

# PERSPECTIVES

BURRUS M. CARNAHAN\*

## Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Issues\*\*

In 1984, then-Vice President Bush personally presented a new American plan for the worldwide elimination of chemical weapons to the Conference on Disarmament in Geneva, which had been negotiating towards that end since 1980.<sup>1</sup> The Bush proposal was an important step towards the creation of an international regime banning the production, stockpiling, and use of these weapons. It also marked the beginning of George Bush's personal commitment to the conclusion of a multilateral treaty prohibiting chemical weapons, a commitment later reflected in his 1989 speech to the United Nations General Assembly.<sup>2</sup>

---

\*J. D., Northwestern University; LL.M., University of Michigan. Mr. Carnahan is a Senior Analyst in the Strategy, Arms Control and Verification Operation of Science Applications International Corporation, McLean, Virginia.

\*\*The Editorial Reviewer for this article was Larry D. Johnson.

1. See U.S. DEP'T OF STATE, U.S. PROPOSES BANNING CHEMICAL WEAPONS (Current Policy Series No. 566, Apr. 18, 1984). The Conference on Disarmament was created in 1978 as a multilateral arms control negotiating forum. It meets in Geneva, Switzerland, and consists of the five nuclear weapon states and thirty-nine other member nations. While independent of the United Nations, the Conference reports on its work to the General Assembly. See INSTITUTE FOR DEFENSE AND DISARMAMENT STUDIES, THE ARMS CONTROL REPORTER 805.A.1 (Jan. 1988). For the history of chemical weapons negotiations in the Conference on Disarmament prior to the Bush proposal, see Lawler, *Progress Towards International Control of Chemical and Biological Weapons*, 13 U. TOL. L. REV. 1220 (1982). See also A. THOMAS & A. THOMAS, LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS (1970).

2. See Dowd, *End the "Scourge" of Chemical Arms, Bush Says at U.N.*, N.Y. Times, Sept. 26, 1989, at A1, col. 6. This commitment has also been reflected in the administration's conclusion

This commitment, which has breathed new life into the chemical weapons negotiations, could not have come at a more critical time. After the extensive use of chemical weapons in the Iran-Iraq War, Third World nations aspiring to regional military power increasingly have come to view chemical weapons as a poor man's atomic bomb. Examples of this are Iraq's threats to use chemical weapons against Israel and the reported construction of a chemical weapons plant by Libya.<sup>3</sup> The successful negotiation of a convention on chemical weapons is thus no longer merely an aspect of arms control relations between the super-powers. It has now become the necessary basis for a global chemical weapons nonproliferation regime.

The United States cannot, however, continue its leadership in this negotiation as long as its own ability to fully implement such a convention remains subject to serious doubt. In recent months, commentators have expressed such doubts more and more frequently.<sup>4</sup> The purpose of this article is to examine and suggest solutions to two of these issues—the constitutionality of on-site inspections under the convention, and the protection of industrial secrets during those inspections.

Chemical weapons kill or injure by their toxic effects on the bodies of victims. While all such weapons are colloquially referred to as poison gases, they can also take the physical form of liquids or powders. Lethal chemical agents are generally classified for military purposes as blood agents, which prevent the normal transfer of oxygen from the blood to tissues; choking agents, for example, phosgene; blister agents, for example, mustard gas; and nerve agents, which attack the central nervous system by interfering with enzymes in the brain.<sup>5</sup> The nerve agent is the most modern and lethal type of agent, having first been developed by Germany in World War II. Examples of all the other types of agents were used in combat during World War I.

While the use of poison in war has for centuries been considered, at least in the West, to be contrary to customary international law,<sup>6</sup> efforts to ban chemical

---

of an executive agreement with the Soviets on chemical verification. See Memorandum of Understanding Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons, *done* Sept. 23, 1989, 28 I.L.M. 1438 (1989).

3. See ARMS CONTROL ASS'N, ARMS CONTROL AND NATIONAL SECURITY/AN INTRODUCTION 128, 131 (1989); Nash, *CHEMWAR in the Third World*, AIR FORCE MAG., Jan. 1990, at 80; Cowell, *Iraq Chief, Boasting of Poison Gas, Warns Disaster if Israelis Strike*, N.Y. Times, Apr. 3, 1990, at A1, col. 5.

4. Such questions have been raised, inter alia, in Connolly, *Does the Constitution Limit On-Site Inspection?*, ARMS CONTROL TODAY, June 1988, at 8; Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U.L. REV. 229 (1988); Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 13 YALE J. INT'L L. 21 (1988); Hamburg, *Constitution vs. Arms Control*, N.Y. Times, Dec. 18, 1989, at A19, col. 4.

5. See A. THOMAS & A. THOMAS, *supra* note 1, at 4-8; ARMS CONTROL ASS'N, *supra* note 3, at 128.

6. See, e.g., art. 16, Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, reprinted in D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICTS 6 (1973); A. THOMAS & A. THOMAS, *supra* note 1, at 49; E. DE VATTEL, THE LAW OF NATIONS 289 (C. Fenwick trans. 1964 reprint of 1758 ed.)

warfare in the modern sense began only at the very end of the nineteenth century. The 1899 Peace Conference at the Hague adopted an instrument whereby the contracting parties agreed "to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."<sup>7</sup> This Declaration was tested and proved to be ineffective in World War I. The earliest German gas attacks did not technically violate the Declaration, however, since the attacks involved releasing clouds of chlorine to be carried to Allied lines by the wind or projectiles that combined shrapnel with poison gas.<sup>8</sup>

Following the Great War, efforts to ban chemical weapons continued, culminating in the 1925 Geneva Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the Protocol).<sup>9</sup> While this Protocol still represents the principal legal restraint on the use of chemical weapons,<sup>10</sup> it does not prohibit their production, possession, or stockpiling. Indeed, most parties to the Protocol have specifically reserved the right to use chemical weapons to retaliate against an enemy, or the allies of an enemy, that has used such weapons first.<sup>11</sup> In effect, then, the Protocol has at best established a prohibition against the first use of chemical weapons in war.<sup>12</sup> The goal of the current negotiations in the Conference on Disarmament is to extend this prohibition to any use of chemical weapons, as well as to the production, stockpiling, or transfer of such weapons.

Chemical weapons are to be distinguished from biological or bacteriological weapons, which use living organisms to infect the victim, causing death or incapacitation through disease. The Protocol prohibited the use of such weapons, and their development, production, and stockpiling was banned by the 1972 Biological and Toxin Weapons Convention (1972 Convention),<sup>13</sup> negotiated in the Conference of the Committee on Disarmament, predecessor of the current Conference on Disarmament.

---

7. Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* D. SCHINDLER & J. TOMAN, *supra* note 6, at 99. Twenty-eight states are party to this Declaration, including all the major European powers of the time.

8. *See* I. HOGG, GAS 23-29 (1975).

9. Geneva Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, *done* June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

10. Following the perceived erosion of its norm against chemical weapons use as a result of the Iran-Iraq war of the 1980s, 145 states, party to the Geneva Protocol, met in Paris from Jan. 7-11, 1989, to reaffirm the continuing importance and validity of the Protocol. *See* Final Declaration *adopted* Jan. 11, 1989, *reprinted in* 89 DEP'T ST. BULL. No. 2144, at 9 (Mar. 1989).

11. The reservations are reproduced in U.N. DEP'T FOR DISARMAMENT AFFAIRS, STATUS OF MULTILATERAL ARMS REGULATION AND DISARMAMENT AGREEMENTS 7-11 (2d ed. 1982). *See also* A. THOMAS & A. THOMAS, *supra* note 1, at 79-85.

12. In 1980 the Legal Adviser of the Department of State concluded that the first use of chemical weapons in war now violated customary international law, even for states not party to the Geneva Protocol. M. LEICH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, at 1026, 1031 (1986) [hereinafter 1980 DIGEST].

13. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *done* Apr. 10, 1972, 26 U.S.T.

Unfortunately, the 1972 Convention's verification mechanisms can be most charitably described as purely symbolic.<sup>14</sup> The deficiencies of the 1972 Convention in this regard soon became apparent, at least in the view of the United States Government. In 1979, an explosion at a military installation near Sverdlovsk, USSR, followed by an outbreak of anthrax in the city's population, led the United States to believe that the Soviet Union had not complied with the 1972 Convention. This incident was followed, in 1981, by official accusations that the Soviets were using mycotoxins against anticommunist tribesmen in Southeast Asia and in Afghanistan.<sup>15</sup> The validity of these accusations is still hotly debated, but frustration over the lack of any effective mechanism in the 1972 Convention for their resolution has led the United States, in particular, to insist on detailed, effective means of verification in the proposed chemical weapons convention.

### I. Impact on the Chemical Industry

Unfortunately for the verification process, many chemicals usable as weapons, and the precursor chemicals of the most lethal chemical agents, have widespread industrial uses. The first gas massively used in World War I was chlorine, primarily because the German chemical industry already had so much of it available.<sup>16</sup> Any effective verification regime must, then, be highly intrusive with respect to the chemical industry, and it might be expected that the industry would resist the creation of such a regime.

Perhaps surprisingly, the chemical industry has taken a generally supportive position on the negotiation of a chemical weapons convention. Thus, the Chemical Manufacturers Association (CMA), the principal trade association of the American chemical industry, has publicly supported the negotiation of a global ban on the production and stockpiling of chemical weapons.<sup>17</sup> This support is not

---

583, T.I.A.S. No. 8062, 1015 U.N.T.S. 163. "Toxin weapons" are poisonous chemicals, produced by living things, used as chemical warfare agents.

14. Article VI of the Convention provides that any party finding that another party is in breach of its obligations may lodge a complaint with the Security Council of the United Nations, a procedure unlikely to be effective against any of the five permanent members of the Council (the United States, the United Kingdom, France, the Soviet Union, and China), who may veto its substantive decisions. See U.N. CHARTER arts. 23, 27. For a characterization of this arrangement as "symbolic verification" see W. POWELL, *ARMS CONTROL VERIFICATION* 81 (1986).

15. See *ARMS CONTROL ASS'N*, *supra* note 3, at 151-52; M. LEICH, *supra* note 12, at 1032-36.

16. See I. HOGG, *supra* note 8, at 24. Chlorine is not, compared with supertoxic agents such as modern nerve gases, considered a particularly effective weapon. Nevertheless, in its initial use at the Second Battle of Ypres, it produced an estimated 5000 deaths against unprotected troops. *Id.* at 28. A more modern example is thionyl chloride, a precursor to the nerve agent Sarin, which is also used in the manufacture of pesticides, dyestuffs, and plastics. See Smith, *Suppliers Reject Poison Gas Program*; *U.S. May Act*, Wash. Post, Mar. 27, 1990, at A5, col. 1.

17. Olson, *The U.S. Chemical Industry Can Live With a Chemical Weapons Convention*, *ARMS CONTROL TODAY*, Nov. 1989, at 21. In addition, some members of the industry have corporate policies against producing chemical weapons. See Smith, *supra* note 16, at A5, col. 1.

unconditional, however, In particular, the “CMA has acknowledged on several occasions its concerns over some of the technical issues surrounding an ongoing, permanent system of verification.”<sup>18</sup>

As a comprehensive, multilateral treaty banning chemical weapons comes closer to reality, these technical issues will become increasingly important for American policymakers as well as for the CMA. While none of these issues are of sufficient magnitude to prevent the successful conclusion of negotiations, they might easily impede widespread acceptance of the convention after it is drafted, make practical implementation of it more difficult, and delay or even prevent ratification by the United States.

## II. Protecting Trade Secrets

As an example, consider one of the issues the CMA identified as most significant for American industry, the “loss of proprietary information . . . to the international agency to be created by the convention.”<sup>19</sup> In the chemical industry, the loss of trade secrets “can cripple even a giant company, and can be fatal to a smaller enterprise;”<sup>20</sup> under the convention, there may well be a “multi-million dollar price tag attached to potential trade secret losses.”<sup>21</sup> At a time when the international competitiveness of American business is a sensitive and growing political issue, any possibility that a chemical weapons convention might lead to the loss of technology and know-how will obviously be of concern to the United States Senate during the ratification process.

The Conference on Disarmament’s negotiating text for a convention currently calls for the creation of a new international body, the Organization for the Prohibition of Chemical Weapons, to conduct systematic on-site inspections of declared industrial facilities producing or using supertoxic chemicals or substances that could be precursors of chemical weapons agents.<sup>22</sup> The Organiza-

---

18. Olson, *supra* note 17, at 21.

19. *Id.*

20. *Id.*

21. *Id.*

22. Conference on Disarmament Doc. CD/1033, Aug. 10, 1990. The new organization is provided for in art. VIII of the draft convention, CD/1033, app. I, at 38–46. The Organization’s purposes are “to achieve the objectives of the Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.” *Id.* at 38.

It will have three organs: a Conference of all the parties, an Executive Council, and a Technical Secretariat. The Conference will be the “principal organ” of the Organization and is to meet annually. *Id.* at 39–42. The composition of the Executive Council remains to be determined, but it will be the executive organ of the Conference. *Id.* at 43; app. II at 211–13. See generally T. BERNAUER, THE FUTURE CHEMICAL WEAPONS CONVENTION AND ITS ORGANIZATION: THE EXECUTIVE COUNCIL (UNIDIR Research Paper No. 5, 1989).

The Technical Secretariat will consist of international civil servants, citizens of parties to the Convention, headed by a Director-General. One unit of the Secretariat will be the International Inspectorate, which will carry out verification measures. Conference on Disarmament Doc. CD/1033

tion's International Inspectorate will also be called upon to conduct "challenge" inspections of sites not subject to routine inspection. In either event, the inspections would be carried out by international civil servants, nationals of any party to the Convention, employed by the Organization's Technical Secretariat. Inevitably, these inspectors will have access to a wide range of sensitive commercial and industrial information as they carry out their duties.

In August 1989, a two-page proposal on the handling of confidential information was added to the negotiating text.<sup>23</sup> Under this document, the Organization would handle four categories of information: (1) that available to the general public; (2) that limited to the governments of states that are party to the convention; (3) that limited to distribution within the Organization's Technical Secretariat, including "detailed, facility-related information"; and (4) the "most sensitive kind of confidential information, containing data required only for the actual performance of an inspection," such as plant blueprints and specific data related to technological processes. Information in this last category is not to be removed from the premises being inspected.

While the adoption of these guidelines is certainly a welcome development, it fails to provide a complete answer to the problem of industrial espionage under the guise of arms control inspection. Rules for the protection of property, including intellectual property, will be ineffective unless they are enforced by sanctions against those who violate them or by adequate compensation to those whose rights have been abused.

### III. Punishing Industrial Espionage

The most immediate problem in designing such sanctions will be to ensure that individual inspectors or other members of the Technical Secretariat are punished if they abuse their positions by engaging in industrial espionage. The guidelines provide that members of the Technical Secretariat will be required to respect confidential information through "contracts or appropriate recruitment and employment procedures" and "agreed measures applied against the Technical Secretariat staff" in case of a violation.<sup>24</sup> Since the Organization will be unable to impose criminal penalties, such agreed measures cannot extend beyond employment-related actions, such as forfeiture of salary or termination of em-

---

at 44-45. The structure and functions of the Organization are obviously inspired by the International Atomic Energy Agency and its functions under the Nuclear Non-Proliferation Treaty. Compare Statute of the International Atomic Energy Agency, *done* Oct. 26, 1956, arts. III, V, VI & VII, 8 U.S.T. 1093, 1095, 1097, 1099, 1101, T.I.A.S. No. 3873, 276 U.N.T.S. 3, 6, 10, 12, 16; Treaty on the Non-Proliferation of Nuclear Weapons, *done* July 1, 1968, art. III, 21 U.S.T. 483, 487, T.I.A.S. No. 6839, 729 U.N.T.S. 161, 172.

23. Conference on Disarmament Doc. CD/952, Aug. 18, 1989, app. II, at 191; also reproduced in Conference on Disarmament Doc. CD/1033, Aug. 10, 1990, app. II, at 214.

24. *Id.*

ployment. If the monetary rewards of industrial espionage were sufficiently high, the effect of such sanctions could be easily blunted.

Criminal prosecution by the state whose industry suffered from the espionage is an obvious alternative. International civil servants are customarily granted immunity from local prosecution, but only for activities connected to their official duties. While it might be argued that at least some forms of industrial espionage would fall outside this immunity, as a practical matter immunity would probably not exist for any act that might take place outside official duties during an inspection.<sup>25</sup>

Immunity may be waived, however. One constructive step the Organization could take early in its existence would be to adopt a clear policy in favor of waiving the immunity of an inspector whenever a state party presents credible evidence that its laws on industrial espionage have been violated.<sup>26</sup>

In practice, of course, the decision to grant a waiver will involve a trade-off between the value of maintaining industrial confidence in the Organization's rules on information control and the possible adverse impact on the morale of the Technical Secretariat. International civil servants are, after all, given immunity from prosecution to enable them to perform their functions without fear or hesitation. The international community as a whole will lose if inspectors generally

---

25. See, e.g., Convention on the Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, art. V, § 18, 21 U.S.T. 1418, 1432, T.I.A.S. No. 6900, 1 U.N.T.S. 16, 24; International Organizations Immunities Act § 7(b), 22 U.S.C. § 288d(b) (1982); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (1987) [hereinafter RESTATEMENT (THIRD)]; L. DEMBINSKI, EXTERNAL MISSIONS OF STATES AND INTERNATIONAL ORGANIZATIONS 195-99 (1988). The draft Protocol on Inspection Procedures adopted by the Conference on Disarmament in Feb. 1990 would accord members of the Organization's inspection team "the inviolability enjoyed by diplomatic agents pursuant to Article 29 of the Vienna Convention on Diplomatic Relations," for the "entire in-country period" in the inspected state, "and thereafter with respect to acts previously performed in the exercise of official functions as Inspector or inspection assistant." Conference on Disarmament Doc. CD/961, addendum to app. I, at 122. Vienna Convention on Diplomatic Relations, done Apr. 18, 1961, art. 29, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502, 500 U.N.T.S. 95, 110, provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

This proposal, if adopted, would grant the inspectors complete immunity from local enforcement jurisdiction during an inspection, even for ultra vires acts such as industrial espionage, but would limit such immunity after the inspection to actions "performed in the exercise of official functions." This might leave some room open for personal liability for abuse of the inspectors' powers, if personal jurisdiction could then be obtained over the inspector in question.

26. Convention on the Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, art. V § 20, 21 U.S.T. 1418, 1434, T.I.A.S. No. 6900, 1 U.N.T.S. 16, 26, thus provides that the Secretary General of the United Nations has "the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Similar waiver language applies to inspectors under the INF Treaty, see Annex—Provisions on Privileges and Immunities of Inspectors and Aircrew Members, Protocol on Inspections, Treaty with the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, signed Dec. 8, 1987, ¶ 4, 27 I.L.M. 90 (1988).

believe that a vigorous inspection effort will result in accusations, perhaps on fabricated evidence, of industrial espionage and that the Director General of the Technical Secretariat will routinely allow them to be tried for such accusations by the alleged victim.

Even from the point of view of a state victimized by genuine industrial espionage, a waiver of immunity will have little value unless the accused individual is in the custody of a government with both the power and the disposition to prosecute. Industrial espionage may well not be discovered until long after the individual inspector involved in the espionage has left the victim state's territory.

Some relief from this situation might be provided by including an article in the chemical weapons convention that would require its parties to enact criminal legislation to enforce the Organization's guidelines on confidential information and to either extradite or prosecute those who have violated the guidelines. An inspector's own nation, for example, would then be obligated either to bring the suspect to trial itself or to extradite the person to a state willing to prosecute. Such "extradite or prosecute" regimes are relatively common in multilateral treaties on international cooperation in law enforcement.<sup>27</sup>

Nevertheless, this approach to the problem has its own associated difficulties. As a policy matter, it may not be wise to encourage states to prosecute their citizens for alleged offenses connected with their activities as international civil servants. This practice could easily be abused, allowing the inspector's national state to exercise an unacceptable amount of control over the inspector's activities as an international civil servant.<sup>28</sup>

---

27. See, e.g., Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, arts. 7, 8 & 10, 18 I.L.M. 1419, 1425, 1426, 1427 (1979); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, *done* Dec. 14, 1973, arts. 3, 7, 28 U.S.T. 1975, 1979, 1980, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, 169, 170.

28. In principle, international civil servants are to act autonomously, free from instructions or interference by their national government. See 3 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 507-15 (1976). U.N. CHARTER art. 100 thus provides:

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
2. Each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

The U.N. and its specialized agencies have included similar provisions in their Staff Rules. The United Nations Administrative Tribunal and the Administrative Tribunal of the International Labor Organization have, on the basis of these rules, found it to be an abuse of power for international civil servants who are American citizens to be disciplined for refusal to participate in a United States Government "loyalty" investigation or program. 3 G. SCHWARZENBERGER, *supra* note 28, at 411-12, 511. A provision identical to U.N. CHARTER art. 100 would apply to members of the Technical Secretariat under the chemical weapons convention. Conference on Disarmament Doc. CD/1033, Aug. 10, 1990, app. I, at 46.



As a practical matter, when an inspector abuses his status to engage in industrial espionage, the greatest economic benefits will often flow to the country of which that inspector is a national. The spy may be regarded as a national hero to his own government and people. Any punishment imposed by the person's own state may be no more than nominal. In such cases, the chief concern of industries subject to espionage will probably shift from punishment of the perpetrator to seeking compensation for the damage done.

#### IV. The Organization and the American Courts

For companies owning chemical plants in the United States, American law may already provide a means of recovering compensation from the Organization for industrial espionage by members of the International Inspectorate. The economic benefits of keeping this mechanism open are likely to be outweighed by its political side effects.

As noted above, individual inspectors will undoubtedly be immune from suit in American courts for activities associated with their official duties. On the other hand, the international organization for which those inspectors will work may well be subject to suit in a U.S. federal court. Under the International Organization Immunities Act and the Foreign Sovereign Immunities Act,<sup>29</sup> federal district courts have jurisdiction, subject to existing treaties, over suits against an international organization for damage or loss to property, occurring in the United States, caused by tortious acts of its employees while acting in their scope of employment.

By no means is it certain that a suit against the Organization for industrial espionage would succeed. Obvious problems of proof are involved when an American company's secret process suddenly appears in a foreign plant some months after an inspection under the convention.<sup>30</sup> In addition, it has not been established that the theft of trade secrets in the United States, to be used abroad, would be considered "damage to, or loss of property, occurring in the United States,"<sup>31</sup> as that phrase is used in the Foreign Sovereign Immunities Act.

---

29. 22 U.S.C. § 288a(b) (1988), and 28 U.S.C. § 1605(a)(5) (1988), respectively. See RESTATEMENT (THIRD), *supra* note 25, § 467 reporters' note 4; 1980 DIGEST, *supra* note 12, at 69. See also *infra* note 32.

30. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business.

RESTATEMENT OF TORTS § 757 comment b (1939). In the chemical industry, even the internal layout of a plant may be a valuable trade secret.

31. 28 U.S.C. § 1605(a)(5) (1988).

Finally, the Foreign Sovereign Immunities Act preserves immunity from suit for "discretionary functions" of the foreign sovereign or international organization.<sup>32</sup>

On the other hand, such an action is certainly within the realm of possibility under current federal law. Counsel for an American company that believes it has been the victim of industrial espionage by a member of the International Inspectorate would be remiss if they did not at least try to recover damages for their client in federal court. The problem is that even the filing of a suit could give rise to considerable diplomatic embarrassment to the United States Government. The liberal discovery process in American civil litigation could, by probing into the internal decision making and personnel policies of the Organization, give rise to further diplomatic embarrassment for both the United States Government and the Organization. When the United States ratifies the chemical weapons convention, Congress will probably seek to avoid future foreign policy problems by amending the Foreign Sovereign Immunities Act to exempt the Organization from suits arising out of inspection activities.

#### A. TAKING CLAIMS AGAINST THE FEDERAL GOVERNMENT

An alternative defendant against whom the victims of industrial espionage by inspectors might proceed would be the United States Government. Trade secrets have been held to be a form of property that is protected by the fifth amendment against taking by the United States Government for public use without just compensation.<sup>33</sup> It could be argued that by ratifying the chemical weapons convention, or by enacting implementing legislation that opens chemical plants to international inspection, or by facilitating a particular inspection during which espionage is believed to have occurred, the United States Government has taken, in a fifth amendment sense, the property of an American company.

Under any of these theories, a claim for just compensation would lie against the government under the Tucker Act.<sup>34</sup> As long as this procedural route remains open, the possibility that the implementation of the convention involves a fifth

---

32. *Id.* § 1605(a)(5)(A) preserves immunity for any tort claim "based upon the exercise or performance or failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . ." It might well be argued that the arms control inspection activities of an international organization involve a "discretionary function." That this is an uncertain shield for the Organization is, however, suggested by *Letelier v. Chile*, 488 F. Supp. 665 (D.D.C. 1980), where the court held the Government of Chile liable in tort for the assassination of Orlando Letelier in 1976. In response to the argument that assassination involved a discretionary function, the court declared that there was "no discretion to commit, or to have one's officers or agents commit, an illegal act." *Id.* at 673. This approach suggests that even if the inspection activity itself is a discretionary function, the Organization's failure to prevent its agents from abusing their access to an industrial plant for espionage purposes would not be regarded as within the discretionary function exception.

33. *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984).

34. 28 U.S.C. § 1491 (1982).

amendment taking of trade secrets would not prevent the United States from carrying out its international obligations under the convention.<sup>35</sup>

## B. ADMINISTRATIVE CLAIMS AS AN ALTERNATIVE TO SUIT

A suit under the Tucker Act for loss of trade secrets might not be successful either. In the Claims Court the United States might convincingly argue that any taking of trade secrets was done by the Organization or the individual inspector, not by the United States, and that the federal government had every reason to believe that the Organization and its employees would abide by their stated policy of protecting confidential information. In any event, the costs and uncertainties of litigation, either against the Organization or the United States, give the American chemical industry little reason for confidence that victims of industrial espionage during inspections will be quickly and effectively compensated for their losses.

In the interests of fairness, therefore, Congress should provide a nonburden-some administrative process for the payment of just claims that might arise from such inspections, including claims for the loss of trade secrets and other intellectual property. Beyond questions of fairness, such a procedure would assist American industry in recovering from any loss of competitive advantage it might otherwise have had but for the conclusion of a chemical weapons convention, an important factor in today's international trade environment. Such a procedure would also help maintain important domestic political support for an international regime banning chemical weapons.

## V. International Claims Procedures

A key difficulty with this proposal is that, in today's tight federal budget climate, the economic burdens arising from abuse of the inspection process should not be borne by the American taxpayer. This need not necessarily be the

---

35. See *Ruckelhaus*, 467 U.S. at 1016-17; *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981). While the United States Claims Court does not have jurisdiction over claims against the United States growing out of a treaty, 28 U.S.C. § 1502 (1988), it does have jurisdiction over claims arising out of unconstitutional acts done in the conclusion or implementation of a treaty. Thus in *Dames & Moore* the Supreme Court indicated that a Tucker Act claim could be brought for any unconstitutional taking of private claims against Iran that occurred when exclusive jurisdiction over those claims was given to an arbitral tribunal by the Algiers Accords settling the hostage crisis of 1979-1981. In his concurring opinion, Mr. Justice Powell was at pains to emphasize that the constitutionality of the Accords depended on the availability of a remedy for the plaintiffs' taking claims:

The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims . . . .

The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.

453 U.S. at 691.

ultimate result, however. As part of the payment process, the United States Government should be subrogated to the claim of the victim company. A precedent for this type of program may be found in the political risk insurance issued to American firms investing in underdeveloped countries by the Overseas Private Investment Corporation (OPIC).<sup>36</sup> OPIC is subrogated to any claims that it pays as a result of a foreign government's expropriation of insured investments.

The United States Government will obviously have resources and diplomatic leverage in asserting its claims against the Organization that would not be available to even the largest corporation. Still, it would be wise to anticipate this issue and seek procedures to avoid turning a routine claims question into an international confrontation.

In particular, the United States should urge the Conference on Disarmament, when drawing up the detailed structure of Organization, to establish special procedures to speedily and efficiently compensate industries or individuals for any loss suffered as a result of inspection activities. In exchange for the benefits of these claims procedures, states party to the convention should be required to grant the Organization absolute, rather than restrictive, immunity against damage suits in their national courts.<sup>37</sup> The result would both increase the ability of the Organization to perform its duties without interference from national courts and reinforce the confidence of the chemical industry in the regime established by the convention.

An alternative model for handling the Organization's claims is provided by the North Atlantic Treaty Organization's method of handling claims arising out of military activities. Under article VIII of the NATO Status of Forces Agreement,<sup>38</sup> if the military forces of one of the allies (the sending state) cause personal injury or property damage in the territory of another NATO party (the

36. See 22 U.S.C. § 2194(a), (f) (1988).

37. In the absence of special provisions in the agreement establishing an organization, member states are free to accord it only restrictive, rather than absolute, immunity. This lacuna would leave the organization open to local suit for tortious acts and commercial disputes. See RESTATEMENT (THIRD), *supra* note 25, § 467, reporter's note 4 (1987); 1980 DIGEST, *supra* note 12, at 69; cf. 3 G. SCHWARZENBERGER, *supra* note 28, at 495. Under the Convention on the Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, art. II, 21 U.S.T. 1418, 1422, T.I.A.S. No. 6900, 1 U.N.T.S. 16, the United Nations appears to have been accorded absolute immunity against legal process in member states. The ultimate relationship between the Organization for the Prohibition of Chemical Weapons and the U.N. system remains undetermined, however, See, e.g. Conference on Disarmament Doc. C/D 961, Feb. 1, 1990, app. I, at 23 n.2 ("[a] view was expressed that the achievement of [the Organization's] objectives should be sought in close co-ordination with the United Nations"); *id.* addendum to app. I, at 122 n.1 (a view was expressed that parts of the Convention on Privileges and Immunities of the United Nations should be taken into account in defining inspectors' privileges and immunities); *id.* at 148 n.1 & 149 n.3 (further consideration required on the relationship to the U.N. Secretary General when the Organization investigates alleged use of chemical weapons).

38. NATO Status of Forces Agreement, June 19, 1951, art. VIII, 4 U.S.T. 1792, 1802, T.I.A.S. No. 2846, 199 U.N.T.S. 67, 82.

receiving state), the receiving state treats the claim as if it had been caused by the tortious activity of its own government. The receiving state adjudicates the claim and pays damages to its injured citizens according to its national law and procedures. Depending on the country, this adjudication might involve a determination of liability and damages by either administrative or judicial means. The receiving state is then reimbursed by the sending state for 75 percent of the amount paid.

The benefits of this type of procedure are several. The injured party has his or her claim settled according to procedures and by legal standards that are familiar, and since the adjudication is carried out by the claimant's own government, no suspicion should arise that the foreign armed force has acted through national prejudice or has applied an inappropriate standard in paying for the damage it has caused. On the other hand, the government actually causing the damage is assured that the claimant's government has adjudicated the claim fairly because it bears the cost of 25 percent of the amount paid. Taken as a whole, the system reinforces mutual trust among the governments party to NATO.

A similar system for sharing the cost of claims resulting from inspections might well be adopted by the parties to the chemical weapons convention, for whom it would also have similar advantages. The government of the inspected state would adjudicate or settle claims arising out of inspection activities, to be reimbursed by the Organization for something less than 100 percent of the amount paid. One advantage of this system over the previous model is that the Organization would not be required to develop its own principles of liability, procedures, and bureaucracy for the handling of claims.

Under either of these models, the United States might well, in the end, pay a substantial part of the economic costs arising from abuse of the inspection process, if for no other reason than it will undoubtedly pay the largest dues assessment of any member state. Nevertheless, by requiring all state parties to the convention to bear at least some of the costs of industrial espionage by members of the Technical Secretariat, those states will be motivated to ensure that the Organization's rules on handling confidential information are enforced to the maximum extent feasible.

## **VI. The Fourth Amendment Problem**

No matter how carefully arrangements are made, both in the United States and internationally, to protect trade secrets under a chemical weapons convention, in practice there can be no guarantee that an inspected firm would never suffer financial injury as a result of inspection activity. This uncertainty raises the possibility that the owner of an individual site might refuse to voluntarily allow it to be inspected.

In the United States the privately owned industrial facilities that might be subject to systematic inspection may number in the thousands, and perhaps as

many as 50,000 sites might reasonably be subject to challenge inspection.<sup>39</sup> Given the large number of potential sites for inspection, it seems inevitable that eventually a property owner in the United States will refuse to consent to an inspection by the Organization. This prospect has raised constitutional concerns in the minds of some commentators.<sup>40</sup> In particular, concern has focused on the fourth amendment to the Constitution, which provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Even the highly-regulated chemical industry appears to retain some fourth amendment rights. That, at least, is what the Supreme Court suggested by strong dictum in *Dow Chemical Co. v. United States*.<sup>41</sup> The issue in *Dow* was whether EPA observation of Dow plants from aircraft constituted a search. Holding that it did not, the Court also observed that:

Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the fourth amendment.

. . . . 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.<sup>42</sup>

Beyond the rights and trade secret concerns of the chemical industry, challenge inspections under the convention could, in theory, extend to any vehicle or building, public or private, that might conceal a clandestine production facility for chemical warfare agents or contain a secret stock of a chemical weapons agent. It cannot, unfortunately, be assumed that an American property owner, not actually involved in the use or production of regulated chemicals, would cooperate with an inspection unless the property contained materials in violation of the treaty, an unlikely event. Possibly the owner would want to conceal evidence of some unrelated crime or illegal activity of which he or she was guilty. The property owner might even be politically opposed to arms control and refuse cooperation solely to harm the treaty regime.

Many partial answers have been suggested to these problems, including requiring federal government contractors to consent to inspections in advance and implement-

---

39. See Olson, *supra* note 17. Any industrial facility using or producing more than a minimum amount of the chemicals on "schedule 2" of the convention would be subject to "routine systematic international on-site verification, through on-site inspection and the use of on-site instruments." Conference on Disarmament Doc. CD/961, Feb. 1, 1990, app. I, at 20. Beyond systematic inspections of these facilities, state parties may request the Organization to conduct challenge inspections "anywhere" under the jurisdiction or control of another party to "clarify (and resolve) any matter which causes doubts about compliance." Conference on Disarmament Doc. CD/1033, Aug. 10, 1990, app. II, at 216.

40. See *supra* note 4.

41. 476 U.S. 227 (1986). Tanzman, *supra* note 4, first noted the importance of this decision for the implementation of a chemical weapons convention.

42. 476 U.S. at 235-36.

ing legislation limiting the jurisdiction of the federal courts to prevent judicial attacks on inspections.<sup>43</sup> Highly regulated industries, subject to government licensing, may be required to submit to warrantless searches,<sup>44</sup> but commentators differ as to whether the chemical industry would fit within that exception.<sup>45</sup>

A foreign affairs exception to the fourth amendment may also exist.<sup>46</sup> This idea should have been laid to rest in the 1950s by a series of Supreme Court decisions on the jurisdiction of American military courts overseas. Following World War II, the United States concluded "status of forces" agreements with its allies covering, among other issues, the exercise of criminal jurisdiction over American military personnel stationed in the allied country. These agreements generally contemplated that the U.S. courts-martial would try civilians accompanying our armed forces overseas, in addition to military personnel.<sup>47</sup>

In a series of cases beginning with *Reid v. Covert*,<sup>48</sup> the Supreme Court held that, to the extent they allowed civilians to be tried by court-martial, such arrangements were unconstitutional infringements of the right to trial by jury and that a treaty could never authorize the federal government to do an act prohibited by the Constitution. The present state of the law on this issue is summarized in the *Restatement (Third) of the Foreign Relations Law of the United States* as follows: "No provision of an [international] agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States."<sup>49</sup>

#### A. MANAGING THE FOURTH AMENDMENT PROBLEM: ARMS CONTROL INSPECTIONS AS FOREIGN SEARCHES

The *Restatement's* formulation also suggests what has so far been missing from previous approaches to this problem: a recognition of the essential nature of

43. See Tanzman, *supra* note 4, at 58; Connolly, *supra* note 4, at 8.

44. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987).

45. Compare Tanzman, *supra* note 4, at 50-52, with Connolly, *supra* note 4, at 10-11. In implementing the convention, of course, Congress might create a new regulatory and licensing regime that would bring the chemical industry within this exception to the fourth amendment's warrant requirement. Such a regime must be limited to a particular regulated industry, however. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Court struck down a statute that subjected all businesses involved in interstate commerce to warrantless OSHA inspections. Applying similar reasoning to the implementation of a chemical convention, it would appear that authority to conduct warrantless searches could not be used to carry out challenge inspections.

46. See Tanzman, *supra* note 4, at 41; Connolly, *supra* note 4, at 11. The argument for such an exception relies on authorities upholding the practice of warrantless wiretapping and electronic surveillance for intelligence and counterintelligence purposes. The constitutionality of such activities is usually based on the argument that neither foreign governments nor their agents have rights under the Constitution, not on the existence of a foreign affairs exception to the fourth amendment. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 254 (1972).

47. See, e.g., *NATO Status of Forces Agreement*, June 19, 1951, art. VII, 4 U.S.T. 1792, 1798, T.I.A.S. No. 2846, 199 U.N.T.S. 67, 76.

48. 54 U.S. 1 (1957).

49. *RESTATEMENT (THIRD)*, *supra* note 25, § 302(2).

the fourth amendment as a restriction on the power of the United States Government and not on the power of foreign governments or international organizations. In principle, the fourth amendment does not even apply to arms control inspections by such entities, any more than it applies to searches by private individuals. That the United States consents to these inspections by treaty does not turn them into actions of the United States Government.

One author acknowledges that the fourth amendment does not apply to actions of foreign governments, but he regards this as of little practical importance. In his view, if U.S. government personnel accompany, or in any way assist the foreign inspectors, then those inspectors "would stand precisely in the shoes of United States officials . . . and, because of United States cooperation, would be subject to the same limitations that would govern an inspection by United States officials alone."<sup>50</sup>

Judicial authority, to the contrary, suggests that the federal government may cooperate with, and aid, a foreign sovereign to carry out acts that would violate the Constitution if done directly by the United States alone. The Constitution does not, for example, prohibit the United States from turning an American citizen over to another country, in accordance with a status of forces agreement or extradition treaty, to face a criminal trial that would not meet constitutional standards of due process.<sup>51</sup> Again, the United States Bureau of Prisons has been held not to violate the Constitution when, under a prisoner exchange treaty, it confines an American citizen in accordance with a foreign sentence reached by means that would violate the prisoner's constitutional rights if used by U.S. officials.<sup>52</sup>

Of most direct significance in assessing the constitutional position of arms control inspections is the line of cases holding that the fourth amendment does not apply to searches conducted by foreign police agencies, even if the evidence seized is later used against an American citizen in a U.S. court.<sup>53</sup> Moreover, this is the area in which the courts have most clearly spelled out the circumstances under which the Bill of Rights might apply to a foreign sovereign's actions.

---

50. Koplow, *supra* note 4, at 295; see also Koplow, *The Law of On-Site Inspection: Arms Control Verification and the fourth amendment*, in *ARMS CONTROL VERIFICATION & THE NEW ROLE OF ON-SITE INSPECTION* 207, 213-14 (1990).

51. See, e.g., *Girard v. Wilson*, 354 U.S. 524 (1957); *Williams v. Rogers*, 449 F.2d 513 (8th Cir.), *cert. denied*, 405 U.S. 926 (1971); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

52. See *Mitchell v. United States*, 483 F. Supp. 291 (E.D. Wis. 1980); *Pfeifer v. United States Bureau of Prisons*, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd on different grounds*, 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980).

53. See, e.g., *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *United States v. Callaway*, 446 F.2d 753 (3d Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972); *United States v. Nagelberg*, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); cf. *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978) (applying same analysis to failure of foreign police to issue *Miranda* warnings during interrogation).



Two such circumstances are generally recognized. First, evidence provided by foreign authorities will be excluded if it was seized from an American citizen by methods that shock the conscience.<sup>54</sup>

The second exception arises from the routine nature of most international cooperation among law enforcement officials. The police of different countries regard criminals, of whatever nationality, as their common enemy. If, however, American officials use the cooperation of foreign colleagues as a subterfuge to avoid the restrictions of the fourth amendment, then obviously American constitutional restrictions should apply to the situation. In an effort to prevent such abuses, the courts have declared that the fourth amendment will apply if American authorities have so involved themselves in the foreign search that the search has become a joint venture of the two law enforcement agencies or if the foreign police are, in effect, merely acting as agents of authorities in the United States.<sup>55</sup>

In practice, defendants have had little success in arguing for the exclusion of evidence on either ground. Thus, the presence of American law enforcement personnel during a search by foreign police has been held insufficient reason to apply the fourth amendment, as has the fact that the foreign search was precipitated by a tip passed on by federal agents.<sup>56</sup>

These decisions imply that a considerable amount of cooperation with foreign authorities may occur before constitutional limitations are applied to what is essentially a foreign governmental activity, albeit one that has an impact on U.S. territory. Beyond this, it should be remembered that from a fourth amendment standpoint, an arms control inspection involves a situation very different from law enforcement.

The parties involved in an arms control inspection will not necessarily be cooperating against a common enemy; instead, their relationship may border on the adversarial. The country being inspected will have a strong interest in ensuring that no violations, even by private firms or individuals, are found during an inspection, since such violations would indicate treaty violation on its part. It will similarly have a sovereignty interest in ensuring that the Organization's inspectors confine their activities to those that are strictly allowable under the convention.

---

54. See *Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1966). For an example of the type of conduct that might shock the conscience of the court, *cf.* *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (illegal arrest followed by extended torture by foreign police).

55. See, *e.g.*, *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977) ("agent" of American police test); *cf.* *United States v. Emery*, 591 F.2d 1266 (9th Cir. 1978) ("joint venture" test).

56. See, *e.g.*, *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (FBI agents provided information leading to foreign arrest and search and were present during part of search); *Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1966) (deputy sheriff from the United States acted as interpreter during search by Mexican police).

In the context of constitutional law, this analysis suggests that more cooperation between the United States Government and Organization inspectors should be permitted before the fourth amendment applies than would typically be the case in a law enforcement situation. Neither the decision of a foreign government (or international organization) to seek an arms control on-site inspection, nor the execution of that inspection, should be subject to the strict requirements of the fourth amendment. And this easing of fourth amendment restrictions should hold even if the federal government provides assistance in carrying out the inspection, as long as the inspection remains essentially a foreign activity.

The key test should be whether the United States in any way instigated or procured the inspection decision or turned the conduct of the inspection into a federal search; if so, the fourth amendment would become engaged. Until that point is reached, however, there ought to be little concern over whether the fourth amendment will restrict the United States' ability to comply with an on-site inspection regime.

The foregoing discussion is not to suggest, of course, that international civil servants should be allowed to wander at will throughout the United States, entering and inspecting private property whenever they wish. Indeed, a number of lawsuits would undoubtedly result if anything like that was attempted, since, as mentioned above, the American law of sovereign immunity allows a foreign government or international organization to be sued for wrongful injury to persons or property (including trespass) committed in the territory of the United States.

#### B. MANAGING THE FOURTH AMENDMENT PROBLEM: AN ADMINISTRATIVE WARRANT PROCEDURE

To ensure that an orderly procedure is followed in the conduct of the Organization's inspections, a firm basis in U.S. statutory law must be established for any inspection of private property. In creating such a basis, Congress might well draw on fourth amendment concepts by way of analogy, to the extent these are consistent with the treaty being implemented. A similar course was followed in regulating electronic surveillance against foreign intelligence activities in the United States. A special court, composed of Article III judges temporarily assigned to it, now passes on governmental requests to engage in such surveillance, using statutory standards drawn from fourth amendment precedents.<sup>57</sup>

Similar legislation implementing a convention on chemical weapons might provide, for example, for the issuance of an administrative warrant for the on-site inspection of private property, issued by an appropriate federal magistrate upon certification by the Secretary of State or the Director of the Arms Control and Disarmament Agency that:

---

57. See 50 U.S.C. §§ 1801-1810 (1982).

- (1) the inspection was requested by a foreign government or international organization (or, in the case of a challenge inspection, a foreign government);
- (2) the inspection is authorized or required by treaty;
- (3) the United States did not originate or instigate the request; and
- (4) participation by U.S. officials is solely intended to ensure the inspection is carried out efficiently, quickly, and in accordance with both the treaty and U.S. law.

New federal regulations and practices would be required to ensure that the last assertion, in particular, remains true. Government officials accompanying and assisting an inspection team would need to be careful that they do not, deliberately or inadvertently, become part of the team, for example, by suggesting additional areas to inspect or new information to seek. Overenthusiastic aid to Organization inspectors could easily turn the inspection into a joint venture, subject to the fourth amendment. American officials could assist the inspectors as required by the treaty, but could not go beyond what is required.

By adopting an administrative warrant procedure, the United States could also foreclose any residual possibility that the Organization's inspections might be subject to attack on fourth amendment grounds. As the Supreme Court noted in *Marshall v. Barlow's, Inc.*,<sup>58</sup> probable cause "in the criminal law sense" is not required to justify the issuance of an administrative search warrant. The Court, holding that warrantless searches by the Department of Labor to enforce the Occupational Safety and Health Act (OSHA) violated the fourth amendment, made it clear that where the search served administrative, rather than criminal law, purposes, the function of the warrant requirement was to prevent executive branch abuse by ensuring that the inspection or search had been approved by a neutral magistrate applying neutral standards.

Under this analysis, even random administrative searches would be constitutional, as long as it could be shown to a neutral magistrate that they were truly random.

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's fourth amendment rights.<sup>59</sup>

In the context of implementing a chemical weapons convention, a decision of the Organization's Technical Secretariat to inspect a particular site in the United States or a request of a foreign sovereign for a challenge inspection of an individual location would appear to be the ultimate neutral source. In these situations, those who decide to inspect are not even subject to U.S. sovereignty,

---

58. 436 U.S. 307, 320 (1978).

59. *Id.* at 321.

assuming their decision is reached outside American territory, in addition to the fact that they are not acting as part of the executive branch of government. Again, the key constitutional tests would be whether the inspection was proper under the convention and whether the United States instigated or suggested the inspection. An administrative warrant issued by a federal judge or magistrate, upon a showing that both tests have been met, would almost certainly withstand any collateral constitutional challenge.

## **VII. Conclusion**

The implementation issues discussed in this article are not likely to become treaty breakers that would prevent President Bush from accomplishing his goal of successfully negotiating a comprehensive convention on chemical weapons in the Conference on Disarmament. However, if the convention is to function smoothly, credibly, and without needless disruption to the American economy, these issues must be resolved at both the national and international levels. Of more immediate concern to the federal executive branch, they must be resolved before the convention can be submitted, with confidence, to the Senate for advice and for consent to ratification. It is certainly not too early for both the Bush Administration and the Congress to begin seeking answers to these practical implementation questions.