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The Expansion of Executive Powers in Response to the Threat of Bioterrorism against Individuals and Agribusiness

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INTRODUCTION

The threat and the fear of terrorist attacks with weapons of mass destruction (WMD) have naturally resulted in an expansion of state and federal governmental authority, but to what extent does such expansion compromise or threaten to compromise individual rights and free enterprise? Much has been written about the tension between governmental counterterrorism measures and the civil rights and liberties of Americans (Baker 2003). This has been a classic concern throughout history. The threat of WMD and their indiscriminate use by terrorists present an even greater challenge, because they concern the vital interests of this country. Bioterrorism in particular is viewed by many as an existential threat (Ackerman 2004, 1044). Bioterrorism is defined as “the intentional use of a pathogen or biological product to cause harm to a human, animal, plant, or other living organism to influence the conduct of government or to intimidate or coerce a civilian population” (Gostin 2003, 8).

As discussed below, the specific threat of bioterrorism has resulted in proposals for a significant expansion of state and federal governmental authority over public health at the expense of individual rights, freedoms and privacy. The threat of a bioterrorist attack against agribusiness (agroterrorism) has resulted in an actual expansion of governmental authority over agribusiness, dictating data sharing and providing for threat responses that could result in very costly quarantines and the destruction of goods and, even worse, a long-term loss of consumer
confidence. In this paper, “agribusiness” refers broadly to all aspects of the food industry (FAO 2014).

This paper examines and compares, in historical context, these two expansions of governmental authority in response to threats of bioterrorism, one of which is aimed directly at people, the other of which is aimed directly at agribusiness. The examination reveals that there is a historical, natural tendency of the executive branch to expand its powers and that the legislative and judicial branches tend to defer to the executive branch during emergencies. The comparison reveals that, although there is such a natural attempt by the executive branch to expand its powers, such expansion has yielded more to concerns over individual rights and liberties than it has to concerns over actual and potential costs to commerce. This difference can be explained by the much greater constitutional authority that the federal government enjoys over commercial activity. A review of the literature reveals that, as a result, the expansion and consolidation of executive powers due to concerns over WMD attacks, bioterrorist and agroterrorist attacks in particular, has been considerable. The measures taken have tended to respect the limits of governmental power vis-à-vis individual freedoms, rights and privacy, whereas agribusiness stands to sustain considerable losses, due to governmental action in response to an actual or suspected agroterrorist attack.

TENSION BETWEEN COUNTERTERRORISM AND CIVIL LIBERTIES

The challenge to the American civil libertarian tradition is how to protect citizens from terrorism and from each other “while not interfering in their lives beyond what is necessary to maintain social order” (Hardin 2004, 77). According to James Madison, the federal government should not be trusted, and private citizens should be safeguarded from its abuses (Ibid.). In peaceful times, most Americans tend to adhere to the fundamental concept of individual
autonomy and abhor restrictions on their individual liberty, especially for paternalistic purposes (Beauchamp 1988, ix). A balance between protective police powers and individual rights and freedoms has therefore been achieved through a constitutional separation of powers (Donohue 2008, 11), but it is “severely weakened in a time of great crisis” (Hardin 2004, 89).

There are many historical examples that confirm Madison’s distrust of government and prove that there is an innate tendency for the executive branch to increase its power at every opportunity in the competition among the three branches. The other two branches exist to define executive powers and to restrain the natural tendency to expand and/or abuse those powers (see, e.g., United Public Workers of America v. Mitchell 1947, 91). But after a major terrorist attack, legislators hastily grant additional powers to the executive branch, without adequate consideration and debate (Donohue 2008, 11). They are concerned about their own re-election and therefore act so that they are “seen to respond to protect the life and property of the citizens” (Ibid.). Donohue warns that such a phenomenon is likely to occur due to concern over the proliferation of biological and nuclear materials and the apparent eagerness of terrorists to sacrifice themselves to cause as much damage as possible to Americans (Ibid.)

In times of emergencies, the federal judiciary, although independent and appointed for life, is nonetheless deferential to the executive branch as well. Ackerman criticizes the judiciary for declining to strike down the executive’s claims to overreaching powers (Ackerman 2006, 1083). The War Powers Resolution (1973), for example, defines when the President can use military force and prescribes reporting requirements, but the President has consistently ignored its provisions (Posner & Vermeule 2007, 167). Similarly, the National Emergencies Act (1976) and the International Emergency Economic Powers Act (1977) place restrictions on the President’s power to declare emergencies. But in an emergency, the statutes are ignored and are
not enforced, because “no one has any interest in insisting that the limitations be respected” (Posner & Vermeule 2007, 167).

Despite the tendency of the executive branch to seize additional power during an emergency, and the deference of the legislature and the judiciary, the overreaching of power has proved to be temporary. Posner and Vermeule have reached the conclusion that there is no “ratchet effect . . . under which wars and emergencies have irreversible effects on future policies” (Ibid., 149-50).

EXPANSION OF FEDERAL POWERS DUE TO THE THREAT OF WMD

In the psyche of Americans, nuclear weapons were the first WMD to pose an existential threat to the United States. The United States had used such weapons against civilian populations in Japan during World War II (Brew 2005, 178), so their devastating effects were not merely theoretical. They were undeniable. In the ensuing arms race between the United States and the Soviet Union, WMD became the crux of foreign policy (Betts 1998, 26), and the looming threat of nuclear attack had a profound and long-term effect on the daily lives of Americans (Schatz and Fiske 1992). The federal government was focused on the locations of Soviet missile silos, not on the possibility than an individual might smuggle a nuclear bomb into the United States. The technology had not yet been developed to make such a device (Leonard 2011). The threat of a nuclear attack by intercontinental ballistic missiles may have served to create and expand the “military-industrial complex” (Eisenhower 1961), but there is no evidence that it caused an expansion of executive powers that had a direct, adverse impact on individual rights and free enterprise.

In the 1990s, after the Cold War, terrorism was on the rise, and the threat of biological weapons displaced the nuclear threat (Betts 1998, 26). During the Cold War, there had been
some isolated incidents of bioterrorism that had planted the seeds of fear. In 1970, the Weather Underground tried to obtain biological agents from the U.S. Army Medical Research Institute on Infectious Diseases (Parachini 2000, 45). In 1984, the Rajaneeshee cult contaminated a salad bar with salmonella at a restaurant in Oregon to influence a local election (Flynn 2009). And in 1991, the Minnesota Patriots Council plotted a ricin attack against government officials (Avery 2004, 277).

By the mid-1990s, the spread of AIDS, the Ebola virus, and tuberculosis raised a new public consciousness and fear which public health advocates were quick to exploit, citing a need to build a public health infrastructure to prevent infectious disease and to improve surveillance (Ibid., 275). In 1997, Tom Clancy published his novel Executive Orders in which terrorists launch a strain of the Ebola virus in the United States, and the President responds by ordering the closure of businesses and the suspension of all interstate travel. (Annas 2002, 1337 (citing Clancy 1997)). That same year, President Bill Clinton became concerned about the threat of bioterrorism, reportedly after reading The Cobra Event, a novel by Richard Preston. (Preston 1997). The following year, in 1998, an antigovernment activist threatened to activate plague cultures against government installations (Annas 2002, 1337). And in 1999, the Aum Shinrikyo used the nerve agent sarin in a Tokyo subway in 1995 (Martin et al. 2008).

After the 9/11 attacks, Congress and the President precipitously enacted the USA PATRIOT Act (2001) before anyone really understood its implications. Bassiouni writes that the post-9/11 “systematic erosion of civil rights” is worse than Americans saw in 1861 during the Civil War when President Lincoln suspended the writ of habeas corpus (Act of August 6, 1861), in 1942 during WWII when President Roosevelt had Japanese-Americans interned following the December 7, 1941 attack on Pearl Harbor (Executive Order No. 9066), and during the early
1950s of the Cold War when Senator Joseph McCarthy went on a “witch-hunt for Communists” (Bassiouni 2004, 1). Cassel wrote that “forces of greed and power” are selling our liberties “down the river in the name of fighting a war that can never be won” (Cassel 2004, 144). The 9/11 attacks, Hardin states, were a license for the “U.S. government to violate its Madisonian principles” (Hardin 2004, 77). Donahue summarizes the extreme measures that were proposed or taken by the federal government in response to terrorist attacks in 2001: Secret courts, secret evidence, proposals to suspend *posse comitatus*, assassination policies, the subcontracting of interrogation to countries where torture is routine, indefinite detention, and widened powers of surveillance (Donohue 2008, 48).

Cole and Dempsey argue that curtailing civil liberties may result in some successes, but is outweighed by “wasted resources consumed by fruitless random searches and generalized monitoring of groups or movements” (Cole and Dempsey Cole 2002, 170). Writers such as Bruce Ackerman insist that “Terrorism—as exemplified by the attack on the World Trade Center—does not raise an existential threat, at least in the consolidated democracies of the West” (Ackerman 2006, 89). The U.S. government has reacted more extremely than European governments have. Warbrick points out that, in the aftermath of the 9/11 attacks, coalition states “have responded in their domestic laws with circumspection. There have not been a raft of emergency laws and widespread interference with individual rights” (Warbrick 2004, 993).

All of these governmental actions were “at the expense of individuals’ civil liberties,” especially the right of privacy under the executive’s expanded surveillance authority (Dragu 2011, 1). Former Deputy U.S. Attorney General Heymann argues that many of the post-9/11 expanded powers “are at odds with American political and legal traditions and create disturbing
precedents” that were made possible through an “abandonment of such constitutional principles as separation of powers” (Heymann 2004, 222).

Among the threats of terrorism, the threat of WMD has arguably proved to be the most powerful at convincing Americans to give up civil liberties. Maclin criticizes the willingness of Americans to sacrifice their Fourth Amendment protections against unwarranted searches and seizures for the sake of public safety (Maclin 2003, 522). The threat was powerful enough to draw our nation into war in Iraq, the consequences of which are still not known over ten years later (Bejesky 2012, 263). Despite the unpopularity of our involvement in Iraq, WMD remain a strong justification for invading other countries under the guise of an evolving international norm known as humanitarian intervention or the Responsibility to Protect (R2P) (Bell 2014, 261).

There are writers, however, who state that there is no need for alarm. While it is indisputable that the executive has expanded its powers at the expense of civil liberties, writers like Posner and Vermeule argue that, compared to other periods of emergency in U.S. history with executive overreaching, post-9/11 counterterrorism measures have been relatively less aggressive (Posner & Vermeule 2007, 149-50). As mentioned above, their studies show that expansions of executive power have been temporary throughout history (Ibid.). They conclude that, although civil liberties are restricted during national emergencies, they are “reinstated when the emergency passes” (Ibid. 150).

According to the Office of Management and Budget, funding for counterterrorism increased from $6.5 billion in fiscal year 1998 to about $10 billion for fiscal year 2000 (GAO 1999). In 2000, about 14% of the budget to combat terrorism was dedicated to dealing with WMD (Ibid.). Since then, and the 9/11 attacks, the number of federal programs and initiatives to combat terrorism has grown even more significantly (GAO 2006). Apart from law enforcement,
two incidental areas where federal authority has expanded the most in response to the threat of WMD are public health and agribusiness. The expansion of governmental authority raises concerns about the infringement of personal rights and liberties in the areas of law enforcement and public health and of economic freedoms in the area of agriculture.

EXPANSION OF PUBLIC HEALTH IN RESPONSE TO THE THREAT OF BIOTERRORISM

As Feingold writes, there is a classic tension “between public health programs intended to benefit the community at large and the protection of individual rights and liberties” (Feingold 1998, 334). The issue is “whether the public interest in protecting civil liberties outweighs the public interest served by the particular public health program” (Ibid., 335). Avery describes how, historically, policymakers have exploited public unease over health issues to “advance the building of public health infrastructure” (Avery 2004, 277).

As early as 1906, President Theodore Roosevelt sponsored the Pure Food and Drugs Act (1906) in response to the media’s exposition of “the worthlessness and hazards of patent medicine” (Beauchamp 1988, 136). A few years after that, in 1910, M.J. Roseneau, the head of the U.S. quarantine station on Angel Island, San Francisco, stated that fear is a useful tool of public health because “it maintains the public’s respect for the threat of epidemic disease” (Avery 2004, 275). Beauchamp contends that, during the New Deal Era (1932-1935), the executive exploited the judiciary’s deference “to expand its dominance over the economy, health and safety, and other areas of social welfare” (Beauchamp 1988, 116). In the 1950s, during the Korean War, the perceived threat of bioterrorism led to the creation of the Epidemic Intelligence Service at the Center for Disease Control (CDC) (Fairchild et al. 2007, 247).
Even before First Lady Hillary Rodham Clinton’s campaign for health care reform, Beauchamp argued in 1988 that “[t]he most important thing we can do to combat the present epidemic [of AIDS] is to move rapidly to some form of national health insurance of national health program” (Beauchamp 1988, 237). And President Reagan’s national security advisor advocated the need to “break down stove pipes” between commercial and governmental databases (Ibid.).

In the 1990s, even before the 9/11 attacks, fears of bioterrorism were already leading to “proposals designed to invigorate the capacities of public health departments to monitor the presence of pathological threats, whether sources were domestic or foreign” (Fairchild et al. 2007, 228). Some said that it was leading to the “militarization of public health” (Ibid., 246). During the Clinton administration, Health and Human Services (HHS) Assistant Secretary Margaret Hamburg, a former New York City health commissioner, stated, “We need to strengthen our national public health infrastructure. This means enhancing our surveillance and epidemiologic capacity; our laboratory capacity to support surveillance efforts; and our communication systems to collect, analyze, and share data” (Hamburg 1999, 564).

In 2001, shortly after the 9/11 attacks, anthrax attacks killed five people in seven states, and the CDC proposed the Model State Emergency Health Powers Act which was quickly drafted under the guidance of Lawrence Gostin at Georgetown University and Johns Hopkins University by borrowing from several existing state laws (Annas 2002, 1337; Bayer and Colgrove 2002, 1811). The purpose of the model act was to encourage uniformity among state legislative schemes (Bayer and Colgrove 2002, 1811). Under the proposed legislation, governors could mobilize the state militia and take extraordinary measures, including the compulsion of individuals to undergo medical examination, testing, vaccination, and treatment (Ibid.). Isolation,
quarantine and criminal penalties were prescribed for those who refused to comply (Ibid.). And
criminal penalties were prescribed for health care providers who refused to participate in
carrying out the extraordinary measures (Ibid.).

The first draft of the model act was quickly prepared for public comment, and there was
considerable criticism that it gave state governors far too much power. George Annas denounced
the model act as “the Old Soviet model of public health (lots of power and no standards for
applying it), hardly a new American model” (Fairchild et al. 2007, 249). The concern was not
only over “invasions of privacy that so provoked the opponents of the act, but the direct linkage
of expanded surveillance to coercive measures that might be imposed by health officials or the
police” (Ibid., 250).

Gostin argued that the threat of bioterrorism and the need to respond to pandemics
justified the compromise of civil rights (Gostin 2003, 6; see also Fairchild et al. 2007, 249). To
make his point, Gostin noted that far more people had died from major outbreaks of infectious
disease than had been killed in war (Gostin 2003, 6). For example, in the fourteenth century, the
bubonic plague wiped out about 25 million Europeans, over a quarter of the population (Ibid.).
And today, the globalization of travel and trade allows for the widespread, rapid transmission of
disease worldwide. Writers like Avery contend that, apart from the threat of bioterrorism, AIDS,
SARS, drug-resistant tuberculosis, Hantavirus, and West Nile fever “offer clear and recent
evidence that infectious disease remains a serious threat to population health, and that the public
health system needs more attention than it has received” (Avery 2004, 285).

Due to the overwhelming criticism of the first draft of the model act, however, the
recommended expansive powers of the states’ governors were diluted in a second draft, which
did not assuage critics. Bayer and Colgrove describe criticism in response to both the first and
second drafts of the model act raised by AIDS advocates, physicians, hospitals, anti-vaccination advocates, privacy advocates, and civil liberties advocates (Bayer & Colgrove 2002, 1811). The Association of American Physicians and Surgeons stated that the model act “turns governors into dictators,” permitting them to “create a police state by fiat” (Bayer and Colgrove 2002, 1811). The Association denounced the second draft as a “disingenuous effort to mute criticism” (Ibid.). The second draft retained provisions that would impinge on the commercial interests of owners of medical facilities whose property and employees could be “commandeered.” The second draft was still considered to be a “prescription for tyranny” (Orient 2002).

Despite its detractors, the model act had, by July 2002, been passed in nineteen states and introduced in seventeen others (Bayer and Colgrove 2002, 1811). That same year, the CDC tried to build on its successful implementation of the model act by announcing its intention to establish a “national syndromic surveillance system” to combat bioterrorism (Henning 2004). As described by the CDC, “syndromic surveillance gathers information about patients' symptoms (e.g., cough, fever, or shortness of breath) during the early phases of illness” (Ibid.). According to Fairchild et al., however, under the concept of Total Information Awareness, “[t]he system would have given intelligence analysts and law enforcement officials access to internet communications, telephone records, credit cards, and banking transactions without a court-approved search warrant” (Fairchild et al. 2007, 248). In 2004, the General Accounting Office (GAO) concluded that CDC’s optimism about syndromic surveillance “might have been premature” (Ibid., 248), and the idea was scrapped.

Much has been written about the history of public health in the United States and accusations that the “protection of the public’s welfare has served as a pretext for erosion of fundamental rights” (Bayer and Colgrove 2002, 1811). Writers like Mariner et al. warn that
“emergencies should not become a pretext for the abuse of power” (Mariner et al. 2009, 365).
Such writers assert that governments, with little or no regard for the low probability that a bioterrorism attack will take place on a massive scale, are seizing the opportunity to expand their public health powers including the power to make emergency declarations, powers to involuntarily isolate or quarantine people, and powers to involuntarily vaccinate, test, or medically treat people. “The threat of terrorism has created a powerful appetite in Washington for sophisticated surveillance systems to identify potential terrorists. These efforts cannot be allowed, however, to undermine civil liberties” (New York Times 2002).

If viewed in historical context, however, it is arguable that the measures taken in the last twenty years are more restrained than the ones experienced by Americans in previous emergencies that threatened vital national interests, including the Alien and Sedition Acts (1798) (undeclared war with France in 1798), the suspension of habeas corpus and military rule (Civil War), the Espionage Act (1917) (the Red Scare of WWI), the internment of Japanese Americans (WWII), and McCarthyism (Cold War).

EXPANSION OF AUTHORITY OVER AGRIBUSINESS IN RESPONSE TO THE THREAT OF AGROTEERRORISM

The threat of bioterrorism includes the more specific threat of agroterrorism which is defined as a “deliberate introduction of an animal or plant disease with the goal of generating fear over the safety of food, causing economic losses, and/or undermining social stability” (Monke 2007, 1). The psychological effects do not compare to those associated with WMD. As Fleischhacker points out, the federal government does not classify agricultural warfare agents as WMD (Fleischhacker 2007, 90). Despite its potential significant economic effects, agroterrorism is directed against livestock, plants, and food, and not directly against people. An agroterrorist
attack can, however, have a significant economic impact. The contamination of animal feed with dioxin in the Netherlands in 2006 cost $1 billion, and the foot-and-mouth disease outbreak in the United Kingdom in 2001 cost $21 billion (Gyles 2010, 347).

The threat of agroterrorism has prompted significant expansions of federal powers over agribusiness, comparable to what has happened in the public health sector. As Fleischhacker points out, about one-sixth of the U.S. gross national product concerns agribusiness (Fleischhacker 2007, 81). Lobbyists for those industries are busy fending off legislation that gives governments the power to require the sharing of data, the destruction of dangerous or contaminated property, the abatement of nuisances, and the confiscation of property for public purposes (Ibid.). Fleischhacker writes that “[m]any scientists and policy makers acknowledge that the threat of agroterrorism is exaggerated” (Ibid., 90).

Under the Homeland Security Act (2002), the U.S. Department of Homeland Security (DHS) obtained authority (previously belonging to the U.S. Department of Agriculture (USDA)) to counter agroterrorism through the inspection of international passengers, baggage, cargo, and conveyances and to quarantine suspicious items that might introduce plant or animal diseases (GAO 2005).

Under the Public Health Security and Bioterrorism Preparedness and Response Act (2002), USDA and HHS have authority “to regulate agents and toxins that pose a serious threat to public health, animals, plants, and animal and plant products” (GAO 2005). The Act gives the U.S. Food and Drug Administration (FDA) authority to mandate the registration of domestic and foreign food processing facilities, to detain food, to debar persons who have convicted of crimes relating to the adulteration of food, and to refuse food at the expense of the owner (Fleischhacker 2007, 93). The USDA has counterpart authority with respect to meat, poultry, and certain egg
products (Ibid.). The FDA has authority over all other foods (Ibid.). Both agencies have authority to inspect and to quarantine crops, animals, foods, and even humans (Ibid.).

USDA has developed the National Veterinary Stockpile (NVS) to deal with an animal disease outbreak through the deployment of vaccines, pharmaceuticals, equipment and commercial support services (Nemane 2012, 325). The FDA has administrative detention authority over all the imported food, which means that it can seize food (Ibid.).

In 2007, a report by the GAO concluded that “a fundamental re-examination of the federal food safety system [was] warranted” and recommended congressional action in subsequent reports (Youngberg 2013, 509; GAO 2009). In 2011, the Food Safety Modernization Act (FSMA) (2011) was enacted to update food safety laws. As McNeill explains, the FSMA gives the FDA broad authority over imported food and food products, including the denial of entry. In order to inspect foreign food processing facilities, the FDA has offices in China, India, Costa Rica, and Belgium (McNeill 2012, 185; see also Taylor 2011, e18(2) (“The FDA’s core job under the FSMA is to set modern prevention-oriented standards and ensure high rates of compliance.”)).

When agroterrorism is suspected, the Federal Bureau of Investigation (FBI) becomes the lead investigating agency (Fleischhacker 2007, 122). In 2005, the FBI established the Strategic Partnership Program Agroterrorism Initiative (SPPA) to develop an interagency (FDA, USDA and DHS) partnership with states and industry to counter agroterrorism through assessments of the food and agriculture sectors (FDA 2007).

Critics of expanded federal powers over agribusiness state that the federal government may be playing “into the aims of terrorist organizations” by creating bureaucratic inefficiencies and interrupting commercial activity” (Donohue 2008, 25). Counter-agroterrorism efforts may
be stunting economic growth in agribusiness by, for example, “severely hamper[ing] the transfer of commercial goods” (Ibid., 28). Extensive surveillance may “discourage innovation or harm commercial activity” (Ibid., 271).

Despite the concerns of critics and the protests of agribusiness, the legislative branch and the judiciary are not likely to intervene to check the expansion of executive powers. The courts “display a well-known deference to legislatures’ wishes to restrict property rights and even personal liberty in order to promote the public’s health” (Beauchamp 1988, x). There is much greater concern for the protection of individual rights and freedoms in the private sphere than there is “in the spheres of the market and communal welfare” (Beauchamp 1988, xi). Ever since the New Deal, courts have been reluctant “to stand in the way of a sharp increase in the federal government’s role in taxation and regulation of interstate commerce” (Beauchamp 1988, 116).

**CONCLUSION**

Much has been written about the expansion of governmental authority to deal with the threat of terrorism, especially the threat of WMD, in the area of law enforcement, where it impinges most on the privacy and Fourth Amendment rights of individuals. The threat of bioterrorism and its subset agroterrorism have a more specific impact on public health and agribusiness, respectively. The threat of bioterrorism has resulted in an expansion of executive powers that threaten to compromise individual rights, freedoms and privacy, as well as the commercial interests of owners of medical facilities. The threat of agriculture has also resulted in an expansion of executive powers, which tend to hamper commerce and could lead to costly business losses in the event of a real or suspected agroterrorist attack. The Constitution tolerates more the federal regulation of commerce than it does the compromise of civil liberties. But either
way, history has shown that the current expansion of executive powers is relatively moderate and probably temporary.
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