MEETING OF THE STATES PARTIES TO THE CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION

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Consideration of ways and means to enhance national implementation, including enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions

Effective Enforcement of National Legislation

Submitted by the United States of America

1. Successful bioterrorism investigations generally require two fundamental elements. First, because a bioterrorism event can affect national security, these investigations should be grounded in a national strategy. Such a strategy would provide for an accurate and expeditious assessment of a potential biological threat. To accomplish these assessments, significant coordination and collaboration often is required among the several governmental agencies. Second, from a law enforcement perspective, to prevent a deliberate or accidental release of a biological agent (or toxin), investigators may need to invoke legal process to apprehend would-be perpetrators. Thus, a clear and comprehensive set of laws governing the illicit use or transfer of biological agents or toxins is indispensable. While these two factors are to a great degree interdependent, the following discussion focuses primarily on the ways to improve investigative strategies.

2. Since the attacks of 9/11 and the contemporaneous anthrax mailings, federal prosecutors and investigators in the United States have greatly increased and re-focused their resources towards using criminal prosecution as a tool to prevent terrorist acts. In the area of bioterrorism, this effort has necessarily resulted in an increased coordination among various domestic agencies. While the Federal Bureau of Investigation (FBI) remains the lead national law enforcement agency in responding to terrorist attacks in general, other agencies such as the Centers for Disease Control and the Department of Agriculture play critical roles in enforcing biosecurity at a national level.

3. Regardless of the specific nation's laws or institutions addressing biosecurity, it appears that any successful investigative strategy should answer three basic questions: (1) What are the

procedures for threat assessment and domestic coordination? (2) What are the protocols for joint investigations and role responsibilities among various public health and law enforcement agencies? and (3) Is there a comprehensive set of laws that correspond to the strategy so that the likely scenarios involving the illicit use or possession of biological agents or toxins can be fully addressed by law enforcement and public health authorities?

4. Effective threat assessment must recognize that the deliberate or accidental release of a biological agent can manifest itself in one of two ways. First, an "overt release" describes a situation where the circumstances of the release plainly demonstrate a criminal intent (e.g., by the nature of the delivery system or the perpetrator announces the attack). Second, a "covert release" involves an unrecognized or unannounced release whereby the appearance of illness may be the first sign of a possible attack. During the early stages after any release, this basic distinction illuminates the different responses by governmental authorities.[1]

5. During a covert event, local public health authorities are likely to lead the initial inquiry into how a disease or sickness is present in a given community. Accordingly, the primary tasks will be diagnosis, provision of medical treatment, and epidemiologic investigation. Law enforcement may only become involved after public health information is developed to indicate a criminal origin. However, the incidence of some diseases, such as inhalation anthrax, is so rare that a single confirmed case should be sufficient cause for the medical community to notify law enforcement.

6. Establishing clear lines of communication among public health and law enforcement authorities before an outbreak or attack is crucial for successful joint investigations. For example, in the United States, each FBI field office includes a weapons of mass destruction coordinator (WMD coordinator). The FBI has endeavoured through inter-governmental liaisons and community outreach to create a network of communication contacts such that once an intentional biological release has occurred, local authorities immediately will contact the local FBI and its WMD coordinator. Public health and law enforcement must then work together in collecting evidence relevant to their respective missions (e.g., interviewing witnesses, collecting and preserving a chain of custody for the materials used to deliver the agent). To improve the working relationships among public health and law enforcement authorities, the FBI and CDC hold annual joint training sessions.

7. When an overt event occurs, law enforcement typically receives the initial detection of the event and in turn notifies public health officials. If known, the location of the release becomes a crime scene. In assessing and responding to the threat, the FBI may rely on its own weapons of mass destruction directorate in Washington, D.C., for operational and analytical support, its hazardous materials response assets for collection of dangerous samples, or other federal agencies. As with any investigation, field testing or collection of biological material must be clearly documented through established chain of custody procedures. In addition to the usual paperwork, physical evidence ostensibly contaminated with biological agents or toxins plainly requires careful handling and storage by trained agents. Definitive analysis will be provided by the appropriate laboratory. To avoid the creation of conflicting witness statements, joint interviews generally are preferable to separate interviews by public health and law

[1] See Jay C. Butler, et al., Collaboration between Public Health and Law Enforcement: New Paradigms and Partnerships for Bioterrorism Planning and Response, EMERGING INFECTIOUS DISEASES, Vol. 8, No. 10 (October 2002).

enforcement officials. However, it should be noted that some witnesses may be very reluctant to provide certain health-related issues (e.g., illegal drug use) in the presence of a law enforcement officer.

8. As an illustration, the anthrax attacks in October 2001 may be viewed as involving both overt and covert releases. The first case of inhalation anthrax was discovered in southern Florida. When a photojournalist in Florida contracted anthrax, there was no outward indication of a criminal intent. Nonetheless, the rarity of anthrax cases in the United States prompted the public health officials to contact law enforcement shortly after the diagnosis was confirmed. On the other hand, the letters sent to the U.S. Senate and NBC News in New York clearly were criminal acts because the white powder was accompanied with threatening notes. From the outset of this event, public health and law enforcement authorities from several states and the federal government worked together to minimize the risk to public health while collecting evidence and investigating the source(s) of the anthrax.

9. Throughout the history of the United States, state and local governments have been primarily responsible for the maintenance of public health. In particular, state public health laboratories accomplish the initial identification of disease, outbreak investigation, and environmental testing. These capabilities among city, county, or state health officials nationwide, however, vary greatly. It was these disparities, coupled with the growing threat from bioterrorism, that prompted the CDC and FBI in 1999 to create the Laboratory Response Network (LRN). The LRN is a nationwide matrix of state and federal laboratories which are linked to one another in order to provide the necessary analytical support during a bioterrorism event. Uniformity and reliability in testing and evidence handling is ensured through standard protocols, reagents, controls, and secure communications.

10. Broadly speaking, the LRN is comprised of three types of labs. “Sentinel laboratories” provide routine diagnostic services to test samples for initial identification. “Reference laboratories” include approximately 140 local, state, federal, and international labs that are equipped to offer confirmatory testing of specimens. Particularly infectious agents or specialized strains are analyzed by “national laboratories” (including those at CDC) which provide highly specialized bioforensics. When there is a suspected release of a biological agent, any initial testing typically will be accomplished at the nearest state laboratory. When further testing or assistance is needed, the state lab may interact with CDC.

11. As to the third element, in assessing the overall effectiveness of an enforcement strategy, it is useful to measure that strategy against the likely scenarios law enforcement and public health authorities may encounter concerning the release of biological agents. Viewed collectively, the threats posed by the illicit use or transfer of biological agents or toxins may manifest themselves in one of five different scenarios. Listed in order of decreasing frequency of occurrence (and increasing severity of risk to public health), these scenarios include (1) “hoaxes” or false reports of biological agents being released; (2) illicit transfers involving certain particularly dangerous pathogens; (3) possession of an unreasonable quantity or type of a biological agent; (4) possession of a biological agent (or toxin) with the intent to use it as a weapon; and (5) the actual use or deployment of a biological agent or toxin as a weapon of mass destruction. As detailed in its presentation, the United States has enacted a variety of national laws addressing these factual scenarios. Such laws not only provide the necessary predication for law enforcement to initiate investigations, but they also provide additional authorizations to search for, and ultimately seize, dangerous pathogens when exigencies preclude prior judicial

process. Deterrence of acts involving the illicit possession or use of biological agents (or toxins) is accomplished through clear legal prohibitions and resulting penalties commensurate with the dangerousness of the offense. Moreover, in preparation for an actual event, national authorities should consider the adequacy of their quarantine laws and anticipate potential scenarios involving attempted breaches of a quarantined area. Finally, the goal of early disruption and prevention of bioterrorist acts is greatly advanced by criminalizing the conduct that leads up to the deployment of a biological agent through criminal offenses such as attempts and conspiracies.

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