Biodefense: A Legal Framework Rework — When Peacetime is the Only Time

Introduction
Bioterrorism is a threat of catastrophic proportions, yet in the wake of the anthrax attacks in the fall of 2001, it became evident that our nation was sadly unprepared. Our innocence as a nation has now been replaced with the sobering reality that we are vulnerable in a way previously contemplated only in the cinematography of Hollywood, as in Outbreak (1995); or in fictional reading, as in The Cobra Event (Richard Preston, 1999). So, too, the aftermath of 9/11 and the subsequent anthrax attacks raise new policy challenges and legal issues at the heart of our system of laws.

Why? The first revelation is that the unique features of bioterrorism which make it particularly unmanageable in our current legal framework. Federal authorities and expertise have been historically organized as weapons of mass destruction, earning the collective acronym, “WMD”; yet radiological and chemical threats differ significantly from biological threats. Radiological and chemical threats are known when they occur, are spent immediately upon their attack, and have a relatively contained geographic region of impact. In marked contrast, biological threats are clandestine in their delivery, with the time of attack being unknown; their impact is not spent upon attack but increases exponentially in its effect on human life; and the geographic region impacted is limited only by the planet, facilitated by the wide use of air travel.
by individuals. The expertise to deal with these weapons also differs, and it is the public health community that is most critical in addressing the threat of bioterrorism; while radiological and chemical threats require medical responses in the limited form of disaster assistance. Prevention, too, is markedly different: criminal investigation with attendant tracking of chemicals and radiological materials is required through the ports of entry and transportation systems; while biological materials must be tracked through medical data through public health surveillance systems; while also in contrast, monitoring ports of entry and transportation systems is meaningless where much smaller quantities of biological materials than chemical and radiological materials can be used for a deadly attack. It is critical that our infrastructure evolve to account for these unique features of bioterrorism.

So, too, the legal framework created through the U.S. Constitutional concepts of federalism as it now exists is unrealistic in light of the threat to U.S. national security. Currently, our national defense against bioterrorism is driven by 54 different state and territorial public health systems, linked only by the web of volunteer efforts of national associations of epidemiologists, public health officers and emergency response officials, with no overarching federal authority or coordination. This is a result of our historical interpretation of the Tenth Amendment which mandates that “those powers not given to the U.S. Congress, nor prohibited by it to the states, shall be reserved to the states . . .” Public health law has traditionally been a power of the state since the time of the colonies, and only through Commerce Clause power has the U.S. Congress taken any of the states’ powers, based upon effects on interstate commerce, such as food safety and drug sales.

National efforts to develop exercises to address the policy and public health needs such
as *Dark Winter* in June 2001 and *Sooner Spring* in April 2002, focused primarily on the medical aspects and only scratched the surface of issues which must be resolved in law and federalism while we have the opportunity to do so in a non-emergency context. The first such national exercise to recognize the vital need to address the legal framework in a comprehensive way for these responses is *Pale Horse 2002*, at Fort Sam Houston Army Depot in San Antonio, Texas in August 2002.

Legal issues and relevant case law which must be addressed by the legal community in order to provide for an effective national defense include separation of powers issues, federalism, federal and state governments roles, private sector effects, criminal and civil implications as well as technological and scientific areas. To address these legal challenges, an overview of these areas as discussed herein can assist in developing a dialogue among the nation’s legal community.

**The changing nature of federalism**

Bioterrorism does not fit well within our traditional notions of the point in time when national security emergency power should shift from state power. The threat of bioterrorism requires a federal presence in public health power, long before we have a national security emergency — because biological threats are an emergency before they are known, the shift to national power would come much too late to provide for our national security without catastrophic consequences. Simply put, a legal framework which minimizes jurisdictional boundaries — because biological agents ignore jurisdictional boundaries — is essential to national security.
An example of such a shift in federalism is evident in the federal response to environmental disasters. Just as public health law is now a state power, so too, was property law in relation to environmental pollution prior to the 1970s. After Congress recognized the failure of having a 50 state system of environmental protection — where pollution recognizes no jurisdictional boundaries — they took action to create a series of federal environmental statutes which preempted states’ traditional sovereign power in property law.

This manner of evolving federalism is not, therefore, foreign to our legal system or to the U.S. Constitution. James Madison wrote in The Federalist Paper No. 46, “If, therefore . . . 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 . . .”

Our system of federalism divides specific powers between the state and federal governments. Congressional powers are those enumerated in the U.S. Constitution; and state powers are all those other powers which include police powers, criminal and public health laws. The Tenth Amendment specifically provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . .”

Even in colonial times, states had quarantine powers to police the public health of the colonists. Only in times of emergency and war, do powers shift to the federal government; while in peacetime, power remains with the states. The problem with this relationship, is that in a biological attack — unlike a chemical or nuclear one — days or weeks will pass before we know we have been attacked. Peacetime is the critical time for the federal government to have a national surveillance system and authority to address a biological attack before it becomes a
national emergency, which will have allowed days or weeks to pass before states call on CDC under the current legal framework, even within a federal Department of Homeland Security.

**Federal government organization**

The current federal government coordination mechanism does not address the unique demands of a biological attack. Under the Clinton Administration, PDD 39 determined that in a terrorism attack, the FBI would be the lead agency, FEMA would be the lead for consequence management, and the National Security Council would be the interagency terrorism policy coordinator. This system works for nuclear, chemical or bombing incidents, but is ineffective with a biological attack. The glaring omission of the Public Health Service or Centers for Disease Control and Prevention (CDC) as a lead agency is a serious weakness in the plan; and the lack of expertise, staff and training for the FBI as the lead agency in a biological attack has been evident since 9-11.

In the Presidential Decision Directive 39 (PDD 39), the FBI is designated as the lead agency for “domestic crisis response” and FEMA as the lead agency for “consequence management” for all weapons of mass destruction. However, the expertise and institutional culture required for epidemiological investigations and biological warfare is much more strongly centered in the mission of the Public Health Service. The Centers for Disease Control and Prevention (CDC), the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID), are more adequately staffed to investigate biological contamination and to provide rapid epidemiological identification of the process and agent being used in any particular bioterrorism event. Both CDC and USAMRIID are considered the world's leading centers for
forensic analysis and have been recommended by leading terrorism experts for leadership roles in bioterrorism, yet our existing current federal organization merely gives lip service to these agencies, and the proposed Department does not reflect these unique resources which are so essential to leadership roles in biodefense.

Apprehension of the bioterrorist is clearly within the mission of the FBI, which reads: “The mission of the FBI is to uphold the law through the investigation of violations of federal criminal law; to protect the United States from foreign intelligence and terrorist activities; to provide leadership and law enforcement assistance to federal, state, local, and international agencies; and to perform these responsibilities in a manner that is responsive to the Constitution of the United States.” The FBI should clearly be involved, but equally clearly, should not be directing the effort to either prepare for or to respond to bioterrorism.

Utilizing the FBI in a role so counter to a mission, for which it does not have the tools or the culture to address, is an experiment that we cannot now afford. So, too, FEMA, as the lead agency for response to a bioterrorism event, has skill primarily in planning for and responding to natural disasters. These typically require immediate infrastructure compensation to communities for such natural disasters as earthquakes, flooding, and volcanic eruption and do not address the kinds of responses necessary for the leadership role for bioterrorism response and preparedness.

In the President’s welcome proposal for a Department of Homeland Security in June 2002, there were three significant signals for a shift from state power to federal power in the war against bioterrorism for national security purposes. First, the proposal plans that “the Department would set national policy and establish guidelines for state and local governments,” which takes that role from the states’ public health agencies. Second, the proposal makes the
Department of Homeland Security “the lead agency preparing for and responding to . .. biological . . terrorism,” which takes part of the states’ public health agencies’ responsibility. Third, the proposal directs that “The new Department would ensure that local law enforcement entities — and the public — receive clear and concise information from their national government,” which again takes part of the states’ public health agencies’ responsibility in originating their own public health information. These federalism shifts for national security are consistent with constitutional constraints and legislation should reflect this distribution of powers.

The bill which proposes a Department of Homeland Security passed the House 295 to 132 July 26, 2002 and is currently being considered by the U.S. Senate; would begin a shift in the current federalism balance in the area of public health to respond to our need for national security.1

State powers

State powers in biodefense are no less important. They involve existing state public health laws, states’ police powers to quarantine and require vaccinations, the proposal of new bioterrorism legislation, utilization of the state national guard, and state common law applicable to bioterrorism. Until a federal system of biodefense is created, our national defense powers lie in the states with assistance from the Centers for Disease Control and Prevention (CDC) upon request by the states, mandated by CDC in their enabling statutory language.

Two important police powers of the state in the area of public health law are in

1 107th Cong., 2d Sess., H.R. 5005 (introduced June 24, 2002).

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quarantine and vaccination. Since Justice Marshall in *Gibbons v. Ogden,*\(^2\) the landmark Commerce Clause case, established that among the states’ powers were those of quarantine, the state power has been recognized. In *Jacobson v. Massachusetts,*\(^3\) the U.S. Supreme Court recognized the power of states to penalize those who refused mandatory smallpox vaccinations. *Prince v. Massachusetts,*\(^4\) precluded a religious objection to vaccination when the protection of the public health would be in danger. Constitutional due process, right of privacy and public health interests of the state are issues which balance this power. The current CDC Smallpox Plan relies upon state public health authorities to take the lead in an emergency.

In the area of state legislation, the National Association of Governors with the CDC and others, commissioned the development of the Model Public Health Act for states, and accelerated it to completion in the winter of 2001 after the anthrax attacks. Approximately 33 states have introduced some form of the Model Act, and 11 states have passed some form of new public health law legislation.

The use of the national guard has raised new issues about state powers. The state’s national guard responds to requests of the Governor or requests of the President of the United States. The U.S. Constitution, Art. I, §8, cl. 15 and 16 provide for a militia to execute the laws of the Union. . . This provides for the authority by the states to appoint officers and to control the militia when it is not in the service of the national government. National Guard members serve as members of both their state National Guard as well as the National Guard of the United States.\(^5\) The role of the national guard and state’s public health authorities must be a focus in state and federal plans and legislation.

State common law was utilized unsuccessfully in the recent anthrax attacks by the postal
workers against the United States Post Office to obtain an injunction to close the Morgan postal facility in New York. The plaintiffs alleged that the United States Post Office had “actions and omissions . . . with respect to the handling of anthrax [which] have created a public nuisance because of the potential exposure of the general public to a deadly bacteria.” Because of the limitation of the Federal Tort Claims Act to money damages and because Congress did not waive sovereign immunity for injunctive relief, the injunction was denied.  

Other conceivable tort issues for the state could include negligence in failing to prepare for an emergency, failure to respond with appropriate medical treatment, failure to warn, in the event of a bioterrorism event, and must be examined on a state-by-state basis.

The U.S. Constitution, New Federal Statutes and Tools

The Biological Weapons and Anti-Terrorism Act of 1989 was passed as part of our responsibility under the international Biological Weapons Convention of 1972 to enact domestic laws to combat bioterrorism. The September 1984 attack of the Bhagwan Shree Rajneesh in Oregon with salmonella contamination of salad bars in Oregon to skew an election, was also part of the impetus behind the statute’s passage. This statute applies to anyone who “knowingly develops, produces, stockpiles, transfers, acquires, retains or possesses any biological agent, toxin or delivery system for use as a weapon.” This section also applies extraterritorially to a national of the United States. It was the Larry Wayne Harris arrest in 1995, which prompted the U.S. Congress to pass the Anti-Terrorism and Death Penalty Act of 1996. His peaceful plans to use plague to develop a vaccine to protect the public from Iraqi attacks made it difficult to find culpability under the Biological Weapons and Anti-Terrorism Act of 1989. Ultimately, he was
given probation for a mail fraud sentence which would not have been possible, had he not misrepresented himself in a letter to the laboratory where he otherwise legally obtained the plague bacteria. A new statute in response, made criminal the unauthorized possession of biological agents used for weapons. In this law, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996, which expands the federal government’s power to prosecute individuals and groups who attempt or even threaten to develop or use a biological weapon, and broadens the definition of bioweapons to include engineered organisms. Again, escaping serious culpability, Larry Wayne Harris, a member of a domestic hate group known as “Identity”, obtained the bacteria through an authorized laboratory and claimed that he was working on a vaccine to protect citizens from a biological attack. This 1996 statute was used in United States v. Wise against domestic bioterrorists attempting to use botulinum toxin; and the 1989 Act in United States v. Baker in a case involving ricin, a deadly derivative of the castor bean, used as a bioweapon. Two defendants after United States v. Lopez, attempted to invalidate the 1989 Act as exceeding Congress’ power under the Commerce Clause. In United States v. Slaughter the district court held that the “there is insufficient evidence that the threatened use of anthrax would have affected interstate commerce to support a conviction . . .”; whereas in United States v. Wise, the circuit court held that the Act did not violate the Commerce Clause, opining, “[t]he threat itself crossed state boundaries; therefore, it cannot be argued that an effect on interstate commerce is lacking in this case.” The recent trend in Commerce Clause cases by the U.S. Supreme Court would suggest that public health law would be infringed by Commerce Clause reach under this statute, particularly since it does not involve economics as in Solid Waste Agency of Cook County and United States v. Morrison, which limited Commerce Clause
power to those areas which truly have economic affects.

The most recent statute, passed this year, the Bioterrorism Prevention Act of 2001,\(^{13}\) engrossed June 12, 2002, goes toward closing loopholes in the previous statutes. The new statute eliminates the need to prove intent to use the biological agent as a weapon, and creates a “reckless disregard” of the public health and safety standard for the handling of biological agents.

Fourth Amendment search and seizure was at issue in *United States v. Larry Wayne Harris*,\(^{14}\) where vials of plague were found in the glove compartment of his car, parked in his driveway. The court found the evidence admissible because the warrant for the address permits a search of a car in the driveway, such as in this case; and also where there is consent — which there was in this case; and the officers had probable cause to believe the vials were in the glove compartment of the car. Searches will be more difficult because of the inherently small quantities of biological agents, such as vials, as in this case. Plainview will be unlikely to reveal the usually small sample quantities of biological weapons, and a very specific idea of the location of the agents will be necessary to successfully recover biological weapon evidence.

An exception from departure from the Federal Sentencing Guidelines was not upheld by the circuit court in *United States v. Leahy*,\(^{15}\) where Leahy was convicted under the 1989 Act involving ricin. The circuit court found that departure upwards where “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described,”\(^{16}\) is acceptable, but not here. The court held that the district court erred in their selection of the analogous sentencing guideline “because there was no
evidence showing that Leahy engaged in an actual act or attempted act of terrorism. . .”17 Given the new criminal statute, the Bioterrorism Prevention Act of 2001, and the seriousness of mere possession of bioweapons, the Sentencing Commission should reexamine the sentencing guidelines after this decision to fashion appropriate guidelines or identify an analogous sentence.

Civil Issues Arising from Bioterrorism

In the recent case, Smith v. Potter, 18 the postal workers at the Morgan facility in New York, which had been contaminated with anthrax spores, utilized a theory under the federal environmental statute, Resources Conservation and Recovery Act (RCRA), requiring emergency cleanup of hazardous materials where there is an “imminent and substantial endangerment.” Unfortunately, the court did not reach that issue, which would have determined how the court might have interpreted “hazardous material,” and the application of RCRA to biological attacks.

Tort claims for the use of vaccine which has unintended bad effects, resulted in landmark litigation with the polio vaccine19 and the swine flu vaccine.20 As a result of the liability created for pharmaceutical companies who produced a narrow profit margin vaccine, the federal government feared that the vaccine would become unavailable. The National Vaccine Injury Compensation Program (NVICP) enabled by the National Childhood Vaccine Injury Act of 1986, 21 which provides no-fault compensation for injury or death from the vaccines for polio, diphtheria, pertussis, tetanus, measles, mumps, rubella, hepatitis B, haemophilus influenza type b, varicella (Chicken pox), rotavirus, and pneumoccocal 7-valent conjugate,22 resulted. The development of new vaccines as well as the anticipated use of smallpox vaccine for the broad vaccination program for adults as well as children as contemplated by the CDC, will make new
legislation necessary.

Further regulatory changes may be needed to address the process for testing and approving such vaccines which are “investigational new drugs (IND)” such as the current smallpox vaccine. For example, the CDC Smallpox Plan requiring vaccination, must include a process of informed consent with each recipient of the vaccine because it is in the IND status, which cannot be waived for civilians.²

Federal labor law was utilized in the recent anthrax contamination of postal facility in Florida in Miami Area Local v. United States Postal Service,²³ where the labor union sought negotiations for worker safety.

Wrongful death actions have been initiated with the death of two postal workers exposed to anthrax while working in the Kenwood postal facility in Washington, D.C. One family has settled with the hospital; while the second family has proceeded through the pretrial litigation stage. In Morris v. Kaiser²⁴, the theory of recovery is based in negligence on the part of the hospital and medical care providers, while a third-party complaint for indemnification and contribution has been filed against the United States by the defendant for the government’s role in failing to take action with the contaminated postal facility and its workers.

In the private sector of risk management, a serious crisis has arisen where insurance companies have dropped their coverage for risks and losses associated with terrorism. Airline

companies, hotels and transportation systems are most seriously impacted by this loss in coverage. In June 2002, the Senate rejected a bill which would exclude punitive damages against businesses for losses due to terrorist attacks without a finding of criminal negligence. Insurance companies would be co-insured by the federal government for 80-90% of the claims amounts. As of July 27, 2002, the conferees are continuing to consider the terms, particularly the award of punitive damages. Currently, the language prohibits the award of punitive damages in excess of the defendant’s direct proportion of responsibility for the plaintiff’s physical harm.25

**Civil Rights issues in public health law concerning bioterrorism**

Civil rights issues will be a concern within the context of the threat of bioterrorism. Surveillance, characterization of the threat, response and quarantine issues at each phase of an attack, will raise fundamental rights issues.

In surveillance, Fourth Amendment search and seizure protections will be a consideration in the collection of samples from individuals, the requirement to provide samples, and the need to enter homes. The right of privacy will be raised in the context of medical information and the need to share this information with public health authorities or law enforcement authorities.

In the response phase of a bioterrorism attack, the use of the military will be governed by the *Posse Comitatus* Act, to protect against the use of military force against civilians. This statute was passed in response to the experience of martial law in the southern United States after Reconstruction, and precludes the military from having enforcement interface with civilians. The statute is limited to providing resources and personnel, but stops short of strategy and military command as part of a civilian operation. The first major infraction under this Act was
found during the Wounded Knee incident in South Dakota, where the military was utilized without the mandatory order from the President.26

Fifth Amendment and Fourteenth Amendment taking without just compensation will be invoked where the requirement to take residences, businesses or vehicles arises in the context of a biological event. Some states are considering legislation to provide for the need to take property in the event of a biological attack.

Human remains are required to be returned to families under the constitutional right of privacy, but must be done without a risk to public safety. Jurisdiction for human remains is within state law, and considers the right of the family to have the remains, and the obligation of the family to take possession of the remains. Jurisdiction for human remains in a government building or a military installation is federal, and military guidelines for human remains applies. For example, in the aftermath of the 9-11 attacks, the jurisdiction for human remains in the World Trade Center was within that of the state of New York; while the jurisdiction for human remains in the Pentagon was that of the U.S. military.

In quarantine, Fifth and Fourteenth Amendment Due Process requirements must be met in detaining individuals; and Fourth, Fifth and Sixth Amendment protections must be raised against non-criminal detentions. The lessons learned from the recent anthrax attacks, which involved a number of local quarantines demonstrated in one case, conflicting interpretations of due process which will result in political chaos. For example, it was reported that in Jefferson County, Missouri, private security officers had to be hired to replace the county deputies when the Sheriff refused to have his deputies evacuate and enforce a quarantine of the building, properly ordered by the County Commissioner, when an anthrax scare occurred.27 Although the
Commissioner had authority to issue this order, the refusal to enforce the quarantine based upon the judgment of the county law enforcement officials raises serious concerns and suggests a national approach to defining due process in the context of quarantine to lessen the chaos in the event of any need to quarantine in a biological attack.

**International Law and Bioterrorism**

The revelations in 1993 that not only did the Soviet Union have a biological weapons production network, Biopreparat, with huge quantities of smallpox; but that Iraq, too, had a not-unrelated biological weapons production facility discovered at the end of Desert Storm alerted Congress to the increasing risk of a biological attack.

The first international instrument to address the threat of bioterrorism at least in a broad sense, was the Geneva Convention of 1925 which simply required civil behavior between countries. Between 1925 and 1969, bioweapons programs proliferated.

In 1969, President Nixon ended the nation’s biological weapons program which had begun in the mid-1940s, and converted all operations to a defensive program, when he said to the world, “I have decided that the United States of America will renounce the use of any form of deadly biological weapons that either kill or incapacitate.” The Biological Weapons Convention of 1972 was the first instrument to address the worldwide elimination of biological weapons, which followed the announcement from President Nixon. Currently, 172 countries are signatories to the Convention, including the former Soviet Union and Iraq. The lack of a monitoring mechanism in the Convention, has made it convenient for the proliferation of biological weapons facilities in the former Soviet Union and Iraq.
The Anti-Terrorism and Death Penalty Act permits the United States to prevent the entry of members of groups known to be engaged in terrorism, such as the Aum Shinrikyo group of Japan, responsible for the sarin gas attacks in the Tokyo Subway in 1995.

Other countries are struggling with the need to develop domestic protection against biological threats, while balancing that need against civil liberties. Comparing other countries’ laws, the United States still compares favorably in protection of civil liberties, even after the passage of the USA PATRIOT Act of 2001.

In Japan, the Anti-Subversive Activities Law of 1952 is intended to provide a legal process by which groups identified as threats, can be disbanded. The standard for disbandment is a clear danger of engaging as an organization in violent subversive activities for political purposes repeatedly and continuously in the future. Even after the Aum Shinriyo sarin attack in the Tokyo Subway, the Japanese Commission failed to find that the acts rose to the level of disbandment. In November 1999, the Japanese Parliament passed new legislation to provide for the tracking of organizations which in the last five years, have committed indiscriminate mass murders. Authorities are allowed to keep such groups under surveillance for up to three years and the police can conduct searches without probable cause at any time. These groups also have a reporting requirement of their activities on a quarterly basis. Violations can result in temporary disbandment or permanent disbandment.

In France, July 22, 2001, the French Parliament passed new legislation which would allow the French government to disband organizations whose leaders commit crimes. This law allows the identification of groups as “cults” where they employ techniques to alter thinking. A Commission appointed by the French government has identified 172 such cults, which are
candidates for disbandment should their leaders commit a crime. This law was widely criticized by France’s citizens as a serious, vague and overbroad threat to civil liberties, yet it remains law.

A recent Gallup Organization poll in the United States reported in June 2002 that 30 percent of Americans favor easier access to mail, e-mail and telephone conversations for legal authorities, which suggests a move in the United States toward tolerance toward government intrusions into traditional areas of privacy, if it provides homeland security.

**Science Issues and Bioterrorism**

The National Academy of Sciences released last month, a study on the use of science and technology in the war against terrorism. The use of new technologies to create biological weapons which offer combined characteristics of several biological agents or present as diseases which have no known vaccine or cure or inactivate the human immune system, making vaccines ineffective in producing the necessary antibodies which creates the immunity are specters on the horizon. New regulations to monitor the laboratories engaged in these studies; or to limit the publication of new discoveries in biotechnology which could aid terrorists in the development of such weapons must ultimately be considered as a measure for national security.

Recent measures to monitor foreign students enrolled in research facilities in the U.S. are of limited utility in identifying bioweapons threats, but instead create a too broad “watch list” which could merely divert federal personnel from more critical homeland security tasks. Focusing our resources in the most efficacious manner in science and technology is critical for our Nation in our War on Terrorism.

**Conclusion**
The legal community now has a window in which to examine impediments to optimal national security, based upon a successful rule of law system, Constitution and system of federalism. Challenges to our civil rights require constant vigilance and protection as we seek to preserve our freedoms in the context of homeland security, but I urge that a broader dialogue might begin among federal lawyers to address the challenges to shaping our legal framework in all of these critical areas. A new Department of Homeland Defense will be successful only if these legal challenges are addressed.

ENDNOTES

1. U.S. Const., Amend. X.
2. 22 U.S. 1 (1824).
7. 18 USC §175(a)(2001).
8. Id.
9. 221 F.3d 140 (5th Cir. 2000).
10. 98 F.3d 330 (8th Cir. 1996).
12. 221 F.3d 140 (5th Cir. 2000).
15. 169 F.3d 433 (7th Cir. 1999).
16. At 15.
17. 169 F.3d 433 at last paragraph (7th Cir. 1999).