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**Bioterrorism Preparation and Response Legislation---
The Struggle to Protect States' Sovereignty
While Preserving National Security**

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"The means of security can only be regulated by the means and danger of attack. They will, in fact, be determined by these rules and by no others."
----James Madison, *Federalist Paper No. 41*

I. Introduction

The security of the United States has been a source of national pride and controversy since the founding of the nation. As a nation, we have enjoyed the protection and peace of mind which comes with having the most powerful military in the world. Today, not one living citizen of the United States, can personally remember a war being fought on American soil. However, the threat of biological attack¹ —as distinct from chemical and nuclear attacks --- has raised new concerns about our national security.

The coordination of traditional emergency response mechanisms within the Constitutional framework are those which are clearly defined and practiced. However, the coordination of peacetime preparations for bioterrorist action is not so clearly defined and remains a vulnerable position for the United States. Where emergency response to natural disasters dictates clear intergovernmental relationships and practiced response operations, a bioterrorism event would be an ongoing disaster with casualties increasing geometrically during the response. In contrast, the casualties in a natural disaster are most likely to have peaked before the response and be in a sharp decline or at zero when the response begins. Preparation and surveillance are most critical to a threat of bioterrorism, and the only way to fulfill the Constitutional mandates for the federal government to provide adequate national security.

The question is now whether our governmental, administrative and legal infrastructure is designed to meet the critical need for our national security system to adequately prepare for, and defend against, such an attack.²

At the heart of the issue of bioterrorism is the balance between state and federal powers for public health regulation. Although the provision of national security falls squarely into the powers of the federal government, the use of these powers has been almost exclusively in the

¹ Bioterrorism may be defined as an overt release of a biological agent which is calculated to expose populations which result in immediate or delayed mortality or morbidity.

² See Victoria Sutton, "A Precarious 'Hot Zone' --- The President's Plan to Combat Bioterrorism", 164 *Mil. Law Rev.* 135 (Spring 2000).

international arena for intelligence gathering for defense, and for military responses on other shores. Never before has the threat to national security originated so pervasively from within the United States' borders. Part of the threat stems from the ability to develop in a relatively small space; that commonly used equipment can easily be converted to use for the production of biological agents; and that the surveillance to prevent such an attack is certainly as important --- if not more critical --- than the response to such a threat. Because of the characteristics unique to a biological threat, our legal foundations of federalism — the division between federal and state powers — are directly challenged.

While it seems that no citizen would object to protection by the federal government, it is equally important to note that erosion of state powers can be threatening to the stability of state sovereignty, particularly in times of peace. The federal government cannot impose on that sovereignty, except, where interstate commerce is affected —the constitutional basis for federal environmental laws as well as the Food, Drug and Cosmetic Act. Other areas such as public health and safety are clearly powers of the states, originating such states' actions as quarantine laws. The Tenth Amendment assures us that states can protect the public health of their citizens as they see fit. The doctrine of preemption provides that the federal government can regulate where the government has so completely taken over the field that there is no room for state law, and state law is thereby preempted. But the U.S. Supreme Court has held that preemption cannot apply where Congress has no authority to regulate in the first place.³

Power between state and federal governments can be shared. Where there are conflicts, if that power is not reserved to the states, then the federal government may preempt the issue. Some scholars suggest that the Supremacy Clause of the Constitution is the source of that power; others suggest it is the Necessary and Proper Clause.⁴

Another approach to federal control involves a cooperative federalism model which establishes national standards based on the authority of federal legislation. States may choose to assume administration of the programs, such as some of the environmental statutes, i.e., the Clean Water Act, the Clean Air Act, and the Safe Drinking Water Act. Again, Congress is limited to regulating that which they have authority to regulate, and such environmental laws are based on Congress' authority to regulate commerce between the states.

However, the demarcation between federal and state powers has been clear in some areas. The regulation of public health has traditionally been a police power of the states, arising from the regulation of contagion and disease during colonial times. Quarantine laws have historically fallen under state powers, as have other areas of public health law; the regulation of national security has been exclusively given to the Congress through the Constitution.

³ The Supreme Court has found that federal environmental laws may preempt state law, but only so long as the federal government has authority to regulate under the Commerce Clause, *New York v. United States*, 505 U.S. 144, 167-168 (1992).

⁴ See, Stephen Gardbaum, "The Nature of Preemption," 79 Cornell L. Rev. 767 (1994), "the most common and consequential error is the belief that Congress's power of preemption is closely and essentially connected to the Supremacy Clause" rather than the necessary and proper clause."

Thus, bioterrorism has given rise to a new conflict with federalism where national security, the province of the federal government, becomes a matter of public health, an area traditionally regulated by the states. This conflict suggests that federalism should give way to the constitutionally delegated powers of the United States to preserve national security, even though it would mean the regulation of state public health systems in order to achieve that goal. The systematic communication and surveillance as well as reporting functions essential to preparation for and response to a bioterrorism event require federal coordination. However, any expansion of the federal government into the area of public health must be sufficiently narrow to avoid the erosion of the states' constitutionally preserved sovereignty.

The modern interpretation of federalism suggests that there is a shift from the New Deal era of federal regulation to recognizing powers reserved to the states, particularly in the area of public health. The suggestion that national public health goals must be implemented through state political processes rather than Congressional legislation⁵ is troublesome because the essence of our defense against bioterrorism will be federal coordination of planning, preparedness and response. States are constitutionally prohibited from regulating such activities.⁶ Traditional cooperative federalism with the necessary flexibility for states self-governance does not lend itself to a precise system designed to operate uniformly with sensitivity and rapid response.

It is established that states have the police powers to quarantine, balanced by the protection of Constitutional due process through the Fourteenth Amendment. In the 1824 landmark case, Gibbons v. Ogden,⁷ the Supreme Court interpreted state police powers to be reserved to the states through the Tenth Amendment. States have regulated public health through quarantine, sanitation laws, control of water and air pollution, vaccination and the regulation of medical professionals. However, it is clearly established that the federal government does not have police powers to do so, except in a narrower circumstance where “in cases of rebellion or invasion the public safety may require it.”⁸ It is also very clear that in times of emergency and foreign invasion the federal government has the Constitutional authority to declare a state of emergency and respond to both invasions and domestic disasters. James Madison, the fourth President of the United States, has described the shared powers of the state and federal governments to mean that the federal government is best to govern during “times of

⁵ James G. Hodge, Jr., J.D., LL.M., “Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law,” 14 J. Contemp. J.H.L. & Pol. 93 (Fall 1997).

⁶ U.S. Const. Art. I, Sec. 10, Cl. 3, “No state shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

⁷ 22 U.S. 1 (1824).

⁸ The Federalist No. 84, 511 (Alexander Hamilton)(Clifford Rossiter ed. 1961).

war” and state government is best in “times of peace”.⁹

However, the threat of bioterrorism is uniquely incapable of fitting neatly within these established Constitutional boundaries. When preparing for war, the federal government continually trains and recruits military troops and conducts international surveillance and intelligence gathering operations in preparation for defense. However, the preparation for action against bioterrorism requires a system of surveillance and preparation which will by necessity involve the state, county, and city governments as logical points in the matrix of national communication, surveillance and preparedness.

There is a vital need to create a mandatory system for epidemiological information, critical to the detection of biological attacks, on a nationwide basis. The battlefield is not traditional: it may be the winds, the mass transit systems, or a crowded gathering. State boundaries become meaningless where the attack media, a disease agent, can travel from any one point on the globe to another in under thirty-six hours.¹⁰

Whether the federal government adequately addresses the unique threat of bioterrorism during times of peace and times of war within the constraints of the U.S. Constitution involves a narrow set of circumstances. In order to effectively address national security concerns, it is necessary to decide whether a public health model exists, or whether other areas of law, such as federal environmental law may be used to design an effective preparation and response system to bioterrorism.

An analysis of the Federalist Papers raises the question as to whether Madison, Hamilton and Jay, authors of the Federalist Papers, may have contemplated the kind of national security issues raised by the threat of domestic bioterrorism.¹¹

⁹ The Federalist No. 44. 293 (James Madison)(Clifford Rossiter ed. 1961).

¹⁰David Satcher, M.D., Ph.D., “The History of the Public Health Service and the Surgeon General’s Priorities,” 54 Food Drug L.J. 13, 17 (1999).

¹¹ The “germ theory” was not among the new knowledge, sweeping in during the Enlightenment era; however, the use of biological warfare should not have been unknown to the Founders. As early as 1385, the practice of catapulting the corpses of plague victims and the carcasses of diseased animals into cities under attack was in use. [Quoting Robert O’Connell, Of Arms and Men: A History of War, Weapons, and Aggression 171 (1989), in Ward Churchill, A Little Matter of Genocide --- Holocaust and Denial in the Americas 1492 to the Present 151-152 (1997).] Clearly, at least a crude notion of how epidemiology works was known at that time. In 1663, Captain John Oldham, a diplomat for Massachusetts Colony, was believed to have deliberately infected the Narragansett Indians by gifting them with contaminated blankets. [Quoting Robert O’Connell, Of Arms and Men: A History of War, Weapons, and Aggression 171 (1989), in Ward Churchill, A Little Matter of Genocide --- Holocaust and Denial in the Americas 1492 to the Present 152 (1997).] In 1763, the Founding Fathers must have certainly known about Lord Jeffrey Amherst’s attempt at genocide when he ordered smallpox-infected blankets to be passed out to the Ottawa and Lenni Lanape Indians in order to accomplish his own quoted goal to ‘extirpate this execrable race.’ [See John Duffy, Epidemics in Colonial America (1953); E. Wagner Stearn and Allen E. Stearn, The Effects of Smallpox on the Destiny of the

II In times of war and peace

The authority and power of the United States is clearly a federal power in times of “war and danger” as interpreted by James Madison:

“The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. . . The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular states.”¹²

Herein, Madison suggested that the more adequate our national defense, the less frequently the question of power over state governments will arise.

In the matter of bioterrorism, our national defense from the foreign perspective is indeed formidable; however, domestically, the “scenes of danger” do not diminish proportionately with the strength of our national defense envisioned by Madison.

Contemplated are “scenes of danger”¹³ which “might favor”¹⁴ the “ascendancy”¹⁵ of the federal government over the states. The “scenes of danger”¹⁶ are those arising from releases of biologic agents, capable of widespread infection in a matter of hours. The “adequacy” of the national defense may have little or no effect on these kinds of attacks. The kinds of attacks contemplated by Madison were likely those by countries having inferior weapons and troops. In a visionary statement concerning national security, Madison suggested that with the rise of new means of inducing danger and attack on our national security, regulation must necessarily adapt and be shaped to respond to whatever new threat evolves. Madison further wrote that this rule is determining, and must be considered supreme relative to any other rules: “The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others.”¹⁷ Here, the characteristics of the weaponry and

Amerindian (1945), footnoted in Ward Churchill, A Little Matter of Genocide --- Holocaust and Denial in the Americas 1492 to the Present 153 (1997).] Whether the Founders contemplated the use of contagion as a possible threat to other than the American Indians is not clear.

¹² The Federalist No. 44, 293 (James Madison)(Clifford Rossiter ed. 1961).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ The Federalist No. 41, 257 (James Madison)(Clifford Rossiter ed. 1961).

attack is the controlling standard --- not the “means of security”.¹⁸ The “means of security”, suggest federal or state powers to provide such security as dictated by the “means and the danger of attack.”¹⁹

Referring to the threat of disease, one court has held that “drastic measures for the elimination of disease are not affected by constitutional provisions, either of the state or national government.”²⁰ The case of a bioterrorism event involves “drastic measures” called upon in an emergency situation, which clearly finds power in the federal government in times of emergency. This case, however, would not give authority to the federal government where the elimination of a disease was not at issue. Surveillance, reporting and preparation for any response to a bioterrorism attack must necessarily come long before *elimination*²¹ of disease becomes necessary.

In the same writing concerning national security, Madison, further suggested that threats can come from within the boundaries of the United States as well as foreign concerns: “In America, the miseries springing from her internal jealousies, contentions, and wars would form a part only of her lot.”²² It was not unforeseeable that internal strife and political rebellions of various degrees would continue to plague the nation.²³

This relationship of the power vested in the federal government is directly proportional to the exigency which the United States faces, evidenced in Madison’s discourse on the powers which should be held by the federal government. Here, again, Madison wrote that it is the exigency²⁴ that controls the proportional amount of federal power required. In the last sentence of his paper, Madison asserted that this question is the same as that of the continued existence of the Union, itself,²⁵ forcing the unequivocal conclusion that the federal government thereby

¹⁸ Id.

¹⁹ Id.

²⁰ In re Caselli, 204 P. 364, 364 (1922).

²¹ Id.

²² The Federalist No. 41, 258 (James Madison)(Clifford Rossiter ed. 1961).

²³ Bernard Bailyn, et. al., The Great Republic --- A History of the American People 306 4th ed. (1992). Rebellions, internal attacks and political factions forming threats to the new nation were probably freshly on the mind of Madison in 1787-1788, and with good reason. In 1787, in western Massachusetts, a group of farmers, unhappy with a threatened mass foreclosure of their farms, known as the Shays Rebellion, temporarily closed the courts and threatened a federal installation during the insurrection.

²⁴ Exigency does not necessarily mean emergency, but rather urgency.

²⁵ The Federalist No. 44, 288 (James Madison)(Clifford Rossiter ed. 1961), “The question, therefore, whether this amount of power shall be granted or not resolves itself into

possesses power to avert destruction of its “continued existence”²⁶

The dangers discussed in Federalist No. 44 considered with the exigencies in Federalist No. 41, indicate that the ascendancy of the federal government may be favored where the exigency demands such a response and the existence of the Union is thus dependent upon such action. Thus, a limited ascendance of the federal government is not only required, but demanded by the constitutional context of national security. However, in times of peace, when the threat exists but does not rise to the level of an exigency, the federal government cannot act where the state has sovereign power. While we are certain that a bioterrorism threat exists, the exigency required by the Constitution to invoke federal powers means there must be an imminent threat to national security.

In this same context, the use of military obviously required the nation to address the use of military in peace-time in order to be prepared in the event of a national security threat. The Federalist Papers address some of the objections raised concerning the federal government power for “keeping them [military troops] up” in “a season of tranquility”. Speaking to the timing which would evoke federal powers, Hamilton asked:

“What time shall be requisite to ascertain the violation? Shall it be a week, a month, or a year? Or shall we say they may be continued as long as the danger which occasioned their being raised continues? This would admit that they might be kept up in time of peace, against threatening or impending danger, which would be at once to deviate from the literal meaning of the prohibition and to introduce an extensive latitude of construction. Who shall judge of the continuance of the danger?”²⁷

Alexander Hamilton described a scenario that has historically justified the maintenance of a military during times of peace, supported the draft, and other national defense preparations. Therein, Hamilton raises the specter of the consequences of a nation which does not have the ability to be prepared for national defense describing “a nation incapacitated by its Constitution to prepare for defense before it was actually invaded.”²⁸

The Founders cautioned against the strictest construction of the Constitution which

another question, whether or not a government commensurate to the exigencies of the Union shall be established; or in other words, whether the Union itself shall be preserved.”

²⁶ Id.

²⁷ The Federalist No. 25, 164-165 (Alexander Hamilton)(Clifford Rossiter ed. 1961).

²⁸ The Federalist No. 25, 165 (Alexander Hamilton)(Clifford Rossiter ed. 1961). The full quotation reads: “If, to obviate this consequence, it should be resolved to extend the prohibition to the raising of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen --- that of a nation incapacitated by its Constitution to prepare for defense before it was actually invaded.”

would leave the nation “to prepare for defense before it was actually invaded.”²⁹ This warning which is clearly analogous to the preparations and surveillance systems necessary to avoid becoming incapacitated by the convention of the strictest construction of state powers in public health and safety.

“As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger and meet the gathering storm must be abstained from, as contrary to the genuine maxims of a free government.”³⁰

This reference to the “distant danger”³¹ and the “gathering storm”³² is an appropriate analogy to the threat of bioterrorism. The caution that avoiding “[A]ll that kind of policy. . .”³³ suggests an aggressive national security policy should be implemented to address such anticipated dangers. This discussion indicates where the Federalists might stand on a national approach to a bioterrorism threat during peace-time --- the raising of a “bioterrorism militia” would clearly be in order.

III. Where the federal government can be more effective than state governments

“The protection and preservation of the public health is among the most important duties of state government.”³⁴ However, Madison observed that “. . . State legislatures will be unlikely to attach themselves sufficiently to national objects. . .”³⁵

“If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State government, the people ought not to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State government could have little to apprehend, because it is only within a certain sphere that the

²⁹ Id.

³⁰ The Federalist No. 25, 165 (Alexander Hamilton)(Clifford Rossiter ed. 1961).

³¹ Id.

³² Id.

³³ Id.

³⁴ Jacobson v. Massachusetts, 197 U.S. 11 (1905).

³⁵ The Federalist No. 46, 298 (James Madison)(Clifford Rossiter ed. 1961).

federal power can, in the nature of things be advantageously administered.”³⁶

The Founders anticipated the need for the nation to have the flexibility to shift long-held powers of the states to the federal government, but only where the people have the highest “confidence” in the federal government, i.e, to respond to the threat of bioterrorism. But is there a legal mechanism to shift the long held powers of public safety from the states to the federal government in the case of bioterrorism, if each state elected to enact a uniform surveillance system which interfaces neatly with that of each and all of the other states would this be sufficient to address the needs of a national security response and preclude the need for more invasive uses of federal powers into the area of public health? The specter of a national security threat led by fifty leaders with fifty different sets of priorities is not only foolish but a failure of the role of the federal government in the “continued existence”³⁷ of the nation.

B. Public safety in times of rebellion

“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it,”³⁸ referring to the Constitutional provision for protection against being confined.³⁹ This specifically identifies a time of public safety as appropriate for the suspension of the writ of habeas corpus, perhaps providing the Constitutional authority to invoke quarantine when the timing is such that public safety is at risk. However, the state has police powers for quarantine, its use contingent upon the public safety. In general, “probable cause”⁴⁰ that the subject is infectious, is all that is required by a state to quarantine.

Therefore, the federal government does have the Constitutional power to quarantine, but only on a much more limited and narrow precept than do the states. The quarantine power of the federal government is an untried power in this context; and the limited use of this power, coupled with the Constitutional due process requirements⁴¹ of individual hearings for each individual makes its practical application in an emergency practically useless to address the exposure of thousands or more to a bioterrorism agent.

The ability of the states to muster state militias was a contentious issue when the Articles of Confederation were discussed during the construction of the Constitution. Alexander Hamilton addressed the issue of separate state militias and cautioned against the separate possession of military forces: “The framers of the existing [Articles of] Confederation, fully

³⁶ The Federalist No. 46, 295 (James Madison)(Clifford Rossiter ed. 1961).

³⁷The Federalist No. 44, 288 (James Madison)(Clifford Rossiter ed. 1961).

³⁸ The Federalist No. 84, 511 (Alexander Hamilton)(Clifford Rossiter ed. 1961).

³⁹ U.S. Const. § 9, cl. 2.

⁴⁰ Ex parte Martin, 188 P.2d 287 (Cal. App. 1948).

⁴¹ U.S. Const. Amend. V.

aware of the dangers to the Union from the separate possession of military forces by the States, have in express terms prohibited them from having either ships or troops, unless with the consent of Congress.”⁴² The use of military forces are an important component of a well-planned defense in preparation for a bioterrorism event, and the possibility of fifty different militias in a national response without one overall leader, again presents a threat to national security and a failure of the federal government to protect the “continued existence”⁴³ of the nation.

IV. “for the common defense or general welfare”⁴⁴

The interpretation of the General Welfare Clause has been incontestably limited to the authority of Congress to tax since the time of The Federalist Papers. The interpretation given to the Clause was essentially narrowed to one of use as a “general phrase” followed by qualifications of the general meaning,⁴⁵ thereby narrowly applying the Clause to the ability for Congress to levy taxes. This limitation precludes the use of the General Welfare Clause as a basis for Congress to legislate on the basis of broad purposes of the general welfare of the nation.

In spite of such sweeping mandates to act for the general welfare, such as: “The prevention of disease or disability and the promotion of health, within reasonable resource constraints, provides the preeminent justification for the government to act for the welfare of society.”⁴⁶ Nevertheless, the General Welfare Clause bestows no power on Congress to act other than to tax in order to carry out these broad mandates.

E. A Contemporary Tenth Amendment Analysis⁴⁷

The original powers used by the states during the colonial era were police powers which

⁴² The Federalist No. 25, 164 (Alexander Hamilton) (Clifford Rossiter ed. 1961).

⁴³ The Federalist No. 44, 288 (James Madison)(Clifford Rossiter ed. 1961).

⁴⁴ U.S. Const. Art. I, Sec. 8, Cl. 1, “The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States. . . .”

⁴⁵ The Federalist No. 41, 262-263, “It has been urged and echoed that the power ‘to lay and collect taxes, duties, impost, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,’ amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. . . . Nothing is more natural nor common than first to use a general phrase, and then to explain nor qualify the general meaning and can have no other effect than to confound or mislead. . . .”

⁴⁶ Lawrence O. Gostin, Symposium: Securing Health or Just Health Care? The Effect of the Health Care system on the Health of America, 39 St. Louis U.L.J. 7, 12 (1994).

⁴⁷ U.S. Const., Amend X., “. . . Powers not delegated to the US by the constitution; nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

include the regulation of health, safety and welfare, later reserved to the states through the Constitution. During that time, states had the exclusive authority for the regulation of public health.⁴⁸ However, in 1870, the Surgeon General of the Public Health Service, General Woodworth, made an effort to establish quarantine as a federal responsibility. The resulting backlash of states' rights objections, argued that the matter of quarantine was better left to the states, as it was the historical pattern. General Woodworth argued that the regulations were inconsistent from state to state and the spread of disease was not relevant to states' borders. After the 1877 outbreak of yellow fever, General Woodworth worked for a national quarantine system which resulted in the Quarantine Act of 1878.⁴⁹ The Act stipulated that federal quarantine regulations must not conflict with or impair those of state and municipal authorities, and was to be administered by the precursor agency of the Public Health Service.⁵⁰ The use of a federal quarantine system would be an integral part of a national security plan against the threat of bioterrorism.

The test for Tenth Amendment distinctions between federal powers and state powers is articulated in Hodel v. Virginia Surface Mining Reclamation Ass'n.⁵¹ First, the challenged statute must regulate "states as states"; second, the statute must involve matters strictly "attributes of state sovereignty"; and third, the state's compliance with the federal statute would impair the state's ability to "structure integral operations in areas of traditional functions." Garcia v. San Antonio Metropolitan Transit Authority⁵² qualified the "states as states" criteria as "one of process rather than one of result," and overruled National League of Cities v. Usery⁵³ where the standard of "traditional governmental functions" failed to articulate a clear principle as to what it means. In Garcia, the dissent of Justices O'Connor, Powell and Rehnquist saw this decision as ignoring the Tenth Amendment restraints on the Commerce Clause and leaving little to restrain Congress from passing legislation encroaching on state activities.⁵⁴ Instead of Tenth Amendment restraints, the majority in Garcia expected that the "built-in restraints that our system provides through state participation in federal governmental action" and the "political

⁴⁸ Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2245 (1996).

⁴⁹ 20 Stat. 37 (1878).

⁵⁰ David Satcher, M.D., Ph.D., "The History of the Public Health Service and the Surgeon General's Priorities," 54 Food Drug L.J. 13, 14 (1999).

⁵¹ 452 U.S. 264 (1981).

⁵² 469 U.S. 528 (1985).

⁵³ 426 U.S. 833 (1976).

⁵⁴ The dissent wrote, "With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."

process” will “ensure[s] that laws that unduly burden the states will not be promulgated.”⁵⁵

The most recent teaching from the U.S. Supreme Court on the protections of the Tenth Amendment was articulated in New York v. United States⁵⁶. In New York, the Court sought to confine Congress’ authority to “commandeer” states in the regulation of the disposal of radioactive wastes.⁵⁷ Rather the states were to be given a choice between regulating or to be preempted by federal legislation, or to attach conditions under the spending power of Congress to encourage states to regulate. This further limited Congressional reaches into state legislative choices, thereby introducing Tenth Amendment protections not recognized previously in the Garcia decision.

The most recent case to address state health and safety regulation in this line of cases is Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Devel. Comm’n⁵⁸ wherein the court sought to avoid preemption of state public health and safety laws by preempting state law only where it conflicts with federal law. The subject of health and safety here, was nuclear safety, and the courts have consistently found that nuclear power and nuclear safety is an area where the federal government has clearly preempted state law. However, the dissent suggests that where safety of the state’s citizens are at issue, the state should have the sovereign power to prohibit the construction of a nuclear power facility.⁵⁹ Again, the recognition of the power of states to protect its citizens is affirmed and the role of states in the federalist system gains establishment in case law.

The construction of federal legislation concerning a mandatory role for the states in what must be a precisely executed system of surveillance and response to any threat of bioterrorism, does not fit within the Tenth Amendment protection standard articulated by Justice O’Connor in New York. Here, the requirement that state’s be given the option to regulate or be preempted may work for the facts of New York, but in a system where coordination and uniformity are essential to a surveillance and response system, there is no room for options such as these.

VI. Police powers, the Commerce Clause, the Supremacy Clause and preemption

The police power

“[a]ims directly to secure and promote the public welfare by subjecting to restraint or compulsion the members of the community. It is the power by which the government abridges the freedom of action or the free use of property of the individual in

⁵⁵ 469 U.S. 528 at ____ (1985).

⁵⁶ 505 U.S. 144 (1992).

⁵⁷ New York v. United States, 505 U.S. 144 (1992).

⁵⁸ 461 U.S. 190 (1983).

⁵⁹ 461 U.S. 190, ____ (1983).

order that the welfare may not be jeopardized.”⁶⁰

Since the Constitution does not expressly grant Congress the power to enact legislation for national public health, there exists a presumption that Congress does not have the power to do so --- rather the states have that power. The Constitutional Convention considered numerous resolutions to give Congress such power, but all were rejected.

The Court extended the reach of the Commerce Clause in Hoke v. United States⁶¹ — wherein the Mann Act⁶² was found to be constitutional — just short of granting police powers, to that of regulations having the “quality of police regulations.”⁶³ The Court limited Congress’ police powers because the Commerce Clause gave the federal government power to regulate “among the states” and “that Congress, as incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”⁶⁴

According to a scholar from the 1920s, James Tobey, the “Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty,”⁶⁵ in reference to the police power. The use of police power by the federal government is a basis on which a federal approach to the threat of bioterrorism might be established.

A bioterrorism event would affect interstate commerce. Spreading rapidly from state to state it could bring death to those involved in commerce, inhibiting business trade and commerce. However, the relatively recent litigation of Congressional power to legislate in traditional areas of state power in *United States v. Lopez*⁶⁶ suggests that reliance on the Commerce Clause for federal bioterrorism legislation might exceed the shrinking reach of Congress’ Commerce Clause powers. More recently, the U.S. Supreme Court, again, limited the reach of the standard for affecting commerce, in the review of the migratory bird rule,⁶⁷ by striking down a regulation which extended federal power beyond Constitutional limits into an

⁶⁰Robert Cushman, “The National Police Power Under the Commerce Clause of the Constitution,” 3 Minn. L.Rev. 289, 290 (1919).

⁶¹ 227 U.S. 308 (1913).

⁶² The Mann Act prohibits the transportation of females across state lines for immoral purposes.

⁶³ Police powers include those regulating safety, health and welfare.

⁶⁴ 227 U.S. 308 (1913).

⁶⁵ James A. Tobey, Public Health and the Police Power, 4 N.Y.U. L. Rev. 126 (1927).

⁶⁶ 514 U.S. 549 (1995).

⁶⁷ Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers, 148 L.Ed.2d 576 (2001).

area of state police powers.

Bioterrorism regulation based upon the doctrine of preemption could be proposed as a basis. Stating the doctrine: state law is deemed preempted by federal constitutional or statutory law either by express provision,⁶⁸ by a conflict between federal and state law,⁶⁹; or by implication where “Congress so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁷⁰ In public health law, Congress, however, has not preempted the field, as for example, as it has in the area of nuclear power.⁷¹ Further, the trend in federalism suggests a trend toward more power for states — not less. . . .

VIII. Conclusion and Recommendations

The enactment of federal legislation on the basis of the Commerce Clause, extending the character of those regulations to the “quality of police regulations,”⁷² is an available federal approach to national security. In a reading of The Federalist Papers in the context of the new threat of bioterrorism, it is evident that the Constitution was intended to permit any shift of powers from the state to the federal government when the people’s confidence shifted to the federal government. With the threat of bioterrorism, people are likely to expect federal preparedness for a national security threat, which ultimately involves extensive peacetime activities. Conversely, they may be unaware that the long-held powers of the states’ governments which have so ably protected the public since colonial times may well prove to be an impediment to the effective role of the federal government, “or in other words, whether the Union itself shall be preserved.”⁷³

Legislation tailored to meet the narrow purpose of national defense against the threat of bioterrorism is an essential responsibility of our federal government. Recognition of the importance of constructing and approving such legislation prior to a bioterrorism disaster,

⁶⁸ See e.g., Rice v. Santa Fe Elevator Corp. 331 U.S. 216 (1947).

⁶⁹ See Maryland v. Louisiana, 451 U.S. 725 (1981); New York State Conf. Of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 653 (1995).

⁷⁰ See Fidelity Fed. Sav. And Loan Assn. V. De la Cuesta, 458 U.S. 141 (1982), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

⁷¹ See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Congress could decide to preempt the field but it should not be in an area of safety. Even in the area of nuclear power, the courts have held that Congress has preempted the field in nuclear power, but *not* in the area of nuclear safety where the concerns of the states’ citizens are at issue.

⁷² 227 U.S. 308 (1913).

⁷³ The Federalist No. 44, 288 (James Madison)(Clifford Rossiter ed. 1961).

requires that Congress face the constitutional challenge of taking national leadership in our national defense, and begin the political debate surrounding such legislation, sooner than later. There will be no opportunity to have the deliberative debate of state and national powers that are raised in this article, and that are essential to properly construct so as to protect our system of federalism, should a bioterrorism threat become a reality.