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FOREWORD TO “THE FIFTH PLAGUE”

Amos N. Guiora & Erin M. Page†*

In developing the scenario-based bioterrorism conference that is the focus of this issue of the *Case Western Reserve Journal of International Law*, we decided that our motivating theme would be to “step outside the box.” We felt that the most important contribution we could make to understanding bioterrorism would be to avail decision and policy-makers the opportunity, in an academic setting, to evaluate the legal and policy aspects of existing disaster response plans. As we had no intention of “re-inventing the wheel,” we did not want to sponsor a reply to an exercise such as *Dark Winter*.¹ Rather, we wanted to examine the critical issues related to a bioterrorist response from a legal and policy perspective. However, we did not want to do so in the traditional, academic structure of paper presentations. We wanted decision-makers to engage each other. We saw our role as facilitators for interaction amongst those officials charged with our safety. They, not us, were to be the focus.

In our preliminary discussions with Professors Michael Scharf, Sharona Hoffman, and Jessie Hill, we considered a number of possible scenarios. Ms. Page, along with another law student, Kelly Swaine, recommended three options: (1) foot and mouth disease (FMD); (2) smallpox; and (3) salmonella typhi (water contamination).

Our decision to adopt the foot and mouth disease option was based primarily on the importance of agriculture to the state of Ohio and to the U.S. as a whole. Forty percent of Ohio’s budget is agriculture-based, and farms comprise much of the outlying area of the city of Cleveland.

A literature survey conducted both with an eye towards examining the existing scholarship and determining how the issue had been addressed elsewhere, led us to the following important conclusion. The legal and policy aspects of bioterrorism in the context of FMD had not been significantly

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¹ *Dark Winter Scenario: Overview*, http://www.upmc-biosecurity.org/website/events/2001_darkwinter/index.html (last visited March 5, 2007).

addressed in previously conducted exercises. Furthermore, no law school had conducted an actual simulation exercise on the issue. We were to be the first. For us, this was an important calling card when inviting local, state, national, and international officials.

Case Law School is the proud home both of one of America's oldest and most distinguished Law-Medicine Centers (directed by Prof. Max Mehlman), established in 1953, and of the Frederick K Cox International Law Center (directed by Prof. Michael Scharf), established in 1991, that has significantly impacted the international debate regarding war crimes.

Furthermore, in July 2005, Dean Gerald Korngold established the Institute for Global Security, Law and Policy (directed by Prof. Amos Guiora). The conference, which was to be sponsored by the three centers, provided us with an extraordinary opportunity to truly impact the public debate.

Upon deciding that the simulation would be FMD based, Erin Page developed the scenario. The initial drafts were shared with leading scientists from Texas A&M University, The Ohio State University, and the University of Michigan. We benefited greatly from the invaluable input of some of this country's leading scholars, both in agriculture science and bio-terrorism research. To them, we owe a large debt of thanks.

Once the scenario was approved by these distinguished academics, we began developing the simulation model. We felt that we could not approach government officials until the scenario received academic "accreditation." Otherwise, we rightly would have been accused of assuming expertise.

In approaching government officials, our guiding philosophy was to include a wide as possible range of government offices representing local, state, national, and international authorities. Furthermore, in order to guarantee (as much as possible) authenticity and accuracy, we decided that we must include a local farmer in the day-long simulation. In consulting with the veterinarian spouse of a colleague, we received the names of a number of local farmers. Phone calls were met with a mixture of skepticism and disinterest. Perseverance led us to the individual who made what conceivably would have been an important conference into a stunning success.

Mr. John Yarish of Grafton, Ohio was as good as they get—a salt-of-the-earth grain farmer who lives on the same farm on which he was raised. Mr. Yarish combines a profound understanding of the extraordinary complexity of farming and the complicated realities of a farmer's life with wit and wisdom that earned him the eternal gratitude of participants and observers alike. This is the place to publicly thank Mr. Yarish for his invaluable contribution to the conference.

In deciding upon the conference's participants, we wanted to include officials from as wide a range of relevant agencies as possible. This led us to county health commissioners, county emergency management of-

ficials, federal judges, members of the national and local media, senior FEMA officials, the FBI, county sheriffs, Canadian emergency, and health officials (thanks to our distinguished colleague Prof. Henry King; not only is Prof. King's range of contacts in Canada astounding, but using his name guaranteed that all of our phone calls were returned!) and perhaps most significantly, to the State of Ohio's Department of Agriculture.

Over the course of the many months required to plan the conference, we were very fortunate to develop an unusually productive working relationship with a number of senior officials in the Department of Agriculture. In particular, we would like to thank Dr. Leah Dorman. Without her on-going, hands-on involvement, the simulation would not have attained the level of scientific accuracy it did.

Furthermore, we greatly benefited from the professionalism of a number of additional senior state officials: Mr. Dennis Tomick from the Ohio Department of Emergency Management; Ms. Tammy Little from the Office of the Governor of the State of Ohio; Mr. Bill Hopper of the Department of Agriculture; and Dr. Thomas Brisker from the Ohio Department of Agriculture.

In order to maximize the professionalism, expertise, and unique perspectives of the twenty-eight participants, we decided to divide the conference into four settings. We designed the scenario to reflect an acceleration of the disease, from Mr. Yarish's farm in Ohio, across the border into Ontario, Canada. To achieve this in as realistic a manner as possible, we decided on the following: the overwhelming majority of participants were not privy to the scenario's details in advance, meaning that they were required to respond spontaneously during the simulation, rather than from a prepared speech.

Furthermore, the four panels (*Initial Stage of Attack*, *From Initial Diagnosis to Three Days After*, *National*, and *International*) included officials from different agencies, guaranteeing both a healthy exchange of viewpoints and a realization that plans developed and assumptions made by particular agencies were not necessarily coordinated with other agencies whose plans and assumptions were oft-times different. In the context of developing legal and policy responses and approaches to such a scenario, this was exactly the contribution that we had hoped we could make.

In addition, the inclusion of local and national media representatives, along with spokespersons from State agencies, ensured that the critical issue of notifying the public would be addressed. The ordering of quarantine, as called for in the scenario, and its subsequent enforcement requires cooperation between reporters and spokespersons. The interaction and dialogue between the media and government agencies shed light on how differently they approach the same issue and how quickly officials must get the message out to the public.

Dan Rather's autobiography from the 1970's, "The Camera Never Blinks,"² has been replaced by "bloggers never sleep;" a failure to understand this and to develop real-time responses, without the need to have endless meetings and conferences, means that the media initiative will be immediately lost. It is akin to a team losing a football game before the opening kick-off.

The enforcement of quarantine on particular communities requires cooperation and teamwork between a wide-range of state and local officials. As was made clear by U.S. District Court Judge Dan Polster, there is a need to articulate this requirement for quarantine. Given quarantine's profound impact on the freedom of movement of private citizens, clear articulation is a must if the decision is to pass judicial muster.

The issue is complicated when issues of interstate commerce are introduced and made extraordinarily complex when international trade is potentially affected. The input by senior Canadian officials made this crystal clear to participants and observers.

In one of the conference's lighter minutes, when a law enforcement official responded "shoo them along" as to how quarantine violators would be dealt with, it was an object of discussion whether he meant "shoo" or "shoot." It was abundantly clear though that close cooperation between all relevant officials is requisite. Violators, according to another law enforcement official would be invited to a "bed-and-breakfast in a gated community." While the reference is clear, the question whether law enforcement is capable of responding to massive violations of quarantine was left open.

² Dan Rather, *The Camera Never Blinks* (1977).