situation or to the individual being incapacitated, the covered entity may re-

102. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

103. *Id.*

104. 45 C.F.R. § 164.512(f)(2) (2002).

105. 45 C.F.R. § 164.512(f)(2)(i)(A)-(H) (2002).

106. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

107. 45 C.F.R. § 164.512(f)(3) (2002).

108. 45 C.F.R. § 164.512(f)(3)(ii) (2002).

lease the PHI, as long as the information is necessary to determine whether a law has been violated by a person other than the patient; the immediate law enforcement activity depends on the disclosure of the PHI, and the situation would be adversely affected by waiting until the individual is able to consent; and the disclosure of the PHI is in the best interests of the individual, as determined by the covered entity.¹⁰⁹ Covered entities may also disclose PHI about deceased patients to law enforcement officials in order to alert the law enforcement official of the death, if the covered entity believes that the death may be the result of criminal conduct.¹¹⁰

6. Permitted Disclosure: Reporting Crimes in an Emergency (45 C.F.R. § 164.512(f)(6))

HIPAA allows health care providers who provide care in response to an emergency situation to disclose PHI to law enforcement officials.¹¹¹ In an emergency situation, providers of emergency care may disclose PHI to law enforcement officials if the disclosure is necessary to inform law enforcement officials of the commission and nature of a crime; the location of a crime or of the victims of a crime; and the identity, description, and location of the perpetrator of such crime.¹¹² This provision applies to first responders in the emergency health care situation, including emergency medical technicians.¹¹³

Comments on Disclosures for All Law Enforcement Related Provisions

The provisions that allow for the release of PHI for law enforcement purposes all have the common goal of protecting an individual or the public from the further spread of the threatening disease by sharing PHI with law enforcement officers. With a few exceptions, these provisions only allow for the release of PHI in response to a request from law enforcement officials. This requirement should provide sanctity to PHI, because it prohibits health care providers from actively distributing information. However, the definition of a “request by law enforcement officials” is too broad. As discussed above, this type of request

109. 45 C.F.R. § 164.512(f)(3)(iii)(A)-(B) (2002).

110. 45 C.F.R. § 164.512(f)(4) (2002).

111. 45 C.F.R. § 164.512(f)(6) (2002).

112. 45 C.F.R. § 164.512(f)(6)(A)-(C) (2002).

113. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

includes media broadcasts, “wanted” posters, and other types of public announcements. The release of PHI should be permitted in the case of a direct request to a health care professional from law enforcement officials, under the specific outlined circumstances. General solicitations to the public should not be permitted.

Finally, in response to a request for PHI by law enforcement officials, only the PHI necessary to aid the officials should be released. For example, law enforcement officials should not be given the Rh factor of an individual if they can determine identity by the color of his hair. This restriction helps to ensure that the law enforcement official receives only PHI absolutely necessary to accomplish her task. Also, this protects the privacy of the individual whose PHI is disclosed to the greatest degree possible under the circumstances.

7. Uses and Disclosures to Avert Serious Threat to Health or Safety (45 C.F.R. §164.512(j))

Consistent with the applicable laws and standards of ethical conduct, a covered entity may use or disclose protected health information, if it believes in good faith that the use or disclosure is necessary to prevent or lessen an imminent threat to the health or safety of the public.¹¹⁴ The disclosure must be to an individual who has the reasonable ability to prevent or lessen the likelihood of the imminent threat from actually occurring.¹¹⁵ Also, covered entities may disclose PHI if the entity believes that the disclosure is necessary for law enforcement authorities to identify or apprehend an individual, because of a statement by an individual admitting participation in a violent crime that the covered entity “reasonably believes may have caused serious physical harm to the victim.”¹¹⁶ However, this type of disclosure is not permitted if the covered entity uncovers the PHI while treating an individual for a propensity to commit the criminal conduct that is the basis for the disclosure.¹¹⁷

There is a “presumption of good faith” when a covered entity uses or discloses PHI to avoid a public health emergency.¹¹⁸ The good faith belief must be based on the covered entity’s actual

114. 45 C.F.R. § 164.512(j) (2002).

115. 45 C.F.R. § 164.512(j)(i)(B) (2002).

116. 45 C.F.R. § 164.512(j)(ii)(A) (2002).

117. 45 C.F.R. § 164.512(j)(2)(i) (2002).

118. 45 C.F.R. § 164.512(j)(4) (2002).

knowledge, or in reliance on a credible representation by a person with apparent knowledge or authority.”¹¹⁹ In the preamble to the HIPAA privacy regulations, the Department of Health and Human Services notes that a “person with apparent knowledge or apparent authority” may include any person, not just a doctor, law enforcement official, or other government official.¹²⁰ The preamble goes on to explain that this provision allows for the covered entity to use or disclose PHI without an authorization, and on its own initiative (without the requirement of a request by a law enforcement official, as is necessary elsewhere in the statute) when it is “necessary to prevent or lessen a serious and imminent threat, consistent with other applicable ethical or legal standards.”¹²¹ However, the Department of Health and Human Services states that this provision was not developed with the intent of creating a duty to warn; rather, it was the intent of the Department to only permit disclosures to avoid a “serious and imminent” threat to health and safety where law otherwise permits it.¹²²

Comments on Uses and Disclosures to Avert Serious Threat to Health or Safety

This standard gives a health care provider the authority to release PHI under two conditions where authority for the release is generally presumed to already exist. First, the provider may release PHI when it is reasonably necessary. Ostensibly, the “reasonably necessary” standard here is the same or similar to the reasonable person standard used currently. Therefore, it is expected that a health care professional would release PHI when a reasonable person would do so because the information may protect the public. Second, under this provision, health care providers are authorized to release PHI where law otherwise permits it; therefore, this provision does not grant a provider any new authority to release PHI.

119. *Id.*

120. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

121. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462-01 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164), available at <http://aspe.hhs.gov/admsimp/>.

122. *Id.* Note the “duty to warn a third person at risk” standard that is promulgated in HIPAA is consistent with case law, which originated in *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425 (1976).

8. Uses and Disclosures for Specialized Government Functions (45 C.F.R. § 164.512(k))

If an activity is deemed “necessary by appropriate military command authorities to assure the proper execution of [a] military mission,” then a covered entity may use and disclose the PHI of a member of the Armed Forces.¹²³ Additionally, covered entities may use or disclose the PHI of Armed Forces personnel to “authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities.”¹²⁴ The preamble states that this provision does not confer to covered entities any new authority to use and disclose protected health information gained in the provision of health care to individuals who are Armed Forces personnel, unless such information is used for the furthering of a military mission.¹²⁵

Comments on Uses and Disclosures for Specialized Government Functions

This section does not grant any new authority to release the PHI of Armed Forces personnel. Additionally, the disclosures made under this section are considered necessary to protect the individual or group of military personnel from spreading or acquiring a contagious pathogen.

9. Verification Requirements (45 C.F.R. § 164.514(h))

The privacy regulations of HIPAA require the verification of the authority and the identity of the public officials to whom a covered entity is disclosing PHI.¹²⁶ The authority of a public official may be verified by a covered entity through any of the following ways: (i) a written statement of legal authority under which the information is requested; (ii) an oral statement of such legal authority; (iii) pursuant to legal process, warrant, subpoena, order, or other legal process issued by a grand jury; (iv) a tribunal that is presumed to constitute legal authority; or (v) when the covered entity relies on the exercise of professional judgment with respect to directory issues or acts on a good faith belief in making a disclosure to avoid a serious threat to health

123. 45 C.F.R. § 164.512(k) (2002).

124. 45 C.F.R. § 164.512(k)(2) (2002).

125. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462-01 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160 and 164).

126. 45 C.F.R. § 164.514(h)(1)(i) (2002).

or safety.¹²⁷ If reliance is “reasonable under the circumstances,” a covered entity may rely on a requested disclosure from a public official as the “minimum necessary for the stated purpose,” if the public official represents that the information requested is the minimum necessary for the stated purpose.¹²⁸

Comments on Verification Requirements

The verification requirement of HIPAA is an example of an excellent check provided under the Act. However, it may not be reasonable to believe that this safeguard will be employed during a public health emergency. During an attack, time will be of the essence. For this reason, it is unreasonable to believe that this HIPAA verification requirement will be followed. The primary focus will be on treating and preventing the spread of disease, not looking for identification badges and authorization papers.

II. CONSTITUTIONAL RIGHTS: THE MSEHPA AND HIPAA

Public health laws have a long history in the United States. Striking a balance between protecting Constitutional rights and maintaining a strong and useful public health system is a dilemma that has plagued America for centuries.¹²⁹ This struggle began long before the development of anthrax, smallpox, and nerve gas. Public health regulations began with sanitation laws and have spanned the decades of the plague, yellow fever, the Spanish influenza, and Acquired Immune Deficiency Syndrome.¹³⁰ The Court’s grant of power to the states in *Holmes v.*

127. 45 C.F.R. § 164.514(h)(2)(iii)(A)-(B)(iv) (2002); 45 C.F.R. § 164.514(h)(2)(iv) (2002).

128. 45 C.F.R. § 164.514(d)(3)(iii) (2002).

129. See Edward P. Richards, *The Jurisprudence of Prevention: The Rights of Societal Self Defense Against Dangerous Persons*, 16 HASTINGS CONST. L.Q. 320, 330 (1989), available at <http://biotech.law.lsu.edu/cphl/articles/hastings/hastings-contents.htm> (the author writes that the Constitution leaves the responsibility of building and maintaining a public health system to the states, under the police power.) Police power is described as a:

general system of precaution, either for the prevention of crimes or calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offenses; 2. Police for the prevention of calamities; 3. Police for the prevention of epidemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence 8. Police for registration.)

Id. at 337.

130. *Id.* at 335.

*Jennison*¹³¹ was an acknowledgement of the public's fear of infectious diseases, and of the need for the government to have liberal access to power to control dangerous situations.¹³² Paradoxically, today, when bioterror agents present an equal danger, the American public seemingly has lost this fear.¹³³

Modern courts have agreed with the *Holmes v. Jennison* Court, issuing opinions about public health laws that are consistent with the historical holding. It has become the practice of courts to uphold public health laws that focus on the prevention of disease and future harm, despite the substantial restrictions that such laws may place on individual liberties.¹³⁴ This "jurisprudence of prevention"¹³⁵ represents the judicial and legislative reaction to real and perceived dangers that exist in American society.¹³⁶ If a court concludes that the purpose of a law is prevention instead of punishment, it gives the state greater latitude during judicial review to rely on expert decision makers, utilize habeas corpus proceedings rather than pre-trial hearings, and use lower standards of proof.¹³⁷

The MSEHPA is a prevention law. There are many similarities between the MSEHPA and the line of preventive jurisprudence decisions. Both have received similar criticism. Just as the courts have been denounced for their preventative holdings that have "limited the presumption of innocence to criminal trials, [and] endorsed the preventive detention of adults and juveniles" in public health cases,¹³⁸ so have MSEHPA opponents condemned the law for "giv[ing] state public health authorities virtually absolute dictatorial powers, with little chance of legal

131. *Holmes v. Jennison*, 39 U.S. 540 (1840). See generally Richards, *supra* note 129.

132. Richards, *supra* note 129, at 333.

133. *Id.* at 336.

"This diminishing support for public health restrictions is less rooted in an increased sensitivity to individual liberties than it is a product of the loss of fear of communicable diseases. With the advent of sanitary measures such as pasteurization of milk and the development of antibiotics, society's fear of communicable diseases has declined."

134. *Id.* at 338.

135. See *id.* The "jurisprudence of prevention" is a term describing holdings that allow substantial restrictions on individual liberties pursuant to public health laws that seek to prevent future harm, rather than punish wrongs.

136. *Id.*

137. *Id.* at 331.

138. *Id.* at 332.

recourse for interned individuals.”¹³⁹ The similar criticisms are due, in part, to the strong likeness between the Act and many of the preventative jurisprudence holdings.

This section will examine three Constitutional liberties violated by the Act: the lack of due process provided under the Act; the invasion of privacy permitted by the Act; and the taking of property without just compensation.¹⁴⁰ The court’s past treatment of these rights will be traced, and then the MSEHPA and HIPAA provisions will be analyzed and summarized in light of their relation to the historical public law holdings.¹⁴¹

1. Power—The Courts Allow Detention without Due Process

Decisions that focus on the prevention of a public health problem reject the traditional principle that individuals may not be detained without the due process protections established by *In re Gault*¹⁴² and *In re Winship*.¹⁴³ These two cases established

139. *CDC Advances Totalitarian Legislation Under Guise of ‘Public Health:’ Forced Drugging and Injections Are On The Horizon*, Nov. 9, 2001, available at www.tetrahedron.org/news/NR011109.html.

140. Eberhart, David, *Model State Bioterror Law Stirs Controversy*, Jan. 3, 2002, available at <http://www.newsmax.com/archives/articles/2002/2/152159.shtml> (arguing that the Act will “intrude on Americans’ civil liberties. . . because [c]itizens who refuse to comply can be detained and charged with a misdemeanor”).

141. Although the applicable HIPAA provisions discussed here have not been as widely criticized as the MSEHPA for threatening Constitutional liberties, its provisions do detract somewhat from the right to privacy in times of a public health emergency. Therefore, they are included in this discussion with the MSEHPA to illustrate how modern day activity in this area compares to past regulation.

142. *In re Gault*, 387 U.S. 1 (1967) (wherein the Court committed a minor to the State Industrial School as a juvenile delinquent, because he was found to have violated a law by making lewd telephone calls. The minor had filed a writ of habeas corpus challenging the procedure used in his case, which was subsequently dismissed. The appellant’s mother, on behalf of the minor, appealed the dismissal. In its decision affirming the dismissal of the writ, the Supreme Court declared, “due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”) *Id.* at 19-20. (The Supreme Court held that hearings must measure up to the essentials of due process and fair treatment, although the hearings do not have to “conform with all requirements of a criminal trial or even of the usual administrative hearing”). *Id.* at 30.

143. *In re Winship*, 397 U.S. 358 (1970) (the appellant, a twelve-year-old boy, was convicted of committing an act which, if committed by an adult, would have constituted larceny. During an adjudicatory hearing, the judge acknowledged that the evidence presented might not establish guilt beyond a reasonable doubt, but rejected the appellant’s contention that the Fourteenth Amendment required such proof. The issue before the Supreme Court was whether proof beyond a reasonable doubt is among the “essentials of due process and fair treatment” required during the adjudicatory stage. In overturning the decision of the adjudicatory hearing, the Supreme Court held that “the constitutional safeguard of proof beyond a reasonable doubt is as

the principle that full due process protections are required prior to all detentions because confinement constitutes punishment, irrespective of the intent of the law authorizing the confinement.¹⁴⁴ Cases such as *Addington v. Texas*¹⁴⁵ and *Bell v. Wolfish*,¹⁴⁶ however, set forth preventive jurisprudence which discards the rule that a civil involuntary confinement requires equal due process as a criminal prosecution.¹⁴⁷

In *Addington*, the appellant's mother filed a petition for his indefinite commitment to a state mental hospital in accordance with Texas law governing involuntary commitments.¹⁴⁸ The state trial court instructed the jury to determine whether, based on clear, unequivocal, and convincing evidence, the appellant was mentally ill and required hospitalization for either his own welfare and protection, or for the protection of others.¹⁴⁹ The jury committed the appellant.¹⁵⁰ The appellant took his case to the Texas Court of Appeals, contending that the trial court should have instructed the jury to use the "beyond a reasonable doubt standard" to reach its decision.¹⁵¹ The Texas Court of Appeals reversed the trial court, holding that the beyond a reasonable doubt standard was proper for this case.¹⁵² The Texas Supreme Court reversed and held the clear and convincing standard to apply.¹⁵³

The case was appealed to the U.S. Supreme Court, which granted *certiorari*.¹⁵⁴ The Supreme Court affirmed the Texas Supreme Court's decision and rejected the use of the beyond a reasonable doubt standard for civil confinements, stating, "[t]here are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense. . . a civil commitment proceeding can in no sense be equated to a criminal prosecution."¹⁵⁵ The

much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*"). *Id.* at 368.

144. Richards, *supra* note 129, at 332 (citing *In re Winship*, 397 U.S. at 365).

145. *Addington v. Texas*, 441 U.S. 418, 431-32 (1979).

146. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979).

147. Richards, *supra* note 129, at 352.

148. *Addington*, 441 U.S. at 420.

149. *Id.*

150. *Id.* at 421.

151. *Addington v. State*, 546 S.W.2d 105, 106 (Tex. Ct. App. 1977).

152. *Id.*

153. *State v. Addington*, 558 S.W.2d 569 (Tex. 1979).

154. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

155. *Id.* at 428.

Court also discussed the history of the beyond a reasonable doubt standard, recognizing that the standard has been reserved for criminal cases, that this “unique standard of proof” is regarded as “the moral force of the criminal law,” and that “we should hesitate to apply it too broadly or casually in non-criminal cases.”¹⁵⁶

The U.S. Supreme Court again rejected the *Gault* and *Winship* rule in *Bell v. Wolfish*.¹⁵⁷ *Bell* was a class action suit brought by inmates in a federal district court, who challenged the conditions of their confinement at the Metropolitan Correction Center, a federally operated short-term custodial facility that was designed to primarily house pretrial detainees.¹⁵⁸ The inmates were not objecting to confinement itself.¹⁵⁹

Both the District Court and the Court of Appeals agreed that it is constitutionally impermissible to subject pretrial detainees to the same conditions as that of convicted criminals.¹⁶⁰ The Supreme Court granted *certiorari* to determine whether the conditions the detainees were subjected to amounted to punishment.¹⁶¹ Finding that the conditions did not amount to punishment, the Court overturned the holdings of the lower courts. The Supreme Court stated that not all detentions are punishments, and that once the government has detained a person pending trial, it is “entitled to employ devices that are calculated to effectuate this detention.”¹⁶² Thus, “the government may detain [an individual] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.”¹⁶³

Both *Bell v. Wolfish* and *Addington v. Texas* stand for the principle that a civil involuntary confinement does not require the same due process as a criminal prosecution.¹⁶⁴ Taken together, these two holdings provide an additional basis for the

156. *Id.*

157. *See Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

158. *Id.* at 523.

159. *Id.* at 527.

160. *Id.* at 531-32.

161. *Id.* at 535.

162. *Id.* at 537.

163. *Id.* at 536-37.

164. *Id.* (holding that, if detention is not found to be punishment, then the individual does not have to be afforded the protections of due process). *See In re Martin* 188 P.2d. 287 (Cal. Ct. App. 1948). *See also Richards*, *supra* note 129 (author points out

power the MSEHPA grants the public health authority. The *Addington* Court focused on the standard of proof required for a civil commitment.¹⁶⁵ Among other considerations, the Supreme Court reasoned that as long as the civil commitment is not punitive, the courts may employ a lower standard of proof than that required in a criminal prosecution.¹⁶⁶

The MSEHPA follows these holdings by utilizing a lower standard of proof for a civil commitment. Under the MSEHPA, the public health authority can isolate or quarantine an individual without a court order to protect the public during an emergency, “. . . if delay in imposing the isolation and quarantine would significantly jeopardize the public health authority’s ability to prevent or limit the transmission of a contagious disease.”¹⁶⁷ The standard employed under the MSEHPA to determine whether isolation or quarantine without a court order is necessary is one of reasonable belief that the person is a threat to the health of the public. This standard is lower than the standard for a criminal prosecution, but should be permissible under *Addington* and according to the court’s pattern of allowing preventive laws wider latitude in determining an appropriate standard of proof.

The *Bell* Court recognized that as long as the conditions of a pretrial detention do not constitute punishment, the detention is permissible.¹⁶⁸ Pretrial detention is analogous to isolation or quarantine during a public health emergency. Pretrial detention is undertaken to prevent potentially dangerous individuals from fleeing and possibly causing additional harm to society. Similarly, an individual may be isolated or quarantined during a public health emergency to ensure that he receives treatment and does not cause harm to society by spreading his disease. Therefore, as long as the conditions of the isolation or quarantine do not constitute punishment, the confinement is permissible under *Bell*.

The isolation or quarantine permitted under the MSEHPA is an example of the use of a preventive law utilizing habeas

that although *Bell* is a criminal case, it has “prepared the way for later determinations that individuals may be detained to protect the public”).

165. *Addington v. Texas*, 441 U.S. 418, 419-420 (1979).

166. *Id.* at 428.

167. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 605(a) (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

168. *Bell v. Wolfish*, 141 U.S. 520, 537 (1979).

corpus, rather than a pretrial proceeding¹⁶⁹ as in *Bell*. The MSEHPA recognizes that quick action is necessary in the case of a bioterror attack, and this may not allow the public health authority the time necessary to obtain a court order to confine an individual to prevent her from spreading a disease. For this reason, the Act permits isolation or quarantine to be appealed *after* detention is initiated, not before the detention begins.¹⁷⁰ This action is permissible because the belief that the government's interest in controlling a communicable disease outweighs the individual's interest in a right to privacy.¹⁷¹

In re Halko directly addresses public health detention.¹⁷² In that case, the court held that under a state's police power, the public health authority can detain an individual because he is a threat to public health, without depriving the individual of any Constitutional rights.¹⁷³ In *Halko*, the petitioner protested the government's power to ceaselessly detain him due to his pulmonary tuberculosis. The petitioner asserted that he was "continually deprived of his liberty" based on the health official's decision to prolong his quarantine.¹⁷⁴

The court rejected *Halko's* claim that the official's action deprived him of a Constitutional right by pointing to the broad police power granted to a state in order to prevent and combat disease.¹⁷⁵ The court stated that

[I]t is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, must take action.¹⁷⁶

169. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 605(c) (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

170. *Id.*

171. *Reynolds v. McNichols*, 488 F.2d 1378, 1382 (10th Cir. 1973) (where the court rejected a prostitute's challenge of a Denver public official's authority to order her to be examined and treated for a sexually transmitted disease without a judicial proceeding, calling the exercise of authority Constitutional).

172. *In re Halko*, 246 Cal. App. 2d 553 (1996).

173. *Id.* at 558.

174. *Id.* at 554.

175. *Id.* at 555.

176. *Id.* at 556 (citing *Lausen v. Bd. of Supervisors*, 214 N.W. 682, 684 (Iowa 1927)).

The powers granted by the MSEHPA to the public health authority are part of the police powers reserved for the state, as discussed by the *Halko* court.¹⁷⁷ Section 103 of the Act describes the police powers, which range from planning a response to a public health emergency, to mechanisms to detain an individual, to ensuring that an affected individual receives treatment without compromising civil rights, all with the goal of preserving public health.¹⁷⁸ In addition, the MSEHPA follows the pattern of other public health laws that allow for the use of expert decision makers, i.e. the public health authority, rather than judicial proceedings, to make a great number of decisions about treatment for an individual with a contagious disease that threatens the public health. Similar to *Halko* where the public health authority, rather than a court, decided to keep the individual with a highly contagious disease under quarantine, under the MSEHPA, the public health authority decides whether or not an individual should be subject to quarantine or isolation.¹⁷⁹

2. Reporting and Disclosing: The Right to Privacy

Critics of the MSEHPA assert that its liberal reporting requirements, which are also permitted by HIPAA, are an invasion on the Constitutional right to privacy.¹⁸⁰ However, modern court decisions, which are in line with the preventive jurisprudence of their ancestors, support the reporting requirements of the MSEHPA and HIPAA.

In *Whalen v. Roe*, the U.S. Supreme Court upheld the reporting of patient information to the public health authority.¹⁸¹ In this case, the pertinent issue was whether a statute that mandated the identification of patients who were taking certain pharmaceuticals constituted an invasion of the right to privacy.¹⁸² In its discussion, the Court recognized the privacy interest of an individual's right to avoid the disclosure of certain personal information.¹⁸³ The appellees argued that the "mere

177. *Id.*

178. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 103 (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

179. *Id.* at § 103(c).

180. Press Release, Take Action Network, *Health Powers Act = Loss of Rights*, Feb. 5, 2002, available at <http://www.takeactionnetwork.com>.

181. *Whalen v. Roe*, 429 U.S. 589, 598 (1977).

182. *Id.* at 598-99.

183. *Id.* at 559-600 (where the Court also recognized "the interest in independence in making certain kinds of important decisions" that could be affected by the Act at issue).

existence in readily available form of the information about patients' use of . . . drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations."¹⁸⁴

The Court concluded, "disclosures of private medical information to doctors, hospital personnel, to insurance companies, and the public health agencies are often an essential part of the modern medical practice even when the disclosure may reflect unfavorably on the character of the patient."¹⁸⁵ Moreover, "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy."¹⁸⁶ Therefore, the Court recognized that, under certain circumstances, the responsibility of the state to safeguard the health of the community takes precedence over the individual's right to privacy.¹⁸⁷

More recently, in *Baptist Memorial Hosp.–Union County v. Johnson*, the Supreme Court of Mississippi addressed a situation where a newborn was given to the wrong mother in the hospital for breast-feeding.¹⁸⁸ The biological parents demanded that the hospital release all the medical information it had about the mother who breast-fed their baby in order to detect any potential health threats to the child as a result of the mistake.¹⁸⁹

The mother who mistakenly breast-fed the baby agreed to the release of a limited amount of her medical information, but asserted her medical privilege of confidentiality in protest of a more extensive request from the family.¹⁹⁰ The court balanced two conflicting interests in its decision: the health interest of the infant who was fed by the wrong person, and the privacy interest of the woman who mistakenly fed the child.¹⁹¹ In balancing the two interests, the court recognized that it had "recently held that public policy encouraging and expediting the investigation and solving of crimes outweighs the privacy rights of individuals,"¹⁹² and that "the state has a compelling interest in . . . seeking out

184. *Id.* at 600.

185. *Id.* at 602.

186. *Id.*

187. *Id.*

188. *Baptist Memorial Hosp. - Union County v. Johnson*, 754 So. 2d 1165, 1166-67 (Miss. 2000).

189. *Id.* at 1167.

190. *Id.*

191. *Id.* at 1168.

192. *Id.*

the truth in civil matters [which] especially holds true when the health and life of another are potentially at stake.”¹⁹³

The court further recognized that “[t]he purpose of the [medical] privilege is to allow a patient to seek treatment without fear of embarrassing disclosure so that he might reveal all of his symptoms to his physician.”¹⁹⁴ However, the court concluded that “the privilege must give way where it conflicts with the sensible administration of the law and policy. . . .”¹⁹⁵ Additionally, “where the need for confidentiality is relatively weak and the need for information in the matter at hand is relatively strong . . . access may be the rule.”¹⁹⁶ The court held that the woman’s identity should be revealed to the child’s family under certain conditions, with specific protections.¹⁹⁷

Both the MSEHPA and HIPAA are in line with this recent holding. The MSEHPA requires covered entities to report PHI to the public health authorities in all situations where there could be a bioterror attack, disease of epidemic proportions, or highly infectious agents that might cause a significant number of fatalities, or pose a serious threat of long-term or permanent disability.¹⁹⁸ This requirement is in accordance with the state’s responsibility for the health of the community, as recognized by the Court in *Whalen v. Roe*.¹⁹⁹ Additionally, certain provisions of HIPAA allow for these disclosures, without the standard consent requirement.²⁰⁰ HIPAA permits a covered entity to use or disclose protected health information if it believes in good faith that the use or disclosure is necessary to prevent or lessen an imminent threat to the safety of the public.²⁰¹

For example, HIPAA allows for the disclosure of PHI in order to facilitate a public health activity.²⁰² “Public health activity” is not defined by the MSEHPA; however, considering the expansive definitions of other terms encompassed in the Act, it is

193. *Id.*

194. *Id.* at 1170 (quoting *State of New Jersey v. John Lee Briley*, 251 A.2d 442, 446 (N.J. Sup. Ct. 1969)).

195. *Id.* (quoting *Briley*, 251 A.2d at 446).

196. *Id.* at 1171.

197. *Id.*

198. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 301(Proposed Official Draft December 2001), available at <http://www.publichealthlaw.net>.

199. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

200. 45 C.F.R. §§ 164.506(a)(3) (2002), 164.510(a)(3) (2002), 164.512(a) (2002), 164.512(a) (2002), 164.512(b) (2002), 164.512(f) (2002), 164.512(f)(6) (2002), 164.512(j) (2002), 164.512(k) (2002).

201. 45 C.F.R. § 164.512(j)(1)(i)(A) (2002).

202. 45 C.F.R. § 164.512(b)(1) (2002).

likely that a great number of activities could be considered to be public health activities.²⁰³ Therefore, covered entities have wide latitude to release PHI to facilitate a public health activity. Because the public health authority has a responsibility to maintain the health of the community, such releases of PHI are not considered an invasion of individual privacy.

As stated in the preamble to the MSEHPA, the Act seeks to ensure a strong, effective, and timely response to public health emergencies, without unduly interfering with civil rights and liberties.²⁰⁴ This indicates that the balancing of patient privacy against the threat to public health, similar to that discussed in *Baptist Memorial Hosp.—Union County v. Johnson*²⁰⁵ (where the interest in confidentiality was weighed against the need for information) occurs throughout the MSEHPA. However, when public health authorities are thrown into action to combat a bioterror or other attack described under the MSEHPA, it is likely that there will not be the luxury of time that was afforded the court in *Baptist Memorial*. Decisions involving testing, vaccination, and treatment of individuals will have to be made quickly, which will not allow public health officials an opportunity to seek judicial guidance or to fully balance the competing interests in the situation. However, because the Act itself balances both interests, the public health authority will be acting in accordance with the *Baptist Memorial* court. The extensive powers granted by the MSEHPA must be available for use by the public health authority if these powers are required.

203. For example, “public health emergency” broadly defines the MSEHPA as follows:

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; (iii) a natural disaster; (iv) a chemical attack or accidental release; or (v) a nuclear attack or accident; 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.

THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 104 (Proposed Official Draft December 2001), available at <http://www.publichealthlaw.net>.

204. *Id.* at THE MODEL STATE EMERGENCY HEALTH POWERS ACT PREAMBLE (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

205. *Baptist Mem'l Hosp. - Union County v. Johnson*, 754 So. 2d 1165, 1168 (Miss. 2000).

In a true public health emergency, a delay of any time could cost an individual's life, or contribute to the spread of disease. It would be impossible to judge situations on a case-by-case basis during such an emergency. As recognized in the preamble to the MSEHPA, "the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain law for the 'common good.'"²⁰⁶ During a state of public health emergency, Americans will be in need of a law that protects the common good, not one that requires extensive interpretation.

3. Liability

(a) *The Fifth Amendment*

The Fifth Amendment prohibits governmental taking of private property "for public use without just compensation."²⁰⁷ This prohibition is applicable to the states through the Fourteenth Amendment.²⁰⁸ A taking question often arises in the context of a state's police power, since a taking requires that governmental power come from another source, such as the police power.²⁰⁹

Within the Fifth Amendment, there is a distinction between the taking of property and the regulation of property.²¹⁰ The government is not required to pay the same compensation for the regulation of property as it is for a taking; however, there is no clear-cut way to determine a taking from a regulation. As a general guideline, it has been held that if a government regulation denies a landowner all economic use of his land, the regulation is equivalent to a physical appropriation and is a taking, unless the landowner's use was unlawful.²¹¹

206. THE MODEL STATE EMERGENCY HEALTH POWERS ACT PREAMBLE (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>; see also *Jacobson v. Mass.*, 197 U.S. 11, 26 (1905) (examining whether an involuntary vaccination violated the petitioner's "inherent right of every freeman to care for his own body and health in such a way that seems best to him." The Court held that the mandatory vaccination did not violate the petitioner's rights, as "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state. . .").

207. U.S. CONST. amend. V.

208. *Chi. Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

209. See *id.* at 255.

210. U.S. CONST. amend. V.

211. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1480 (2002).

In contrast, if a court finds that the regulation only decreases the economic value of the property while an economically viable purpose remains, the government action is not necessarily a taking.²¹² If a taking occurs, the government must either pay the property owner the reasonable value of the property at the time of the taking, or pay the property owner for damages attributable to the regulation.²¹³ It is important to note that in the case of an emergency, courts give more deference to an action taken pursuant to a regulation, and therefore are less likely to find the governmental action a taking requiring compensation.²¹⁴

As written, the MSEHPA does not entirely comply with the Fifth Amendment takings clause.²¹⁵ Article Five of the MSEHPA gives the public health authority broad power to take a wide range of actions concerning facilities (medical and other), materials, roads, and public areas during a public health emergency.²¹⁶ During a public health emergency, the public health authority may call for the condemnation, decontamination, lease, transport, maintenance, renovation, or distribution of materials or facilities as is deemed necessary to respond to the public health emergency.²¹⁷

Also, the public health authority may take control of a health care facility for the duration of the emergency and require the facility to provide services or the use of the facility for another purpose as may be reasonable and necessary to respond to the public health emergency.²¹⁸ The public health authority may additionally control the movement of the public to affected areas and may prescribe travel routes, modes of transportation,

212. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 485 (1987).

213. See *First Evangelical Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

214. See *United States v. Caltex, Inc.*, 344 U.S. 149, 162 (1952); see also *Miller v. Schone*, 276 U.S. 272 (1928).

215. THE MODEL STATE EMERGENCY HEALTH POWERS ACT §§ 506, 805(a) (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>. (The MSEHPA complies with the Fifth Amendment takings clause by allowing states to take private property for a legitimate public use during a public health emergency, so long as the owner is provided fair market value compensation. However, the MSEHPA allows the state to take private facilities where the facility endangers public health. Under this circumstance, the state is not required to compensate the owner of the facility).

216. *Id.* at § 502(a)-(d).

217. *Id.* at § 501(b), 502(a).

218. *Id.* at § 502(b).

and destinations in connection with the provision of emergency services.²¹⁹ Finally, the public health authority may control health care materials during a public health emergency by distributing, rationing, or establishing access priority to the materials.²²⁰

In accordance with the takings clause of the Fifth Amendment, MSEHPA requires the state to provide just compensation to the owner of any property that is lawfully taken by the public health authority for its temporary or permanent use during a public health emergency.²²¹ The MSEHPA also requires that “to the extent practicable consistent with the protection of the public health, prior to the destruction of any property. . . the public health authority shall institute appropriate civil proceedings against the property to be destroyed in accordance with existing laws and rules of [the]. . . State.”²²² However, during emergency situations, including a public health emergency, the Supreme Court has interpreted government action liberally, favoring the action to be a regulation, rather than a taking.²²³ Therefore, it is less likely that during a public health emergency, government action to control property will be interpreted as a taking requiring just compensation.

The MSEHPA does not comply with the takings clause insofar as it does not require the state to compensate a property owner 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.”²²⁴ This is unconstitutional because it allows the state to take property without providing just compensation. This section should be categorized as the closure, decontamination, evacuation of a facility or materi-

219. *Id.* at § 502(d)(1), (2).

220. *Id.* at § 502(c).

221. *Id.* at § 805(a).

222. *Id.* at § 507.

223. *See, e.g., Miller v. Schone*, 276 U.S. 272, 279 (1928) (holding that when a state is forced to make a decision between the survival of two classes of property in a public health threat, it does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another, which, in the judgment of the legislature, is of the greatest value to the public); *United States v. Caltex, Inc.*, 344 U.S. 149, 159 (1952) (the Court found that the wartime destruction of private property by the Army to prevent the capture and use of the land by an advancing enemy was not a reimbursable taking under the Fifth Amendment, as based on the urgency of the situation and the fact that the enemy would have destroyed the property if the United States Army did not get to it first”).

224. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 506 (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

als, or the destruction of a facility or materials. The first group is likely the regulation of property, therefore not requiring compensation. However, the destruction of a facility or materials is unquestionably a taking, and therefore the owner must be compensated under the Fifth Amendment. There should be one exception to this rule: where the owner of the destroyed property has purposefully contaminated the property to spread a communicable disease, he should not be compensated.

(b) *Liability for Medical Error*

The Supreme Court established the parameters of governmental immunity for certain wrongdoings in *Berkovitz v. United States*²²⁵ In *Berkovitz*, the Court heard the case of a two-month old boy who contracted a paralyzing case of polio after being given a vaccine that had been approved by the appropriate government agencies.²²⁶ The petitioner asserted that the United States was liable for the boy's injuries under the Federal Tort Claims Act (hereinafter "FTCA").²²⁷ The petitioner alleged that agencies of the United States had acted wrongly in the release of the particular batch of polio vaccine the boy received, thereby violating federal law and policy regarding the inspection and approval of polio vaccines.²²⁸ The FTCA generally authorizes suits against the United States

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."²²⁹

The discretionary exception to the FTCA excludes from statutory liability any claim based on a federal agency or employee's exercise or performance, or the failure to exercise or perform a discretionary function or duty.²³⁰ The government argued that the discretionary exception barred all claims arising out of the regulatory activities of federal agencies.²³¹ The Court stated,

225. *Berkovitz v. United States*, 486 U.S. 531 (1988).

226. *Id.* at 533.

227. 28 U.S.C. § 2674 (2002).

228. *Berkovitz*, 486 U.S. at 533.

229. *Id.* at 535 (quoting 28 U.S.C. § 1346(b)(1) (2002)).

230. *Id.*

231. *Id.* at 538.

“the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.”²³² Properly applied, this exemption only protects governmental actions if the decision involved the permissible exercise of policy judgment by the government worker.²³³ Therefore, the Court rejected the government’s argument that the discretionary exception precludes governmental liability for any and all acts arising out of the regulatory programs of federal agencies.²³⁴

The MSEHPA allows the public health authority to direct in-state or out-of-state public health workers to respond to a public health emergency as necessary.²³⁵ The Act provides that neither the state nor any public officials referred to in the Act shall be liable for “the death of or any injury to persons, or damage to property, as a result of complying with or attempting to comply with this Act or any rule or regulations promulgated pursuant to this Act. . . during a state of public health emergency,” except in cases of gross negligence or willful misconduct.²³⁶

Both the MSEHPA and the FTCA provide for liability for wrongdoing; however, the FTCA provides for it to a greater degree. Recall that in *Berkovitz*, the Supreme Court found that the federal government is shielded from statutory liability under the discretionary exception of the FTCA if the agent who caused the injury was acting under his own policy judgment at the time of the damage.²³⁷ However, as a general rule under the FTCA, the government may be liable if a worker causes damages while acting within the scope of his office, in accordance with a government policy, statute, or regulation.²³⁸

Under the MSEHPA, if a worker is acting in accordance with the Act, including reporting PHI as permitted under HIPAA, neither the state nor the public health worker will be liable for any wrongdoing. However, if the injury is attributable to gross negligence or willful misconduct, then either the state or the public health worker will be held accountable. Therefore, as general rule under the FTCA, the government is liable for work-

232. *Id.* at 536.

233. *Id.* at 539.

234. *Id.* at 538.

235. THE MODEL STATE EMERGENCY HEALTH POWERS ACT §§ 608(a), (b) (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

236. *Id.* at § 804(a).

237. *Berkovitz*, 486 U.S. at 537.

238. *Id.* at 535.

ers who are acting in a statutorily prescribed manner, and it is free from liability if the worker is acting under his own discretion. In contrast, as a general rule under the MSEHPA, no one is liable for problems that arise as a result of a worker who causes damages, but has acted in compliance with the Act; however, either the government or worker will be held accountable for actions that are found to be of gross negligence or willful misconduct.

4. Conclusion

The MSEHPA follows the line of preventive jurisprudence cases. In accordance with preventive jurisprudence, the MSEHPA follows the three trademarks of other public health holdings. First, the Act allows the states to rely on expert decision makers by giving the public health authority the power to determine whether an individual should be detained without due process proceedings.²³⁹ Second, the Act utilizes habeas corpus proceedings, rather than pre-trial hearings, by allowing an individual to require an order to show cause for his continued quarantine or isolation to be produced.²⁴⁰ Finally, the MSEHPA utilizes a lower standard of proof by allowing the public health authority to detain an individual without a court order to protect the public during an emergency, when failing to confine the individual would pose a significant threat to the public's health.²⁴¹

The MSEHPA and the HIPAA provisions also follow current decisions regarding privacy and health records.²⁴² The MSEHPA, however, does not fully comply with the compensation requirements of the Fifth Amendment. The Act falls short by failing to require compensation for all takings by the state during a public health emergency. However, due to the fact that the courts have liberally interpreted regulatory actions during emergency situations, the MSEHPA may be in line with these requirements.²⁴³

239. THE MODEL STATE EMERGENCY HEALTH POWERS ACT § 605(a)(1) (Proposed Official Draft Dec. 21, 2001), available at <http://www.publichealthlaw.net>.

240. *Id.* at § 605(c)(1).

241. *Id.* at § 605(a)(1).

242. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 605 (1977); *Baptist Mem'l. Hosp. - Union County v. Johnson*, 754 So. 2d 1165, 1170 (Miss. 2000).

243. *See, e.g.*, *Miller v. Schone*, 276 U.S. 272, 279 (1928); *United States v. Caltex*, 344 U.S. 149, 154 (1952).

III: SYNTHESIS OF THE MSEHPA, HIPAA PROVISIONS AND CONSTITUTIONAL LIBERTIES

Change is abundant and yet often difficult to accept. Terrorists have invaded the United States and shown Americans that we, too, are vulnerable to different forms of attack. The MSEHPA is changing the face of the public health system because it enables the governor, the public health authority, and other officials to utilize and enforce public health laws that have existed for some time but lacked enforcement power.

Similarly, HIPAA is changing the way Americans look at their health information. The recent and abundant breaches of health information privacy have forced Americans to demand change that will bring back the security of health information. The constitutional liberties enjoyed by Americans for over 200 years are also changing. Americans can no longer expect to live in the same society that their ancestors did. Freedom still reigns in America, but it is a more guarded, reserved freedom.

In the face of terror and the new need to be protected from it, the government, the public health system, health care workers, and American citizens must work together to reach an acceptable balance between shelter from terror and the safeguard of Constitutional liberties. In order for Americans to be adequately protected, the MSEHPA, HIPAA provisions, and Constitutional liberties must all succumb to change. Each area must yield to allow the others to work effectively, without compromising integrity and purpose.

It has been said, "a bioterrorism policy must find a balance between compliancy and igniting public fears of a totalitarian military lock-down and thus becoming self-defeating."²⁴⁴ In attempting to strike the delicate balance that provides protection from a bioterror attack, government must be conscious of the problems that are particular to such an attack. Bioterror agents are different from other means of terror warfare, because the agents continue to replicate after the initial attack, and are passed from person to person.²⁴⁵

In order to do its job of protecting the public adequately, the government must continue to be granted wide latitude, like that the courts have traditionally allowed, to develop strong and effective laws and protocols that will combat bioterrorism. Critics

244. Edward P. Richards, *Bioterrorism and the Use of Fear in Public Health*, at 4, available at http://biotech.law.lsu.edu/blaw/bt/epr_bioterror01.pdf.

245. *Id.* at 3.

of the MSEHPA contend that the legislation appears to be “a classic case of government overreaction.”²⁴⁶ In fact, government overreaction to this situation would be evident through unreasonably expansive power grants that threaten to eliminate, not merely narrow, Constitutional liberties.

The MSEHPA and the provisions of HIPAA that work with it are positive changes for America. Although both laws require the right to due process, the right to privacy, and the ability to be compensated for other injustices to be limited, the protection the laws provide during a bioterror attack will far outweigh these sacrifices. Critics have recognized the narrowing of the Constitutional liberties by the MSEHPA and HIPAA provisions and have called for unreasonable reactions to these new protections. The alternatives suggested by critics of the MSEHPA and HIPAA provisions are equally as restricting to American’s Constitutional rights as are the two Acts. For example, opponents have suggested that Americans put their health at risk to defend the right to privacy by refusing vaccination.²⁴⁷

The CDC has recognized that the United States is vulnerable to heretofore unprecedented chemical and bioterror acts.²⁴⁸ It is this looming threat that has caused uncertainty and brought fear back into the hearts of many Americans, similar to the fear spoken of by the court in *Holmes v. Jennison*.²⁴⁹ However, this new fear has developed in a population of Americans who are much more savvy about their Constitutional rights than those of the last century. It is this knowledge that is causing Americans to demand the privacy rule of HIPAA and to rightly challenge the MSEHPA. However, it is this same knowledge that may end up causing great harm to the United States during a bioterror attack. Americans must refocus their concerns to learn about the new challenges that face lawmakers as they “grapple with

246. Press Release, Libertarian Party, *New ‘Emergency Health Powers Act’ is a Dangerous Expansion of State Power*, Jan. 14, 2002, available at <http://www.lp.org/press/archive.php?function=view&record=559>.

247. The Take Action Network, *The Emergency Health Powers Act*, available at <http://www.takeactionnetwork.com>.

248. THE CENTER FOR DISEASE CONTROL AND PREVENTION, *Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response*, 49 MORBIDITY AND MORTALITY WEEKLY REPORT 1, Apr. 21, 2000, available at <http://www.bt.cdc.gov/Documents/BTStratPlan.pdf>.

249. *Holmes v. Jennison*, 39 U.S. 540, 574 (1840) (discussing the extensive powers of the federal government when similar authority in the state government would be “contradictory”).

the right balance between civil liberties and emergency health powers in a new age of biological terrorism.”²⁵⁰

250. Justin Gillis, *States Weighing Laws to Fight Bioterrorism*, WASH. POST, Nov. 19, 2001, <http://www.washingtonpost.com>.