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## ***Constitutional Problems with Enforcing the Biological Weapons Convention***

by **Ronald D. Rotunda**

### **Executive Summary**

The 1972 Biological Toxins and Weapons Convention—often called the Biological Weapons Convention, or BWC—requires the signatories to renounce the development, employment, transfer, acquisition, production, and possession of all biological weapons listed in the convention.

Yet the BWC does not provide for any protocol for enforcement because, as the United States candidly acknowledged at the time, compliance with the convention would be unverifiable. However, the Clinton administration now supports efforts to develop an enforcement protocol, even though it acknowledged that it does “not believe that the Biological Weapons Convention, in the terms in which the United States assesses that word [BWC], is verifiable.”

Efforts to enforce the BWC are noble but probably fruitless. The proposed enforcement protocol’s implementation threatens important constitutional rights: the right to privacy reflected in the Fourth Amendment, the separation of powers principle found in the appointments clause, and the right to

intellectual property found in the Fifth Amendment.

Unlike most arms control agreements, the BWC applies to private parties—not merely to sovereign signatories. Few constitutional difficulties exist when the U.S. government agrees to implement limits on the number of *its* intercontinental ballistic missiles by providing for inspection of the facilities that *it* owns. We do not think of the U.S. government as having a right to privacy.

Things are quite different when the United States wishes to inspect facilities owned by private parties. The U.S. government can search private dwellings *only* after it has secured a search warrant from a neutral magistrate upon a showing of probable cause, and the government would have to use its officers—executive branch officials who are subject to the Constitution and controlled by the executive. The administration’s proposed enforcement protocols—to the extent that they will apply to private parties—would violate these important constitutional principles.

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## Introduction

By 1929, 54 nations, including the United States and the Soviet Union, had renounced war as an instrument of national policy and signed the Kellogg-Briand Pact of 1928. Nonetheless, war still exists. With the same hope, the Biological Toxins and Weapons Convention—often called the Biological Weapons Convention, or BWC—outlawed biological weapons. The convention was signed in London, Moscow, and Washington, D.C., in 1972 and entered into force in 1975. Yet, like war itself, these weapons still exist and still may be used.

Today, 162 countries have signed the BWC, and 144 governments have ratified it. Countries that have ratified the treaty include such pariah states as Cuba, Iran, Iraq, and Serbia. The BWC requires the signatories to renounce the development, employment, transfer, acquisition, production, and possession of all biological weapons listed in the convention. Yet the BWC did not provide for any protocol for enforcement because, as the United States candidly acknowledged at the time, compliance with the convention would be unverifiable.

If we fast-forward to the present—approximately a quarter of a century after the convention first came into being—we find an important difference: the administration now supports an international effort to develop an enforcement protocol, while still acknowledging that it does “not believe that the biological weapons convention, in the terms in which the United States assesses that word [BWC], is verifiable.”<sup>1</sup>

The United States is part of a group called the “Ad Hoc Group” (often called the AHG). Since January 1995, the AHG has been considering a protocol to enforce the BWC. By the end of 1999, the AHG had met for a total of only 44 weeks over that five-year period.<sup>2</sup> The AHG did not have a sense of urgency. Since the collapse of the Soviet bloc and the steadily weakening economic position of other state sponsors of terrorism, such as North Korea and Cuba, the terrorist threat has lessened.<sup>3</sup> Yet now there appears to be a push for the

United States to approve an enforcement protocol before President Clinton leaves office. In March 2000 President Clinton announced:

It would be foolish to rely on treaties alone to protect our security. But it would also be foolish to throw away the tools that sound treaties do offer: A more predictable security environment, monitoring inspections, the ability to shine a light on threatening behavior and mobilize the entire world against it. So this year, we will work to strengthen the Biological Weapons Convention.<sup>4</sup>

The question is whether the proposed protocol—still being drafted—is sound, whether it offers a more predictable security environment, and whether it does so in ways that do not intrude on important constitutional protections.

Donald Mahley, nominated by President Clinton to be special negotiator for chemical and biological arms control, stated that the proposed enforcement protocol would be “another aspect of enhancing national security.” According to Mahley, such protocols should “be subject to the same kind of risk-benefit analysis as other security components. They are not unique to themselves.”<sup>5</sup> This paper attempts to begin the risk-benefit analysis that Mahley has urged.

First, the enforcement protocol is not necessary for the United States to eliminate its own stockpile of biological weapons. The United States has already done that and more. In November 1969, several years before the BWC, President Richard Nixon unilaterally renounced all U.S. research on biological weapons and allowed only research on defenses and vaccines against the use of biological weapons.<sup>6</sup> Similarly, the United States does not need the enforcement protocol to renounce the first use of biological weapons, since President Nixon unilaterally renounced any use, first or retaliatory, of biological weapons.<sup>7</sup>

Second, the enforcement protocol is unusual in its enforcement mechanism

against private persons and organizations. The protocol will authorize foreign inspectors to search individuals and companies in the United States to uncover evidence of criminal activity. Those searches will often be conducted without the strict protections of the Fourth Amendment and its requirement that a search warrant be issued by a neutral magistrate only after a finding of probable cause.

Treaties do not normally authorize foreign inspectors to search private property of U.S. citizens on American soil. There is no legal problem with the U.S. government's opening its facilities to the inspectors of other nations or international organizations. Although Mahley acknowledges that the administration does "not believe that the biological weapons convention, in the terms in which the United States assesses that word, is verifiable,"<sup>8</sup> the United States may constitutionally make the decision to open public facilities. As long as the administration secures whatever statutory authority is needed, U.S. military installations can be opened to foreign inspectors. However, the focus of the BWC enforcement protocol is on private facilities.

Normally, a search of private property must comply with the procedural requirements of the Fourth Amendment. In addition, those law enforcement officials who conduct such a search are the equivalent of police officers, who are normally subject to the restraints of the Constitution and the protections found in the appointments clause of Article II. And, if those law enforcement officials use their authority to improperly seize (or steal) property, the government must provide just compensation.

Three major constitutional problems with the enforcement protocol will now be examined. They involve the Fourth Amendment, the appointments clause of Article II, and the Fifth Amendment.

## Fourth Amendment Issues

Fourth Amendment issues are raised by any enforcement protocol that proposes

intrusive warrantless searches of nongovernmental persons or entities.<sup>9</sup>

### Effectiveness and Constitutionality

The Supreme Court is more likely to invalidate a statutory system of searches<sup>10</sup> that is ill designed and narrowly tailored to ferret out wrongdoing. In the Supreme Court ruling *Chandler v. Miller*,<sup>11</sup> the Court invalidated a Georgia law that required candidates for certain state offices to certify that they had tested negative for illegal drug use within 30 days prior to qualifying for nomination. The Court found (8 to 1) that the statute was unconstitutional because it was an unreasonable "suspicionless" search prohibited by the Fourth Amendment. In the course of its analysis of the problem, the Court found that the Georgia law was invalid under the Fourth Amendment because

Georgia's certification requirement *is not well designed* to identify candidates who violate antidrug laws. *Nor is the scheme a credible means to deter* illicit drug users from seeking election to state office. The test date—to be scheduled by the candidate anytime within 30 days prior to qualifying for a place on the ballot—is no secret. . . . [U]sers of illegal drugs, save for those prohibitively addicted, could abstain for a pretest period sufficient to avoid detection.<sup>12</sup>

In the case of the BWC, the U.S. government does not believe that the enforcement protocol it is embracing is a "credible means to deter" the manufacture, storage, or use of biological weapons.<sup>13</sup> As noted earlier, the government does not believe that compliance with the convention is verifiable.

That assessment is hardly speculation. Right after the Soviets signed the BWC in 1972, they violated it.<sup>14</sup> The Russians may have become more open since the collapse of the Soviet empire, but "rogue" states—such as Iraq or Syria—would probably not be as forthcoming about their arsenal of biological

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weapons. Indeed, although both of those countries have signed the BWC, U.S. experts believe that Iraq and Syria continue to have “extensive” biological weapons programs.<sup>15</sup>

The post-Gulf War inspections of Iraq have been the most systematic, thorough, and rigorous in modern times. According to the Hoover Institution, the UN Security Council passed resolutions that created “extraordinarily demanding inspection regimes with powers that no inspection regime is ever going to have in an ordinary situation anywhere else. And even [Iraq’s] facilities got through this regime.”<sup>16</sup> The UN Special Commission (UNSCOM) was unable to uncover biological weapons even through its unusually intrusive inspection regime.

One of the UN inspectors recalled his on-site inspection of Al Hakane, which, the West now knows, was Iraq’s primary biological weapons production facility:

At the time we visited [Al Hakane], in early 1995, the Iraqis were claiming that this was a legitimate facility involved in the production of single cell protein, a supplement from animal feed, and a biological pesticide. . . . And we saw the facility and the fermenters which were being used for this purpose and it looked just like an ordinary, legitimate commercial facility except there were some tantalizing and troubling aspects about the facility that didn’t quite fit. I mean it had high security, was extremely dispersed, it had bunkers. But that in itself was not a smoking gun. . . . We did not draw any conclusions that this facility was in fact or had been used in the past as a weapons facility and it was not until August of 1995 with the defection of Hussein Kamel who is the mastermind behind Iraq’s biological weapons program that the truth came out.<sup>17</sup>

If the thorough UNSCOM inspection regime could not uncover evidence of a biological weapons program, a less rigorous inspection

program would have an even slimmer chance of success.

A defective enforcement protocol, which promises more than it can deliver, is likely to be invalid under the Fourth Amendment. If the enforcement protocol requires intrusive searches *and* still has significant loopholes, then it intrudes on important constitutional rights without fulfilling its promise of eliminating or substantially reducing biological warfare.

**Open-Ended and Invasive Searches**

The protocol contemplates extremely intrusive searches of private property. The protocol’s search of private property must be unusually thorough to have any chance of working effectively, but such invasive searches create a greater risk of a violation of the Fourth Amendment. Because biological toxins occur naturally in the environment,<sup>18</sup> numerous individuals and private businesses could be subject to those searches.

Compare the general, open-ended search envisioned by the BWC with the requirements of the Fourth Amendment—as interpreted by the Supreme Court in the case of *Marron v. the United States*:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer exercising the warrant.<sup>19</sup>

The protocol appears to envision what the Supreme Court argued the Fourth Amendment was designed to prevent: “general warrants,” which grant government officials “sweeping power” to invade the premises of “merchants and businessmen” to “search at large for smuggled goods.”<sup>20</sup>

**Specious Arguments to Justify Erosion of the Fourth Amendment**

There are three major arguments that are commonly invoked to justify searches without

warrants issued by a neutral magistrate who has found probable cause.

*The Foreign Affairs Power.* Commentators have argued that the president's "national security powers" would justify an erosion of the Fourth Amendment. As one commentator asserted:

[P]residential *national security powers* might permit U.S. consent to highly innovative and informative OSI [on-site inspection], particularly of commercial facilities with lesser constitutional protection. . . . Innovative, *intrusive* OSI of manufacturing, transportation, storage and R&D facilities could be invaluable tools for arms control. The Constitution is favorably disposed.<sup>21</sup>

On the contrary, the Constitution is not favorably disposed. The people who are subject to the searches are neither foreign nationals nor agents of a foreign government; they are U.S. citizens living in the United States.

When President Nixon's attorney general John Mitchell tried to use national security to undercut the reach of the Fourth Amendment, the Court was not persuaded. For example, in *United States v. United States District Court*,<sup>22</sup> the defendants sought pretrial disclosure of the government's electronic surveillance information on them. In response, the attorney general filed an affidavit stating that he had approved the wiretaps for the purpose of "gather[ing] intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." The district court, the appellate court, and the Supreme Court all rejected the government's claim that the warrantless surveillances were a lawful and reasonable exercise of presidential power to protect national security. The surveillances violated the Fourth Amendment.

The Supreme Court agreed that the question of the president's power to authorize electronic surveillance in internal security

matters without prior judicial approval was a "delicate" question. The Court acknowledged that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees. . . ." Nonetheless, the Fourth Amendment requires prior judicial approval for that domestic security surveillance. The Court went on to say that the freedoms of the Fourth Amendment cannot properly be guaranteed if the executive branch has the discretion to conduct domestic security surveillances without securing the detached judgment of a neutral magistrate, who makes the decision to issue the warrant.

The law does not change when the attorney general's name is Janet Reno, even though Reno has attempted to claim "inherent authority" to justify warrantless searches.<sup>23</sup> The Supreme Court has never avoided or dismissed an individual's claim that the government exercised the foreign affairs power to deprive him of constitutional rights.<sup>24</sup> Yet, some commentators continue to be enamored of the "foreign affairs" argument.

*Spending Power.* Another argument raised to justify limiting the reach of the Fourth Amendment relies on the taxing and spending clause, under which the U.S. government has the power to attach certain conditions to expenditures of federal money. The line of reasoning is that individuals or companies who contract with the government will "waive" their Fourth Amendment rights as a condition of doing business.<sup>25</sup>

First, that waiver theory does not apply to the many individuals or entities that do not engage in business with the federal government. Second, the waiver theory is not sound even as it pertains to those persons who do contract with the government. The waiver argument raises several important questions. Could tenants in a government housing project be forced to waive their rights under the Fourth Amendment as a condition of receiving housing?<sup>26</sup> The court says no.<sup>27</sup> Why stop with the Fourth Amendment? Could the government require housing tenants to waive their rights against self-incrimination under

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the Fifth Amendment or their right to a jury trial in a criminal case? Could the government force its contracting parties to waive their right of free speech or their right against cruel and unusual punishment?

In none of those instances does a true waiver exist; there is no voluntary relinquishment of a known right. Instead, the government is conditioning benefits on the requirement that the recipient give up constitutional rights. The Court would not allow any such forced relinquishment or surrender of constitutional rights—as indicated by *South Dakota v. Dole*,<sup>28</sup> the leading case on the subject.

In *Dole*, Chief Justice Rehnquist, for the Court, upheld the federal power to withhold federal highway funds from states that permitted people under the age of 21 to buy liquor. The Court used a four-part test to determine if the conditions imposed are valid under the taxing and spending clause. First, Congress’s spending power must pursue the general welfare. Second, Congress must speak “unambiguously” so that recipients of the funds exercise their choices knowingly. Third, the condition must not be unrelated to federal interest in the particular national program. And, fourth, no “independent constitutional bar” exists to the federal government’s conditional grant of funds.<sup>29</sup>

The fourth requirement—that no independent constitutional bar exists to the federal government’s conditional grant of funds—needs to be discussed further. *Dole* found that the Twenty-first Amendment (dealing with state powers to regulate alcohol) was not an independent constitutional bar. But, the Court said that Congress could not use its spending powers

to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.<sup>30</sup>

In short, Congress could no more use its spending power to require its contractors to

waive their rights under the Fourth Amendment than it could use its spending power to require those contractors to waive their rights under the Eighth Amendment, which forbids cruel and unusual punishment.

*Pervasively Regulated Industries.* The last major argument to justify warrantless searches is that the requirements of the Fourth Amendment are inapplicable if the places to be searched are already “pervasively regulated.”<sup>31</sup>

First, many of the places that would be searched under any BWC enforcement protocol are not pervasively regulated. For example, a kitchen is not pervasively regulated, but one could still produce biological toxins there.

Second, whatever the meaning of “pervasively regulated” is, the Supreme Court ruled—in *Dow Chemical v. United States*—that a major chemical corporation, such as Dow Chemical Company, is not included in the definition.<sup>32</sup> In *Marshall v. Barlow’s, Inc.*, the Supreme Court made clear that the Fourth Amendment applies with full force to that company and others like it. The Court explained that a “closely regulated industry” is “the exception,” not the rule.<sup>33</sup> What “distinguishes [closely regulated] enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware.”<sup>34</sup> In *Almeida-Sanchez v. the United States*, the Court noted that the “businessman in a regulated industry in effect consents to the restrictions placed upon him.”<sup>35</sup> Those “pervasively regulated industries” have been limited to three areas—alcohol, firearms, and mining—and are limited “responses to relatively unique circumstances.”<sup>36</sup> The BWC enforcement protocol is not limited to pervasively regulated industries; it is not even limited to commercial buildings.

*Donovan v. Dewey* is the leading case on approving a search of a pervasively regulated industry without all of the Fourth Amendment safeguards.<sup>37</sup> The case upheld warrantless inspections of underground and surface mines on the grounds that mining is a pervasively regulated industry. What com-

mentators often miss about that decision is why the Court dispensed with the normal warrant requirement. The Court noted that the “statute’s inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.”<sup>38</sup>

In *Donovan*, the Court found three factors that made it “difficult to see what additional protections a warrant requirement would provide.”<sup>39</sup> None of those factors would apply to the enforcement protocol of the BWC.

- “The [Mine] Act requires inspection of *all* mines and specifically defines the frequency of inspection.”<sup>40</sup> The BWC protocol could not provide for regular inspection of all places that could produce or store biological weapons—that would include every garage and refrigerator.
- The Mine Act provided that a mine operator could know the inspector’s purpose and the limits of the inspection because “the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations.”<sup>41</sup> The BWC’s enforcement protocol could not, with specificity, set out the limits of the inspection—for that would undercut the usefulness of an inspection. On the contrary, the protocol would need to authorize the inspector to look in every nook, niche, and crevice of the inspected facility.
- “The Act provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have.”<sup>42</sup> That is the most important limitation. If the mine operator refused entry, the secretary of labor could not search the premises; instead, he could only commence a civil action to allow a search. That injunctive proceeding would provide an adversary hearing. A court could rule on whether the search could proceed and—if it could—on what its limits would be.<sup>43</sup>

When a law enforcement official seeks a search warrant, no adversary proceeding is necessary. The law enforcement official presents his case, *ex parte*, before the magistrate. The warrant requirement (the *ex parte* proceeding) offers less protection than does the statute, which provides for an adversary hearing.<sup>44</sup> In short, the *Donovan* decision gave the mine operator *more* protection than he would have received from a regular search warrant.

Another way of examining the issue is to ask if the requirement of a warrant would *benefit* the mine operator more than the statutory scheme would. The Court found that it was “difficult to see what additional protection a warrant requirement would provide.”<sup>45</sup> The Court gave the mine inspector no right to inspect without a search warrant. Instead, the inspector could only ask permission to inspect. If the mine operator refused entry, the inspector had the burden of going to court to seek an injunction. The *Donovan* decision—even in the case of pervasively regulated industries—does not sanction any warrantless *general* search for biological weapons.

*Marshall v. Barlow’s, Inc.*, makes this last point quite clear. In *Marshall*, the Court considered a provision of the Occupational Safety and Health Act, which permitted inspectors—without any warrant—to

enter without delay and at *reasonable* times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . . to inspect and investigate during regular working hours and at other *reasonable* times, and within *reasonable* limits and in a *reasonable* manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.<sup>46</sup>

The searches that the provision authorized—unlike searches for biological weapons capa-

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bility—were limited to business establishments. The searches—unlike searches for biological weapons capability—were limited in scope and (as the statute emphasized by repeating the word four times) “reasonable.” Nonetheless, the Supreme Court held that this provision violated the Fourth Amendment.

The searches were unconstitutional without a search warrant—even though the Occupational Safety and Health Administration regulates “a myriad of safety details that may be amenable to speedy alteration or disguise.”<sup>47</sup> One would expect that searches pursuant to the enforcement protocol would be at least as intrusive and extensive as the searches discussed in the *Marshall* case. If the OSHA searches were unconstitutional, then, a fortiori, the more extensive searches of the enforcement protocol must also be unconstitutional.

**Remedies for Fourth Amendment Violations**

If the government violates the Fourth Amendment, litigants may exclude as evidence the results of the illegal search. They may also sue for damages. However, those remedies do not cure the violation. Thus, some parties probably would sue to enjoin prospective violations of the Fourth Amendment.

Foreign adversaries—who often do not respect U.S. legal principles such as probable cause, search warrants, intellectual property, and just compensation—will probably claim that the refusal of the American courts to follow the enforcement protocol demonstrates that the United States does not really support the elimination of biological weapons. Moreover, other countries may justify and excuse their own refusal to comply with the BWC by asserting that their own constitutions give them rights to exclude our inspectors.

Even though the courts would be expected to enjoin unconstitutional searches, the problems that a BWC enforcement protocol creates cannot be ignored. The courts are the ultimate guardians of our liberty, but that does not excuse the other branches of government from abdicating their own responsibilities. If Congress

does choose to ratify the ill-conceived protocol, any enforcement of the protocol should provide that inspectors secure a search warrant that meets the requirements of the Fourth Amendment—unless the persons who are inspected voluntarily waive their constitutional rights. Even then, the warrant cannot authorize open-ended searches. The Fourth Amendment says clearly that the warrant must specifically describe the place to be searched and the persons or things to be seized.

**Issues under the Appointments Clause**

The appointments clause of the Constitution gives the president the power to appoint all “officers of the United States,” but Congress may authorize “inferior Officers” to be appointed by the president alone, the courts of law, or the heads of departments.<sup>48</sup> The framers of the Constitution sought to preserve liberty and establish accountability by separating powers. The framers gave Congress no role in appointing those who exercise executive branch powers—except that the Senate’s approval is needed for confirmation of senior executive branch appointments. Executive branch officials would be appointed by members of that branch or (in a few instances) by the courts.<sup>49</sup>

Under the enforcement protocol, inspectors would be acting under color of authority of the United States and thus are subject to the appointments clause. If the inspectors did not act under such authority and under the exercise of executive power, the subjects of the search would have no more obligation to let inspectors enter and search than they would have the obligation to let the next door neighbor snoop.

However, international inspectors under a BWC enforcement protocol would be a peculiar breed. No one in the executive branch would appoint or remove those inspectors. Presumably, the protocol would allow the president to object to the appointment of an inspector or to request his or her removal,



but the president would be a supplicant before the international tribunal that would rule on such matters. The appointments clause appears to be violated by international inspectors who would have police power over private parties but who would not be subject to appointment and removal by any U.S. official in the normal manner.<sup>50</sup>

The Supreme Court has made clear that the framers created and limited the appointment power to “ensure that those who wielded it were accountable to political force and the will of the people.”<sup>51</sup> By enacting the Brady Act, Congress sought to give state officials the power to enforce a particular federal law. In *Printz v. United States*<sup>52</sup> the Court held that Congress could not require state executive branch officials to enforce federal law; however, the Court’s reasoning went beyond that narrow statement of the holding. The Court held that the separation of powers was violated by Congress’s vesting executive branch authority to persons who are not accountable to the executive branch:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, “shall take Care that the Laws be faithfully executed,” personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the “Courts of Law” or by “the Heads of Departments” who are themselves Presidential appointees). The Brady Act effectively transfers this responsibility to thousands of CLEOs [chief law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. See *The Federalist* No. 70

(A. Hamilton); 2 *Documentary History of the Ratification of the Constitution* 495 (M. Jensen ed. (1976) (statement of James Wilson); see also Calabresi & Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L. J.* 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.<sup>53</sup>

The appointments clause does not appear to allow Congress to give law enforcement authority to inspectors who are appointed by neither the executive branch nor the courts and who are not responsible to any official in any of the three branches of government.<sup>54</sup> The federal government can authorize international inspectors to engage in searches of the government’s own facilities, such as military bases, but the Constitution does not authorize the government to give international inspectors the right to exercise police power over U.S. citizens and other persons and entities protected by the Constitution.

## Fifth Amendment Issues

The Constitution provides that no private property shall “be taken for public use without just compensation.”<sup>55</sup> Intellectual property is a form of property.<sup>56</sup> If the federal government takes that property, the Constitution requires that just compensation be paid. If the federal government sets up a legal structure that permits international inspectors to steal intellectual property, a “taking” also exists for purposes of the just compensation clause.<sup>57</sup> It is generally conceded that the “procedures likely to be applied to verify arms control treaties are sufficiently intrusive to pose a legitimate threat to CBI [confidential business information].”<sup>58</sup>

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try that now contribute to a substantial share of our export earnings. Inspectors would have to “collect small samples of the biological agents that are produced at a particular facility. An international inspector going into a biotechnology firm to take swabs and samples could get a lot of information about the processes and some of the proprietary information that the company depends on for survival.”<sup>59</sup> American companies lead the world in biotechnology, and foreign competitors exist that would like to help themselves to that information.

Intrusive inspections create a serious risk of industrial espionage by foreign inspectors—many of whom come from nations that often do not respect intellectual property rights. Given the monetary incentives, some inspectors would undoubtedly engage in the theft of technology. Inspectors can also be spies. For example, after the Gulf War, the inspectors who inspected Iraqi weapons facilities included spies for the United States who acted under cover of UN protection.<sup>60</sup> Although the French deny commercial spying, French national intelligence is considered the “most aggressive” in corporate espionage.<sup>61</sup>

If—in the course of inspecting every nook and niche for biological weapons—one of the inspectors stole intellectual property, a taking of property would exist. The Fifth Amendment guarantees just compensation for such takings.<sup>62</sup>

The Fifth Amendment’s just compensation clause does not forbid the taking of property. The government can take property *if* just compensation is paid. In that sense, the clause is quite unlike the search and seizure clause and most other provisions of the Constitution. Consequently, *if* a theft of intellectual property results from the searches that the enforcement protocol authorizes, the U.S. government can “cure” that taking by providing just compensation. But the government must first establish a fair procedure to provide just compensation.

A reasonable just compensation law will have to deal with some difficult questions arising from the fact that the inspectors who

might steal secrets are foreign nationals with diplomatic immunity. If an American business claims that an inspector stole its trade secrets, would the business be able to subpoena the foreign inspector or would diplomatic immunity shield the suspect? Even if no immunity existed, what if the foreign inspector refused to submit to a deposition and to discovery? Often, by the time the theft of industrial secrets is discovered, the inspector will be outside the jurisdiction of U.S. courts. Who will bear the cost of the inspector’s refusal to submit to American courts? Will the burden of proof shift if the foreign inspector ignores an American subpoena?

Any implementing legislation for the ill-conceived protocol should at least provide that an injured party be able to sue the U.S. government, which will stand in the shoes of the foreign inspector. In addition, the United States should bear the burden of proof. Shifting the burden of proof to the defendant is not normal. But in this case, a shift would be just because the U.S. government’s actions are the reason the plaintiff would not have the tools that plaintiffs typically have to discover the truth. In other words, the U.S. government decided to grant the inspectors diplomatic immunity, authorized the foreign inspector to enter the country and to inspect the premises, and allowed the inspector to leave the jurisdiction of the United States and its courts.

The United States would thereby have denied discovery to plaintiffs who allege that intellectual property has been stolen. Hence, fairness requires that the United States bear the costs unless it is willing to require that inspectors submit themselves to the full jurisdiction of U.S. courts.<sup>63</sup> Thus, if the plaintiff collects a judgment from the United States, then the U.S. government could seek to recoup its losses by securing payment from the offending inspector. But the inability of the United States to collect from the inspector should not affect the right of the injured plaintiff to collect from the United States.

Any new law will also need to determine

how to measure the value of the property that has been taken. The typical rule—as Supreme Court justice Oliver Wendell Holmes stated—is that the amount due is measured by what the owner has lost rather than what the taker has gained.<sup>64</sup> In other words, if the inspector engaged in industrial espionage, the person or entity whose secrets have been taken is entitled to the full value of that intellectual property—even if the inspector simply gives it away to a foreign government or company.

Furthermore, Fourth Amendment violations cannot be “cured” merely by the payment of compensation. An action may violate the Fourth Amendment as well as the Fifth Amendment, and remedies for the two violations are independent. The person whose Fourth Amendment rights were violated would also have a Fifth Amendment right to compensation if an unlawful physical intrusion onto his premises has occurred. Physical occupations are per se takings, for which just compensation is due.

By granting the inspectors a right of entrance (a right that is permanent as long as the enforcement protocol is in force), the protocol will limit the right of the property owner to exclude others from areas that the property owner did not open to the general public. As Justice Thurgood Marshall noted, “The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”<sup>65</sup> Consequently, in those cases, a taking exists for which compensation is due.<sup>66</sup>

Even if the degree of intrusion were quite minor, the requirement for compensation would not be affected. For example, in the case of *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>67</sup> a city ordinance required an owner of an apartment building to allow installation of a cable television receiver on the outside of the structure (on portions of her roof and the side of her building). The ordinance tried to avoid the takings issue by paying a one-time fee of \$1. Justice Marshall, writing for the majority, rejected the city’s argument and held that a taking existed. The Court ruled

that just compensation was due—even if the amount of the physical intrusion was not “bigger than a breadbox.”<sup>68</sup>

## Conclusion

The United States should continue to renounce the use of biological weapons. However, like a magnanimous bequest in a pauper’s will, any proposed enforcement protocol of the BWC would promise much but deliver little. The administration concedes that compliance with the protocol is not verifiable.

A BWC enforcement mechanism will provide more than empty promises. The protocol will undermine the privacy rights that U.S. citizens expect and that the Fourth Amendment guards, will interfere with the safeguards that the appointments clause was designed to guarantee, and will compromise the intellectual property rights that the Fifth Amendment protects.

Effective enforcement of the BWC—even without considering the constitutional limits imposed by the Fourth Amendment—is problematic. As one of the protocol’s supporters, the Chemical and Biological Arms Control Institute, has advised:

The Biological Weapons Convention (BWC) is an important, but limited instrument of policy. The United States should seek to bring the current effort to strengthen confidence in compliance through a legally binding protocol to a successful conclusion. But expectations about the arms control dimension of anti-BW strategy must be modest, particularly regarding the issue of “verification” of the convention. Rather than looking for “smoking guns,” resolution of non-compliance questions should be viewed as a process of exploration and interaction between the international community and a country of concern until all of the questions about that country’s activities are resolved satisfactorily.<sup>69</sup>

**Like a magnanimous bequest in a pauper’s will, any proposed enforcement protocol of the BWC would promise much but deliver little.**

**If the U.S. government cannot constitutionally search a kitchen or a factory without a search warrant and probable cause, then it cannot authorize foreign inspectors to engage in such searches.**

Any treaty or executive agreement that conflicts with the Constitution is unconstitutional. Surprisingly, some commentators have argued that the foreign affairs power limits the application of the Constitution. For example, during the oral argument in *Dames & Moore v. Regan*<sup>70</sup>—which upheld the executive agreement on the American hostages in Iran—a lawyer supporting the agreement argued that the United States must release Iranian assets simply because the agreement said so. Justice Rehnquist asked: “What if the agreement had said no one in the U.S. should criticize the Ayatollah? Would the U.S. be liable?” The lawyer answered “yes!”<sup>71</sup> The Court, fortunately, rejected that argument.<sup>72</sup>

Justice Black, in *Reid v. Covert*,<sup>73</sup> articulated what is the generally accepted view today among commentators and courts:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with *all the limitations* imposed by the Constitution. . . . The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.<sup>74</sup>

If the U.S. government cannot constitutionally search a garage, a kitchen, a factory, or a storage area without a search warrant and probable cause, then it cannot authorize foreign inspectors to engage in such searches. The United States cannot delegate to foreign officials a power that it does not possess. Searches that violate the Fourth Amend-

ment, the appointments clause, or the Fifth Amendment are not cured of the violation by the simple expediency of a treaty ratification or an executive agreement.

Those people who favor the proposed enforcement protocol—notwithstanding the constitutional problems—no doubt have good intentions. But good intentions alone cannot leap over the constitutional hurdles. As Justice Brandeis noted, “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>75</sup>

## Notes

1. Donald Arthur Mahley, Statement at hearing before the Senate Committee on Foreign Relations to confirm Mahley as ambassador during his tenure as special negotiator for Chemical and Biological Arms Control issues, 106th Cong., 2d sess., April 4, 2000, p. 23.
2. Tibor Tóth, “Time to Wrap Up,” *CBW Conventions Bulletin*, no. 46 (December 1999): 1.
3. Milt Bearden and Larry Johnson, “Don’t Exaggerate the Terrorist Threat,” *Wall Street Journal*, June 15, 2000, pp. 3–5. The authors, former CIA officials, point out that, from 1983 to 1988, international terrorists killed more than 400 Americans. In the last five years, that figure dropped to 58. According to Bearden and Johnson, on average, more Americans have died annually over each of the last five years from venomous snake or scorpion bites than at the hands of international terrorists.
4. William Jefferson Clinton, Remarks at the Carnegie Nonproliferation Conference, March 16, 2000 (videotape).
5. Mahley, p. 11.
6. Eric C. Taylor, “Strengthening the Biological Weapons Convention: Illusory Benefits and Nasty Side Effects,” *Cato Institute Policy Analysis* no. 355, October 18, 1999, p. 4.
7. *Ibid.*
8. Mahley, p. 23.
9. See, generally, Timothy Lynch, “In Defense of the Exclusionary Rule,” *Harvard Journal of Law and Public Policy* 23, no. 3 (Summer 2000): 711–51.
10. Congress would have to enact a statutory scheme to implement any enforcement protocol.

John C. Yoo, "Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding," *Columbia Law Review* 99 (1999): 1955. Yoo argues that the framers believed that treaties could not exercise domestic legislative power without the consent of Congress. According to Yoo, the framers expected that Congress's control over treaty implementation through legislation would constitute an important check on the executive's power in foreign affairs.

11. 520 U.S. 305, 117 S.Ct. 1295 (1997).

12. *Ibid.* at 320. Emphasis added.

13. Mahley.

14. David Hoffman, "Deadly Germs from Cold War," *Washington Post*, June 7, 2000, pp. A24, A28.

15. Hoover Institution, "Nowhere to Run, Nowhere to Hide: Bioterrorism," May 28, 1998, <http://www-hoover.stanford.edu/main/uncommon/fall98/302.html>, pp. 5-6.

16. Abraham D. Sofaer, quoted in Hoover Institution, p. 17.

17. Jonathan B. Tucker, quoted in Hoover Institution, pp. 11-12. Hussein Kamel was Saddam Hussein's son-in-law. His defection prompted Baghdad to turn over 100 boxes of information about Iraq's chemical and biological weapons program. The United Nations had not known about that information, which never would have come to light had there been no defection. See Daniel Williams, "Iraqi Defectors Killed on Return to Baghdad; Relatives Reportedly Shot Brothers," *Washington Post*, February 24, 1996, p. A1; and Greg Myre, "After Five Years in Iraq, Work Is Still Turbulent for U.N. Arms Inspectors," *Washington Post*, April 9, 1996, p. A16.

18. Taylor, p. 2.

19. 275 U.S. 192, 196 (1927). Since 1927 the Supreme Court has extended, not contracted, the application of the Fourth Amendment.

20. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (footnotes and citations omitted). The Court also noted, "The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes." *Ibid.* Warrantless searches are "generally unreasonable," and "this rule applies to commercial premises as well as homes." *Ibid.* at 312. And, according to the Court in *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977):

[T]he Fourth Amendment's commands grew in large measure out of the colonists

experience with writs of assistance, [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.

21. Thomas A. Connolly, "Does the Constitution Limit On-Site Inspection?" *Arms Control Today*, July 1988, p. 12. Emphasis added.

22. 407 U.S. 297 (1972); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976).

23. Benjamin Wittes, "Aldrich Ames' Legal Legacy: Surveillance Court Gets New Powers," *Legal Times of Washington, D.C.*, November 7, 1994, p. 1.

24. Lewis Henkin, *Foreign Affairs and the Constitution* (Mineola, N.Y.: Foundation, 1972), p. 486, n. 6. See also, David Koplow, "Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States," *New York University Law Review* 63 (1988): 325-30.

25. For an example of such reasoning, see Connolly, pp. 8, 9.

26. The Clinton administration has argued that public housing tenants be required to sign leases that would waive their Fourth Amendment rights and allow the police to search their apartments without warrants. Guy Gugliotta, "Clinton Lets Police Raid Projects," *Washington Post*, April 17, 1994, p. A1. For the arguments opposing the administration policy, see Clarence Page, "For CHA Residents, a Fight to Keep Their Constitutional Rights," *Chicago Tribune*, April 13, 1994, p. 21; "Gun Sweeps: No Model for Cities" (editorial), *New York Times*, April 20, 1994, p. A18; and Charles Ogletree and Abbe Smith, "Clinton's Plan Is Misguided," *New York Times*, May 7, 1994, p. 23.

27. See *Pratt v. Chicago Housing Authority*, F. Supp. 792 (N.D. Ill 1994).

28. 483 U.S. 203 (1987).

29. *Ibid.* at 207-8.

30. *Ibid.* at 210-11.

31. The leading case, discussed below, is *Donovan v. Dewey*.

32. See *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). The Court upheld (5 to 4) the Environmental Protection Agency's aerial observation, within navigable airspace of open areas.

The majority noted that Dow did not have a “subjective expectation of being free from aerial surveillance, since Dow had taken no precautions against such observation—in contrast with its elaborate ground-level precautions.” *Ibid.* at 230. The Court emphasized that the EPA, engaged in only aerial observation, *did not* use “highly sophisticated surveillance equipment” and made its observations “without physical entry.” *Ibid.* at 237–38 (footnote omitted). Emphasis in original.

The majority then made clear that a major chemical manufacturer is not “pervasively regulated” and is entitled to full Fourth Amendment protections:

*Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe [ibid. at 237].*  
[Emphasis added.]

33. 436 U.S. 307, 313–14 (1978).

34. *Ibid.* at 313.

35. 413 U.S. 266, 271 (1973).

36. 436 U.S. at 313.

37. 452 U.S. 594 (1981).

38. *Ibid.* at 603.

39. *Ibid.* at 605.

40. *Ibid.* at 603–4. Emphasis in original.

41. *Ibid.* at 604.

42. *Ibid.*

43. *Ibid.* at 605.

44. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (St. Paul, Minn.: West Group, 1996), pp. 445–56. As LaFare explains, “A warrant is clearly of no benefit” when a statute provides that there shall be an adversary hearing “in lieu of the ex parte application.”

45. 452 U.S. at 605.

46. 29 U.S.C. § 657(a) (1976). Emphasis added.

47. 436 U.S. at 316.

48. U.S. Constitution, art. II, sec. 2, cl. 2. The “Heads of Departments” refers to the heads of the various departments that make up the president’s cabinet.

49. *Morrison v. Olson*, 487 U.S. 654 (1988).

50. That point is more fully discussed in John C. Yoo, “The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause,” *Constitutional Commentary* 15 (1998): 87.

51. *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991).

52. 521 U.S. 898 (1997).

53. *Ibid.* at 922–23 (footnote and some internal citations omitted).

54. For a contrary view, see Martin S. Flaherty, “Are We to Be a Nation? Federal Power vs. ‘States’ Rights in Foreign Affairs,” *University of Colorado Law Review* 70 (1999): 1278, 1279. According to Flaherty, “[T]here is nothing to prevent Congress from, for example, directing local law enforcement checks of gun purchasers pursuant to a treaty or executive agreement, even though the Court held in *Printz* that the federal government lacks exactly this power when acting under its domestic authority” (footnote omitted). Flaherty also notes that “federal foreign affairs authority does and should trump the prohibition against the national government enlisting state officials” (*ibid.*, p. 1280). Justice Black answered that argument years ago. See the discussion in text at notes 74 and 75.

55. U.S. Constitution, amend. 5.

56. See, for example, *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) at 1003–4 (trade secrets are property protected by the just compensation clause).

57. “Whenever property is taken from someone with the assistance of government officers, there is a deprivation of property.” Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 3 (St. Paul, Minn.: West Group, 1999), p. 73.

58. Barry Kellman, David S. Gualtieri, and Edward A. Tanzman, “Disarmament and Disclosure: How Arms Control Verification Can Proceed without Threatening Confidential Business Information,” *Harvard International Law Journal* 35 (1995): 125. The authors note that, even with careful preventive measures, information will be lost. Therefore, they argue that the government should explore various means of providing just compensation.

59. Dean Wilkening, quoted in Hoover Institution, p. 13.

60. Taylor, p. 6.

61. Neil King, Jr. and Jess Bravin, "Call It Mission Impossible, Inc—Corporate-Spying Firms Thrive," *Wall Street Journal*, July 3, 2000, p. A1.
62. 476 U.S. at 228, 232 acknowledged that Dow Chemical could raise a Fifth Amendment "taking" claim if someone who searched would use the confidential information to compete with Dow.
63. Congress ignored those problems when implementing the enforcement procedures under the Chemical Weapons Convention. That convention "provides no guidance on what burden of proof ought to rest with Company B to prove the loss of intellectual property." Quoted in John C. Yoo, "BCW Treaties and the Constitution," in *The New Terror: Facing the Threat of Biological and Chemical Weapons*, ed. Sidney D. Drell, Abraham D. Sofaer, and George D. Wilson (Stanford, Calif.: Hoover Institution Press, 2000), pp. 269, 287.
64. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).
65. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (footnote omitted).
66. For example, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), held that if the government wanted to make what was formerly Kuapa Pond into a public aquatic park, it could not do so without invoking its eminent domain power and paying just compensation.
67. 458 U.S. 419 (1982).
68. *Ibid.* at 438, n. 15.
69. Chemical and Biological Arms Control Institute, <http://www.cbaci.org/>. The institute has described itself as follows: "The Chemical and Biological Arms Control Institute is a nonprofit corporation established to promote the goals of arms control and nonproliferation, with a special, although not exclusive focus on the elimination of chemical and biological weapons."
70. 453 U.S. 654 (1981).
71. See Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes*, 6th ed. (St. Paul, Minn.: West Group, 2000), p. 310.
72. See John E. Nowak and Ronald D. Rotunda, "A Comment on the Creation and Resolution of a 'Nonproblem': *Dames & Moore v. Regan*, the Foreign Affairs Power, and the Role of the Court," *U.C.L.A. Law Review* 29 (1982): 1101.
73. 354 U.S. 1 (1957) (plurality opinion). No other justice disagreed with Justice Black's statement. The contrary view derives from some dictum by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416 (1920), which has been taken out of context.
74. 354 U.S. at 5–6, 14, 16 (Black, J., joined by Warren, C.J. and Douglas and Brennan, JJ.) (plurality opinion) (footnotes omitted). Emphasis added.
75. *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

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