

AAPS Analysis: Model Emergency Health Powers Act (MEHPA) Turns Governors into Dictators

Alert distributed to medical societies, Dec 3, 2001

Background

HHS Secretary Tommy Thompson is urging State legislatures to adopt the Model State Emergency Health Powers Act, prepared by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities for the Centers for Disease Control and Prevention. This Act grants unprecedented and unchecked powers to the Governors of the 50 States. It can be downloaded from <https://www.aapsonline.org/legis/msehp2.pdf>.

It is likely that HHS will tie passage of the Act to billions of dollars in federal funding: the usual method of bribery/coercion to get States to pass legislation that would otherwise never be considered.

Paul Weyrich of the Free Congress Foundation said: "Tommy Thompson, whom I have considered a friend for thirty years, should be ashamed of himself for advocating this kind of Big Brother legislation. This is not the Tommy Thompson we knew as a four-term governor of Wisconsin."

HHS is using the 9/11 emergency as a pretext to rush passage of an Act that has been in the works for more than a year. Its main author, Lawrence O. Gostin, was a member of Clinton's Task Force on Health Care Reform, whose secret documents were exposed to public view as a result of the AAPS lawsuit (*AAPS et al. v. Hillary Rodham Clinton et al.*) He was a member of Working Group 17, Bioethics, of Cluster V, The Ethical Foundations of the New System, and also a member of the informal group promoting Single Payer. It is odd that Tommy Thompson should be urging adoption of a plan originating with the most extremist left wing of Clinton's Health Care Task Force.

This legislation is a serious threat to our civil liberties. Indeed, "this law treats American citizens as if they were the enemy," stated George Annas, chairman of the Health Law Department at the Boston University School of Public Health (*San Francisco Chronicle*, 11/25/01). It must be exposed to the light of day in the next month and a half.

"If protests are sufficient and if conservative legislators in state legislatures are properly alerted, perhaps there is a chance to beat back this monster," Weyrich said.

Major Provisions

Declaring an Emergency

Under this Act, any Governor could appoint himself dictator by declaring a "public health emergency." He doesn't even have to consult anyone. The Act requires that he "shall consult with the public health authority," but "nothing in the duty to consult ... shall be construed to limit the Governor's authority to act without such consultation when the situation calls for prompt and timely action." The legislature is prohibited from intervening

for 60 days, after which it may terminate the state of emergency only by a two-thirds vote of both chambers. (Apparently, it does not have the authority to find that the state of emergency never really existed.) **Article III, Section 305(c)**. There is also the possibility that the Governor could declare a new emergency as soon as his powers were about to expire.

What is a public health emergency? It is whatever the Governor decides it should be. By the definition in the Act, it could be an "occurrence," or just an "imminent threat" of basically any cause that involves a biological agent or biological toxin that poses a "substantial risk" of a "significant number" of human fatalities or disability. **Article I, Section 104(g)**. Terrorism need not be involved; any threat of an epidemic would suffice.

The Act does not define "substantial risk." Could it mean a 1-in-1,000,000 chance? Risks of that magnitude are already being invoked as a cause for alarm, say of a measles outbreak with transmission through an unvaccinated child, and a pretext for removing exemptions to mandatory vaccines. The EPA also uses such low (and purely hypothetical) risk as the rationale for very costly regulations, so the precedent is well-established.

Is a "significant number" five (the number of deaths from anthrax as of the date of this writing); 24 (the number of deaths from chickenpox in 1998 and 1999 combined, 12 of them in persons under the age of 20, used as a reason for mandatory childhood vaccination); 100 cases of AIDS; thousands of deaths from smallpox, as most readers may assume, or a single case? It could be any of these because the definition is at the sole discretion of the Governor. The most plausible of the dire threats generally cited is a smallpox outbreak. However, given the nature of the disease and advanced medicine and sanitation, such an outbreak could be contained without any of the extreme measures in this Act, just as in the 1970s. (See, for example, "Super Smallpox Saturdays?" by Michael Arnold Glueck, M.D., and Robert J. Cihak, M.D., *WorldNetDaily*, Nov 15, 2001, <https://www.wnd.com/2001/11/11682/>.) Because of the adverse side effects of the vaccine (including death), more harm than good could be done by an ill-advised, unnecessary mass vaccination campaign.

Patient Privacy Abolished

The Act would impose significant new reporting requirements on physicians and pharmacists, further diminishing the confidentiality of medical records. Personal identifying information would have to be reported in writing, without patient consent, in the event of "an unusual increase" in prescriptions related to fever, respiratory, or gastrointestinal complaints that might represent an epidemic disease or bioterrorism, or of any other illness or health condition that could represent bioterrorism or epidemic or pandemic disease. Such conditions are legion.

Gostin concedes that his privacy provision is based on his own model privacy act of 1999, which apparently no state has adopted. Like the Clinton privacy regulations that AAPS is

now challenging in court, Gostin's view of privacy is to allow unrestricted disclosure to federal authorities. **Section 506.**

Unlimited Power

How would the Governor handle the emergency? By whatever means he chose. He is under no obligation to use scientifically valid methods, or to choose the least destructive method, or to perform any kind of risk-benefit analysis. He may suspend any regulatory statute, or the rules of any state agency, if they would "prevent, hinder, or delay necessary action." **Article III, Section 303(a)(1).** Among the laws to be suspended would probably be those permitting religious, medical, or philosophical exemptions to mandatory vaccines.

The Governor may not only utilize all the resources of the State and its political subdivisions, but commandeer any private facilities or resources considered necessary, and "take immediate possession thereof. Such materials and facilities include, but are not limited to, communication devices, carriers, real estate, fuels, food, clothing, and health care facilities." **Article IV Section 402(a).** He may "compel a health care facility to provide services," but it is not clear what means he may use to compel its personnel to work (**Article IV Section 402(b)**), except that any physician or other health care provider who refuses to perform medical examination or testing as directed shall be liable for a misdemeanor. **Article V Section 502(b).**

The Governor may destroy any material or property "of which there is reasonable cause to believe that it may endanger the public health." **Article IV Section 401(b).** And while the State shall pay just compensation to the owner of any facilities that are "lawfully taken" or appropriated (**Article IV Section 406**), there is a huge exception:

"Compensation shall not be provided for facilities or materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger the public health pursuant to Section 401." **Article IV Section 406.**

The Governor is in charge of determining "reasonable cause." There is a strong incentive for him to declare any losses to private owners to be noncompensable. "Reasonable cause" might mean "contaminated." Is the Senate Hart Office Building contaminated with anthrax? Yes. Should it therefore be destroyed, or subjected to fumigation with chemicals that would destroy much of the equipment and furnishings? Most think not.

The problem is that given a sufficiently sensitive testing method, everything is probably "contaminated" with almost everything else. Moreover, every testing method has some level of false positives. The late Conrad Chester of Oak Ridge National Laboratory stated that any place that has ever supported cattle has anthrax contamination (lecture before Doctors for Disaster Preparedness annual meeting, 1996). The same probably applies to any land that has supported sheep or goats, or any land that has had the wind deposit soil from such an area. In other words, anthrax spores are probably ubiquitous, though at a concentration that very rarely causes any harm. Such harm as was done may have been misdiagnosed by physicians who were unfamiliar with anthrax and not specifically looking for it.

Under this law, nothing would stop the Governor from ordering a citizen to turn over his house to be used as an isolation facility, and later destroying the house on the grounds that it is contaminated. This order, like any other, could be

enforced at gunpoint by any law enforcement officer.

In a time of public hysteria, fanned by press coverage based on the "if it bleeds, it leads" policy, common sense is likely to be an early casualty. It is even possible that terrorists—or persons bent on radical transformation of society and the American form of government—could deliberately raise a false alarm and influence a Governor to take action that would result in more damage to freedom than the terrorists themselves could ever accomplish. Or radical environmentalists (who haven't, to date, generally had the label of terrorist applied to them) could bring about the destruction of an activity that they object to (such as logging, cattle ranching, or modern farming). There are no checks and balances in this Act to prevent such an occurrence, and no meaningful accountability for the public officials who carry out a basically misguided policy, however destructive.

Command and Control

The Act assumes that the best method to use in an emergency is force and central control. There is no evidence that force works better than leadership, which can bring out the best in citizens coming together to meet the crisis, just as firefighters, police, medical professionals, hotel owners, and other businessmen did in New York City. Totalitarianism is not only evil but has had uniformly disastrous results.

Although the world has 40 centuries of experience to show that the effect of price controls on the economy is comparable to that of an asteroid impact on the earth, the Act empowers the Governor to ration, fix prices, and otherwise control the allocation, sale, use, or transportation of any item as deemed "reasonable and necessary for emergency response." This specifically includes firearms. **Article IV Section 402(c)** and **Section 405(b).** Moreover, the Governor can simply seize such items. **Article IV Section 402(a).**

The Act grants Governors the exclusive power to control the expenditure of funds appropriated for emergencies; the intent and priorities set by the Legislature would be irrelevant.

The Governor may delegate powers at his sole discretion to unelected political appointees.

Criminalizing Refusal of Medical Treatment

The Act empowers the public health authority to decide upon medical treatment or immunizations and to impose its view on individuals, who are liable for a misdemeanor should they refuse. **Article V Section 504(b).** Although it might in some circumstances be prudent and justified to quarantine a person who refuses immunization during an outbreak, it is tyrannical to criminalize the medical choice to decline a treatment. An immunization or treatment might well cause serious harm to certain individuals even if the public health authority does not recognize that it is "reasonably likely" to lead to "serious harm"—another two important undefined terms. **Article V Section 504(a)(4).**

The Act gives the public health authority the right to isolate or quarantine a person on an ex parte court order, with no hearing for at least 72 hours. If the public health authority decides that an unvaccinated person is a risk to others, even if uninfected, he could be quarantined. **Article V Section 503(e).** It is quite possible that public health authorities could force such a person from his home to a place of quarantine, where he will be exposed to infected persons. Such places shall be maintained in a safe and hygienic manner "to the extent

possible,” and “all reasonable means shall be taken to prevent the transmission of infection among isolated or quarantined individuals.” **Article V Section 503(a)**. The Act itself thus implies that an uninfected person is at risk by being placed in such a facility; it is quite likely that he could be at greater risk than if he had the freedom to protect himself as he saw fit. It is assumed that public health authorities will be “reasonable”; however, this assumption is questionable. Even now, children not vaccinated against hepatitis B are being excluded from school even though there is NO risk that an uninfected child can transmit the disease and a minuscule risk that he can acquire the disease at school.

Zero Accountability

If the State does more harm than good through unfettered use of its draconian power, it can rely on the state immunity clause: “Neither the State, its political subdivisions, nor, except in cases of gross negligence or willful misconduct, the Governor, the public health authority, or any other State official referenced in this Act, is 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.” **Article VIII Section 804**.

Note that the law would grant certain immunities even for deaths improperly caused, and allows such immunity even for advisors who made recommendations based on conflicts of interest.

Summary

This Act would broaden government access to private medical records; greatly weaken protections against the taking of private property without compensation; criminalize refusal to be conscripted for public service or to take medical treatment; potentially increase the risk of infection to many individuals on the pretext of protecting the common good; subjugate scientific analysis and deliberation to the raw assertion of power; greatly expand the power of government to interfere with commerce; and immunize state officials from sanctions against gross abuses of power.

Although certain extraordinary government interventions might be warranted in a true emergency, the government already has significant emergency powers as well as the ability to convene a special session of the legislature. It is highly inadvisable to completely suspend our delicate system of checks and balances upon the word of a Governor that an emergency requires it.

This Act, in effect, empowers the Governor to create a police state by fiat, and for a sufficient length of time to destroy or muzzle his political opposition. The most telling sentence is: “The public health authority shall have the power to enforce the provisions of this Act through the imposition of fines and penalties, the issuance of orders, and such other remedies as are provided by law, but nothing in this Section shall be construed to limit specific enforcement powers enumerated in this Act.” **Article VIII Section 802**.

It is unlikely that the vast expansion of governmental powers would be restricted to combatting a smallpox outbreak. Once the precedent is established, it could be expanded to other types of “emergencies.”

This proposal violates the very principles that its author, Lawrence O. Gostin, has previously outlined, while giving

them lip service. His article recommends that “public health authorities should bear the burden of justification and, therefore, should demonstrate (1) a significant risk based on scientific evidence; (2) the intervention’s effectiveness by showing a reasonable fit between ends and means; (3) that economic costs are reasonable; (4) that human rights burdens are reasonable...” (see *JAMA* 2000;283:3118-3122).

An Alternate Proposal

Although this Act should be rejected, there are certain measures that State governments might want to consider:

- A reevaluation of the procedures for effectively quarantining persons who are a significant demonstrable risk to others, while preserving due process and substantive rights;
- Improving overall preparedness for attacks with weapons of mass destruction: upgrading and expanding facilities for the prompt detection and identification of infectious agents, toxins, chemical weapons, and radioactivity; evaluating and augmenting State and local supplies of vaccines, antibiotics, protective gear for first-responders and medical personnel, isolation facilities for treatment of casualties, shelters against radiation, potassium iodide, other essential equipment and supplies, and information on self-protection available for rapid public distribution;
- Measures to protect private citizens, including physicians, against civil liability resulting from efforts to aid others in an emergency (suggested in **Article VIII Section 804**);
- Permitting the State to waive certain licensure requirements for the duration of the emergency to permit recruitment of additional personnel (**Article V Section 507(a)**); and
- Suspending State, federal, or local regulations or ordinances that interfere with prudent response to an emergency while providing no scientifically proven significant benefit, subject to ultimate review and rescission or post-emergency resumption without retroactive penalties, based on scientifically valid methods.

There are many EPA requirements, for example, that are not based on good scientific evidence and could be disastrous in a real emergency. At the time of the World Trade Center fire, the EPA had to acknowledge that asbestos controls were totally excessive, in order to prevent a public panic about inhaling the white dust.... The ban on DDT (imposed despite the overwhelming preponderance of scientific advice and evidence opposed to this action) would severely inhibit the containment of an outbreak of mosquito or other insect-borne diseases. The ban on incinerators because of exaggerated concerns about insignificant releases of dioxins would prevent the safest and most expeditious method of destroying dangerously contaminated materials.

Conclusions

States can and should improve their ability to respond to disaster, including bioterrorism. However, having the Governor play doctor and dictator is not the right response. Citizens should distribute information about the actual content of the Model Emergency Health Powers Act to opinion leaders, newspaper editors, columnists, the Chamber of Commerce, business groups, medical society officials, legislators, and the Bush Administration.