Constitutional & Policy Issues Regarding Domestic U.S. Enforcement of the Proposed Biological Warfare Convention Inspection Protocol

*By Thomas C. Wingfield & Michael McDavid Coyne**

The first wave of targeted biological warfare attacks on the United States has driven the Administration and Congress to reexamine America's legal and policy options for making future attacks—especially large, indiscriminate ones—less likely. While this is largely a military and intelligence problem, international law does have has an enabling role to play. One frequently proposed option is strengthening the Biological Weapons Convention with an enforcement mechanism, the centerpiece of which would be an intrusive inspection regime resembling that of the Chemical Weapons Convention ("CWC").[1]

The 1972 Biological Toxins and Weapons Convention ("BWC")[2] purports to ban completely the development, employment, transfer, acquisition, production, and possession of all biological weapons listed in the convention. The primary criticism of the BWC has been its lack of an enforcement mechanism. Attempts to craft an enforcement protocol have met with resistance in the United States from constituencies who believe that such a protocol would violate three main parts of the U.S. Constitution: the Appointments Clause, and the Fourth and Fifth Amendments. While advocates and opponents of such an inspection regime will continue to argue their policy preferences, it is important to first stake out the constitutional limits which frame the debate. This will permit a principled discussion within the bounds of constitutionally permissible options. It will also serve as a reminder to our European allies in the current war that, unlike their parliamentary systems, the American constitutional system has firm brakes on government action that are not easily removed.

While few outside academia imagine that such a vigorous inspection approach, on its own, would have any effect on the malefactors currently contemplating the further use of biological weapons against the United States, in democracies already possessing a free press, separation of power, and an engaged and politically potent citizenry, the addition of an intrusive inspection regime could persuasively demonstrate the rejection of chemical and biological weapons. In setting a universally accepted standard for the discovery and destruction of such weapons, the customary international law arising from the consistent state practice of the civilized nations could quickly expand the *de facto* standard into a *de jure* one. This might permit a firmer basis for obtaining an authorization or consensus to use force, and even provide an additional lawful basis for unilateral action.

This paper will first examine the Constitutional and legal impediments to employment of an effective BWC inspection protocol in the U.S., with a particular view towards analogizing the situation to the current inspection regime prescribed by the CWC. Second, key policy and procedural issues concerning proposed enforcement mechanisms to the BWC will be considered.

I. U.S. CONSTITUTIONAL CONCERNS

Article II, Section II, Clause 2 of the Constitution (the "Appointments Clause") gives the President the power to appoint all "officers of the United States," with the advice and consent of the Senate, however, Congress may authorize "such inferior Officers, as they think proper" to be appointed by the President alone, the courts of law, or the heads of departments. Generally speaking, "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the Senate's advice and consent.[3] The Appointments Clause is understood to be an instrument of the separation of powers doctrine, wherein no one single branch of government has the ability to act unchecked by another branch of government.

Commentators have suggested that inspections under the BWC would run afoul of the Appointments Clause by vesting executive authority (*i.e.*, the presidential appointment of inspectors) in officers who were accountable to neither the Executive nor the Legislative branches, and thus violating the separation of powers doctrine.[4] This line of reasoning assumes that the inspectors are solely members of an international authority such as the United Nations, and would be accountable only to such international authority. As such, a hypothetical BWC inspector might be appointed by the President, but then report his finding to a special BWC commission unrelated to the U.S Congress or judiciary.

In 1997, the U.S Senate considered Senate Resolution 75,[5] ("Senate CWC Ratification") regarding the ratification of the CWC. From the outset the Senate declared the primacy of the U.S. Constitution, stating that:

> *Nothing in the [CWC] requires or authorizes legislation, or other action by the United States prohibited by the Constitution of the United States, as interpreted by the United States.*[6]

The Senate also dealt with similar issues regarding the selection of inspectors and conflict with the Appointments Clause, and resolved the matter by ensuring that there would always be federal "inferior officers" present at CWC compliance inspections. In order to accomplish this, a "United States National Authority" was established. It consists of personnel from the Department of Defense when military installation inspections are in question and Department of Commerce personnel when non-military facilities are inspected. The presence of a United States officer (in conjunction with the international authority) would seem to address the legitimate concerns associated with the Appointments Clause and separation of powers doctrine given its relatively successful operation with respect to the CWC.

The Fourth Amendment to the Constitution reads:

> *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.*

As a general rule, searches of private property in the United States require that authorities show cause for the search and obtain a warrant to conduct the search unless the occupant consents. Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.[7]

Critics of the BWC have noted the possibility that inspections could prove unconstitutional because they might be overly broad and present unnecessary invasion upon private property, especially companies engaged in the bioengineering and pharmaceuticals business. In addition, commentators have argued that the precedent permitting inspections within *pervasively regulated* industries does not apply to the likely targets of BWC inspectors because the pharmaceutical and bioengineering fields have not historically been considered pervasively regulated.[8]

Other exceptions to the general requirement for a search warrant have evolved, which have relegated the warrant requirement primarily to criminal cases. The elimination of a warrant requirement has increased even within criminal field to include exceptions for administrative searches justified by *special needs beyond the normal need for law enforcement*.[9] The Supreme Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees under this rule.[10]

The Senate CWC Ratification addressed these issues and promulgated the following procedures as conditions to its consent:

> (28) CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE.—
>
> (A) IN GENERAL.—In order to protect United States Citizens Against unreasonable searches and seizures, prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that—
>
> (i) for any challenge inspection conducted on the territory of the United States . . . where consent has been withheld, the United States . . . will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized; and
>
> (ii) for any routine inspection of a declared facility under the [CWC] that is conducted on the territory of the United States, where consent has been withheld, the United States . . . first will obtain an administrative search warrant from a United States magistrate judge.[11]

Under the CWC, there are two basic types of inspections contemplated, the routine, scripted variety which have occurred in arms control settings for years, and the challenge inspection. Voluntary compliance with routine inspections has proved non-problematic for CWC inspectors. In addition to the concerns of inspected parties about the appearance of non-compliance with the CWC by refusing routine inspection, voluntary consent has been backed up by the possibility of obtaining a potentially more invasive criminal search warrant. There has to date, however, been no test of the challenge mechanism described above. The existence of a CWC inspection regime that appears to be narrowly tailored with constitutionality in mind, and which contains numerous procedural safeguards, would seem to be equally applicable to any BWC inspection procedure.

In addition, new technologies have been developed (and are continually being developed) that may permit sufficient inspection to occur without even having to cross what is constitutionally considered a "search." Immunological and DNA assays may now be conducted with little more than air samples from the inspection target.[12]

The Fifth Amendment to the Constitution reads in pertinent part that:

> *No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Under the Fifth Amendment, if the federal government takes private property—which *is* an act within the discretion of the federal government—the owner must be provided with just compensation.[13]

BWC critics have argued that any inspection regime would necessarily put the confidential business information and intellectual property of certain companies at risk of theft by foreign inspectors. The aggrieved party in such a scenario would ordinarily be free to seek full recompense from the taker, but because the takers may be subject to diplomatic immunity or otherwise practically immune to judgments, critics urge that the federal government should agree to compensate companies that become the victim of such intellectual property theft. Hence the main issue is how to assure that Fifth Amendment *just compensation* rights of a party are not potentially violated by a BWC inspection procedure.

Industrial espionage is a widespread problem that is not limited to the rather narrow field of international weapons inspections and compliance. Indeed, many of the same mechanisms companies use to protect confidential information could be employed in the case of BWC inspections. In addition, technological advances and lessons learned through CWC inspections can substantially mitigate the likelihood that intellectual property theft would occur under the circumstances.

The Senate Ratification Resolution addressed the same issue in the context of the CWC, providing that:

> (A) UNAUTHORIZED DISCLOSURE OF UNITED STATES BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—

(i) an officer or employee of the [inspecting organization] has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the [CWC] any United States Confidential business information coming to him in the course of his employment or official duties or by reason of his examination or investigation of any return, report, or record made to or filed with the [inspecting organization], or any officer or employee thereof, and

(ii) such practice or disclosure has resulted in financial losses or damages to a United States person, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify Congress in writing of such determination.[14]

The Senate Ratification Resolution goes on to provide that the President will certify to Congress that the inspecting authority will have waived any immunities from jurisdiction that might be pleaded by the inspector, and that if such a waiver is not forthcoming, funding to the inspecting authority may be withheld.[15]

While this procedure has not yet been tested, it would appear to provide a reasonable response to many of the concerns raised by those concerned that businesses would have no redress against larcenous inspectors. At the same time, technology may work to the advantage of intellectual property owners by ensuring that tests are immediate, binary (*i.e.*, they tell the inspector only if a prohibited material is present or absent) and leave the inspector with no samples from which further study or theft would be beneficial. Electronic devices that perform a type of DNA sampling are capable of doing this and are available on the market today.

II. POLICY RELATED MATTERS

Regardless of constitutional strengths or infirmities, there are excellent policy arguments to be made against arms control agreements that are concluded for their own sake, as ends in themselves, rather than as means to an end. Such agreements are rightly criticized as subtracting from international peace and security, in that they demonstrate vacillation by democracies unwilling to enforce the norms they claim to support. One such policy objection to a strengthened BWC is the example of nations that have signed and then immediately violated the original Convention. The former Soviet Union did this routinely, and maintained an impressive stockpile of biological weapons—and a vast research and development infrastructure—long after signing the BWC. This is proof of the inefficacy of treaties unsupported by credible enforcement mechanisms, but not necessarily an indictment of all treaties *per se*. A CWC-type regime of routine and challenge inspections would make this kind of large-scale violation less likely.

Another objection follows logically from this, in that small or covert programs could escape such an inspection regime. While this may be true, it is not necessarily fatal flaw. The mere fact that such a program would have to be kept small (with presumably a resultingly smaller capability), or be made covert (with the costs proportionate to the degree of secrecy (ergo efficacy) desired) would lead many nations to conclude that a small capability expensively developed and maintained might not be worth the financial investment, or the risk of international condemnation if exposed. An enforceable BWC would narrow the list of candidate violators to a more predictable length, and allow vastly increased intelligence collection against this smaller set of targets.

A third objection is that Iraq's biological weapons program escaped detection by a far more intrusive inspection regime than is being contemplated for the BWC. This is an excellent point, but perhaps it militates for tougher inspections or greater resolve in dealing with recalcitrant inspection targets, not capitulation on the part of inspectors. Hence, the issue with Iraq points not so much towards a failed inspection regime as it does toward a generally suspect foreign policy.

Another series of criticisms revolve around the protection of classified government information, or proprietary commercial information. That is, any inspection regime intrusive enough to detect the presence of an unlawful biological agent would, by definition, be sensitive enough to determine not just the presence, but characteristics of, lawful but secret agents, such as a patented microbe of a biotech firm. This is a valid criticism, and if a good-faith BWC inspection presents a threat, the threat of a bad-faith inspection under the pretext of a BWC concern is even more vexing. There is a long list of nations whose governments and commercial interests hope to benefit from America's immense investment in biotech by stealing its final products. Whether operating in good or bad faith, the members of an international BW inspection team would almost certainly be as well equipped as their CWC counterparts. According to the Defense Threat Reduction Agency:

> CWC inspection equipment will include transportable satellite communications, binoculars, chemical agent detectors and monitors, gas chromatography/mass spectrometers, individual protective equipment, and computers. Non-destructive or non-damaging evaluation equipment such as neutron interrogation systems, ultrasonic pulse echo systems, and acoustic resonance spectroscopy will also be used . . . .[16]

In addition to this analytical equipment, the CWC also provides that inspectors may operate their own communications equipment, both among inspectors at the site and between inspectors and OPCW headquarters in The Hague.[17]

As serious as this problem is, it is not intractable, and most if not all of the work has been done in preparation for the CWC's inspection regime. Section 2 of the Senate's resolution of advice and consent to the CWC contains twenty-eight "understandings" of key provisions of the CWC.[18] These understandings are *de facto* conditions negotiated between the Senate and the Administration, and, along with the implementing Executive Order, are the legal nexus through which the Convention operates in the U.S. Five of these provisions are apposite in the protection of proprietary information, and could be directly transplanted to the BWC:

§ Paragraph 3 states that fifty percent of out year (beyond the current fiscal year) funds would be withheld from the U.S. contribution to the OPCW's operating budget if an independent internal oversight office were not estab-

lished within that organization.[19] The Senate intended that something resembling an Inspector General would provide an extra layer of security for the protection of confidential information provided to the OPCW in the course of its inspections.

§ Paragraph 9 requires protecting the confidential business information of U.S. chemical, biotechnology, and pharmaceutical firms.[20] The Senate requires the Administration to certify annually that these industries are not being harmed by their compliance with the CWC.[21]

§ Paragraph 16 is intended to protect against the compromise of confidential business information, either from an unauthorized disclosure or a breach of confidentiality.[22] The former is, under the Senate understanding, a publication of confidential business information made by an OPCW employee and resulting in financial damage to the owner of the information.[23] The latter is an inappropriate disclosure of such information by an OPCW employee to the government of a State Party.[24] In both cases, the Senate states that it will withhold a punitive fifty percent of the annual dues to the OPCW until the offending party is made amenable to suit in the United States, or the injured party is otherwise made whole.[25]

§ Paragraph 18 is a straightforward prohibition against taking physical samples from an inspection site inside the United States to a laboratory outside the United States.[26] Given that a violative chemical substance can be identified on-site, this prohibition is a precaution against the "reverse engineering" of samples taken from sensitive government or commercial facilities.

§ Paragraph 21 advises the Administration to make assistance teams from the Defense Threat Reduction Agency available to the owner or operator of any facility subject to routine or challenge inspections under the CWC.

In addition to these protections, there is another layer of defense known as "managed access." The techniques of managed access were developed by the British in anticipation of intrusive arms control inspections. One commentator explained:

> In broad outline, under this approach a challenge inspection would be permitted "anywhere, anytime" but it would not involve unfettered access. Rather, the inspected state would have rights to limit access in certain respects. Inspectors would be permitted to perform those activities necessary to confirm that treaty violations were not being conducted at the inspected site but would not necessarily be able to determine what in fact did take place there.[27]

The most prominent of these are listed in paragraph 48 of the CWC:

> [T]he Inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, *inter alia*:
>
> (a) Removal of sensitive papers from office spaces;
>
> (b) Shrouding of sensitive displays, stores, and equipment;
>
> (c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;
>
> (d) Logging off computer systems and turning off data indicating devices;
>
> (e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;
>
> (f) Using random selective access techniques whereby inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;
>
> (g) In exceptional cases, giving only individual inspectors
>
> access to certain parts of the inspection site.[28]

The Defense Threat Reduction Agency, charged with advising U.S. government and private facilities on the fundamentals of treaty compliance, suggests additional managed access techniques:

> Careful inspection route planning is often the easiest and most economical method of protecting sensitive areas. By simply escorting inspectors on a pre-determined route, both between and within buildings, escorts can prevent the team from seeing some classified, sensitive or proprietary activities . . . . When the facility believes it cannot grant access into a building or area, an alternate means of demonstrating compliance must be suggested for those areas. Examples of such alternate means include showing inspectors convincing photographs or other documentation related to an inspector's concern. . . . In some cases, it may not be prudent to allow an inspector from a certain country to have access to a sensitive room or area . . . in extreme cases where route planning, alternative means and shrouding cannot be effective, it may be worthwhile to consider temporarily shutting down or moving operations in highly sensitive areas prior to allowing inspectors access.[29]

Finally, and perhaps most interestingly, the CWC does not mention or prohibit operational deception, the intentional misleading of inspectors in areas not material to the object and purpose of the treaty. While deceiving the inspection team about possible non-compliance is a clear violation of the CWC, taking indicators of an unhideable secret, and adding to them deceptive indicators of a false secret, would deceive only those inspectors operating in bad faith as intelligence collectors. This doctrine could, with equal efficacy, be incorporated in to a BWC inspection regime.

While nontrivial objections to the constitutionality of a BWC inspection regime exist, especially with regard to concerns under the Fifth Amendment, it appears likely that an inspection annex could be fashioned to pass constitutional muster. On the other hand, getting past the policy and practical issues opposing an inspection regime involves more than the satisfaction of constitutional rule-based precedent. No responsible party will argue that private industry (or government) should be forced to open its doors and secrets to competitors

and enemies, but advancing technologies appear to be improving the likelihood that that these well-founded misappropriation concerns can be overcome.[30] In addition, the U.S. experience with CWC inspection compliance seems to indicate that there is first, some benefit to inspections and second, a potentially workable solution to the policy issues.

* Thomas C. Wingfield: Counsel and Principal National Security Policy Analyst for the Aegis Research Corporation in Falls Church, VA. A national security attorney, Mr. Wingfield specializes in treaty compliance and use-of-force issues. He has advised Aegis clients around the world on CWC challenge inspection preparation. A former naval intelligence officer, Mr. Wingfield received his J.D. and LL.M. from Georgetown, and is an S.J.D. candidate at the Law School of the University of Virginia. He is a Lieutenant Commander in the Naval Reserve, has served as the Chairman of the American Bar Association's Committee on International Criminal Law, and is a Lecturer in Law at the Columbus Law School of the Catholic University of America.

Michael McDavid Coyne: Principal with Securilex in Atlanta, GA. Mr. Coyne is a former Marine officer who received his J.D. from Cornell Law School (mike@securilex.com).

Footnotes

[1] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Jan. 13, 1993, 32 I.L.M. 800; S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) [hereinafter Chemical Weapons Convention], *reprinted in* WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994) at 471.

[2] *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*. 26 U.S.T., 1015 U.N.T.S., entered into force March 26, 1975.]

[3] *Edmond v. United States*, 520 U.S. 651, 663 (1997) (Scalia, J.).

[4] *See generally*, Ronald D. Rotunda, *Constitutional Problems with Enforcing the Biological Weapons Convention*, Cato Institute, Foreign Policy Briefing No. 61 (Sept. 28, 2000) [hereinafter *Rotunda*]. *See also* David Kopel, *Another Bad Treaty,* National Review Online << http://www.nationalreview.com/kopel/kopel090601.shtml>> (Sept. 6, 2001).

[5] S. Res. 75, 105th Cong., 1st Sess. (1997) ("To advise and consent to the ratification of the Chemical Weapons Convention, subject to certain conditions").

[6] *Id.* at 39.

[7] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

[8] See *Dow Chemical Co. v. United States*, 476 U.S.227 (1986).

[9] See *New York v. Burger*, 482 U.S. 691 (1987).

[10] See *Id.*

[11] S. Res. 75 at 62.

[12] See generally, Dr. Jack Melling, *Issues Relating to On-Site Sampling and Analysis,* paper prepared for the Federation of American Scientists (Aug. 19, 1997) (available at <http://www.fas.org/bwc/papers/onistes&a.htm>) Of course this same fact may militate against the presence of *hostile* inspectors on Fifth Amendment takings grounds discussed *infra*.

[13] See *Backus v. Fort Street Union Depot Co*., 169 U.S. 557 (1898).

[14] S. Res. 75 at 44.

[15] *Id.*

[16] DEFENSE THREAT REDUCTION AGENCY, SECURITY OFFICE, ARMS CONTROL AND THE INSPECTOR, Oct. 4, 1997, 11.

[17] Chemical Weapons Convention, *supra* note 2, verification annex, pt. II, sec. D, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 297.

[18] S. Exec. Res. 75, 105th Cong., CONG. REC. S3378 (daily ed. Apr. 17, 1997), sec. 2.

[19] *Id*. at 3-6.

[20] *Id*. at 21.

[21] *Id*.

[22] *Id*. at 43-48.

[23] *Id*. at 44. The Senate Resolution states:

(A) UNAUTHORIZED DISCLOSURE OF BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—

(i) an officer or employee of the Organization [the OPCW] has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, and

(ii) such practice or disclosure has resulted in financial losses or damages to a United States person, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination. *Id.*

[24] *Id*. at 46. The Senate Resolution states:

(B) BREACHES OF CONFIDENTIALITY.—

(i) CERTIFICATION.—In the case of any breach of confidentiality involving both a State Party and the Organization, including any officer or employee thereof, the President shall, within 270 days after providing written notification to Congress that the Commission described under paragraph 23 of the Confidentiality Annex has been established to consider the breach. *Id*.

[25] *Id.* at 45-47.

[26] *Id*. at 51.

[27] J. CHRISTIAN KESSLER, VERIFYING NONPROLIFERATION TREATIES: OBLIGATION, PROCESS, AND SOVEREIGNTY (1994) at 78-9.

[28] Chemical Weapons Convention, verification annex, pt. X, Sec. C, para. 48.

[29] DEFENSE THREAT REDUCTION AGENCY, SECURITY OFFICE, CHEMICAL WEAPONS CONVENTION: THE IMPACT, Apr. 28, 1995, 9-11.

[30] This is arguably of heightened importance because it (i) lessens or eliminates the possibility of IP or classified information theft, and (ii) diminishes the need to build an adequate and appropriate remedy into the effectuating legislation.