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American Bar Association

Section of Natural Resources, Energy, and Environmental Law

**IMPLEMENTING THE CHEMICAL WEAPONS CONVENTION:
THE NUTS AND BOLTS OF COMPLIANCE**

**Chemical Weapons Convention Inspections
and the Right to Privacy in the United States**

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CHEMICAL WEAPONS CONVENTION INSPECTIONS AND THE RIGHT TO PRIVACY IN THE UNITED STATES

1 INTRODUCTION

The Chemical Weapons Convention¹ (CWC) offers a unique challenge to the United States system of constitutional law. Its promise of eliminating what in my opinion is the most purely genocidal weapon from the world's arsenals, as well as destroying the facilities for producing these weapons, brings with it a set of novel constitutional issues. I submit to you that our ability to solve these potential problems in a way that preserves our basic constitutional values is essential to preserving our national identity. The opinions I express here, of course, are my own.

It is particularly appropriate that we as attorneys take on this puzzle. The end of the Cold War has brought with it a strengthened sense of international norms, a resurgent United Nations, and a growing investment in democratic governmental structures. In short, the rule of law appears to be growing. As lawyers, we have the responsibility of helping to nourish it.

This discussion is about the privacy issues raised by the CWC and about how federal implementing legislation can allow verification inspections to take place in the United States under the Convention while remaining in compliance with the Constitution. By implementing legislation, I mean a federal statute that would be enacted separately from Senate approval of the Convention itself. Although implementing legislation is a relatively unusual accompaniment to a treaty, it will be necessary to the CWC, and the Administration submitted a bill into the last Congress for this purpose.²

The privacy problems posed by the CWC arise from the verification inspection scheme embodied in the treaty. The CWC depends heavily upon on-site inspections to verify compliance with its key requirements. These include destroying all chemical weapons stockpiles and bringing potential chemical weapons precursors under international control.

The Convention contains four distinct kinds of inspections: systematic inspections of chemical weapons storage and destruction facilities, routine inspections of various declared facilities, challenge inspections, and a variant on challenge inspections in cases of alleged use of chemical weapons. All inspections are supposed to be only as intrusive as necessary to carry out the Convention. These inspections will be carried out by professional inspectors employed by the Organization for the Prohibition of Chemical Weapons (OPCW), located in The Hague, which is responsible for enforcing the

1. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800 (1993) [*hereinafter* CWC].

2. S. 2221, 103rd Cong., 2d Sess., 140 Cong. Rec. S 7249 (1994); H.R. 4849, 103rd Cong., 2d Sess., 140 Cong. Rec. H 6453 (1994) [*hereinafter* Proposed CWC Implementation Act of 1994].

Convention. Generally, the inspected State Party — for our purposes today the United States — is permitted to assign observers to accompany the inspectors.

2 POTENTIAL INVASIONS OF PRIVACY DURING VERIFICATION INSPECTIONS

A verification inspection under the CWC is nothing more or less than a government investigation. The underlying difficulty that brings me before you today is that United States ratification of the CWC will make submission to these investigations a solemn international obligation that the Executive Branch will be required to enforce, even though the people who will actually carrying out the inspections may not be subject to the same kinds of controls on government investigations to which we have become accustomed in our history. As we shall see, the key to avoiding problems is to consider separately the various privacy interests that are implicated by each type of CWC inspection, and to determine how each can proceed with due respect for both privacy and the Convention.

2.1 OVERVIEW OF THE FOURTH AMENDMENT

The Fourth Amendment to the Constitution has become perhaps the broadest shield protecting private persons against government intrusion. It states:

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.³

The most often-cited formulation of what the Fourth Amendment covers in modern jurisprudence was written in 1967 by Justice John Marshall Harlan concurring in *Katz v. United States*:

There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."⁴

Hence the phrase "reasonable expectations of privacy" that attorneys like to use to summarize the privacy interest protected by the Fourth Amendment. Other decisions have established that the Fourth Amendment protects commercial property, as well as

3. U.S. Const. amend. IV.

4. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

private homes and persons although commercial property is protected to a lesser degree than homes.⁵

The general rule is that a search warrant, issued by a neutral magistrate upon a showing of "probable cause," — not by an Executive Branch official — is a prerequisite to a constitutionally valid search.⁶ Because judges are institutionally independent of law enforcement agencies, this is thought to provide a measure of insulation from unreasonable invasions. Exceptions to the warrant requirement exist, but are not favored by the Supreme Court.⁷ We will get into one of these exceptions later.

2.2 FOURTH AMENDMENT "SEARCHES"

While warrants are generally required for searches, not all government inspections are "searches" within the meaning of the Fourth Amendment. For example, a person has no reasonable expectation of privacy in objects that are in "plain view," because "[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well."⁸ Accordingly, inspectors are not conducting "searches" when they sense (see, hear or smell) what is detectable by anyone nearby.⁹ The same logic applies to mere entry into the public portions of commercial establishments,¹⁰ to aerial overflights of open industrial facilities (at least where any sensing equipment is relatively unsophisticated),¹¹ and to detection of illegal drugs in public places by drug-sniffing dogs.¹² Furthermore — and this is very important — government searches need no warrant when the person consents to being searched.¹³

The search process also determines in part its constitutionality. Searches that are limited in scope and clearly defined in advance are more likely to pass constitutional muster than those that are sweeping, lengthy, or careless.

5. *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) (citation omitted).

6. *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

7. See Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. Rev. 229, at 311 n.504.

8. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1977).

9. *Air Pollution Variance Bd. v. Western Alfalfa*, 416 U.S. 861 (1973).

10. *Barlow's, Inc.*, 436 U.S. at 315.

11. See *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986).

12. *United States v. Place*, 462 U.S. 696, 707 (1983).

13. In *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), the Supreme Court examined the theoretical basis of the consent search concept and endorsed a process of "examining all the surrounding circumstances to determine if in fact the consent to search was coerced." *Id.* at 229.

2.3 REMEDIES FOR VIOLATIONS OF FOURTH AMENDMENT RIGHTS

Of course, a right is meaningless without a remedy. Governmental violations of the Fourth Amendment may be met either by a court injunction to prevent a search if the subject finds out in advance or refuses entry, or by a subsequent award of monetary damages to compensate losses. The proper defendant would be either the individual that carried out the unconstitutional search, or the government itself, although it is uncertain whether the Federal Tort Claims Act¹⁴ (FTCA) consents to suits against the federal government for damages for an unconstitutional search under the CWC. Without a waiver of sovereign immunity under the FTCA, no damages will be available from the federal government; only the individual government officials who conducted the search might be liable under the doctrine announced in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*.¹⁵

Injunctions are a particular problem for the CWC. If the subject of a search could prove that an impending on-site inspection was about to violate its Fourth Amendment rights, a private business might be able to obtain a court injunction prohibiting the search.¹⁶ Unfortunately, an injunction against an on-site inspection would probably breach the CWC if it prohibited a legitimate inspection from occurring.

And one should not assume that this could never happen. For example, a private firm might want to protect its trade secrets from disclosure, or might fear that a federal employee escorting OPCW inspectors might discover and report violations of other laws, such as environmental requirements. Somebody might simply be cantankerous. Of course, granting of injunctions is an exercise of a court's discretion under its equity power and it could refuse to enjoin CWC inspections in view of the national security implications of its actions. The point is that the law right now is uncertain and all parties will benefit if the risk created by this uncertainty can be reduced.

2.4 APPLICABILITY OF FOURTH AMENDMENT TO CHEMICAL WEAPONS CONVENTION INSPECTIONS

Assuming that such a court fight ensued over an impending inspection, it is uncertain whether the Fourth Amendment warrant requirement applies at all to searches involving foreign affairs. The Supreme Court has never ruled on the question, and lower courts have split on the cases that are most closely analogous.¹⁷ On one hand, the interest of Americans in privacy is not inherently reduced because the inspection is by an international organization. On the other, the international sensitivity of on-site

14. Act of Aug. 2, 1946, ch. 753, tit. IV, 60 Stat. 842 (principally contained in 28 U.S.C. §§ 1346(b), 2671-80).

15. 403 U.S. 388 (1971).

16. Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 13 YALE J. INT'L L. 21, 38-41 (1988).

17. *Id.* at 41-44.

verification inspections pursuant to a treaty would create a strong national security interest in compliance. It has also been argued — although I think unpersuasively — that CWC inspections by foreign inspectors employed by the OPCW are not "state action" by the United States and therefore are not subject to the Fourth Amendment at all.¹⁸ Regardless of these potential escapes from confrontation, I do not believe that one can predict the outcome of a case that might test these propositions because not enough precedent exists. Therefore, prudence demands examination on a specific level of each of the four types of CWC inspections to seek ways to avoid the confrontation altogether.

3 INTEGRATING CHEMICAL WEAPONS CONVENTION INSPECTIONS AND THE FOURTH AMENDMENT

The most important image to keep in mind as I discuss how the Fourth Amendment might impact on verification inspections under the CWC is of peeling an onion. Each type of inspection and each category of property that will be searched presents somewhat different privacy issues. The situation is not monolithic at all, and, in my opinion, the most intelligent way to avert difficulties is to pare the different situations off individually and deal with them on their facts.

Therefore, the remainder of my discussion about the Fourth Amendment will include two separate parts. First, I will describe some strategies that can resolve Fourth Amendment issues across every type of CWC inspection. Second, I will review some problems created by the particulars of three of the four different kinds of CWC inspections and suggest solutions for each that could be included in implementing legislation — some of which are and some of which are not actually a part of the Administration's recent bill. In the interest of time and with a nod toward reality, the one type of inspection I will not cover is where actual use of chemical weapons is alleged. I trust that by the end of the process of peeling this constitutional onion we will not all be in tears from the smell.

3.1 GENERAL SOLUTIONS TO FOURTH AMENDMENT PROBLEMS

A number of general solutions to potential Fourth Amendment problems have the effect of substantially reducing the extent of any conflicts with the CWC.

3.1.1 Government Owned Facilities

First, many of the facilities that will be subject to CWC inspections — and all of the facilities that will have to entertain the most intrusive systematic inspections — are owned by the federal government, as I understand it. This is certainly true of the nine locations where chemical weapons in the United States are stockpiled and are planned to be destroyed. These facilities are not entitled to the protection of the Fourth Amendment

18. See Carnahan, *Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Questions*, 25 INT'L LAWYER 167, 181-84 (1991).

because the Fourth Amendment protects the people from the government, not the government itself.

Therefore, inspections of government owned property located in government owned facilities in general present no Fourth Amendment problem; where the government is holding private property in which a person has a reasonable expectation of privacy (such as a confidential health record), the search might have to be limited. Other difficulties, such as national security considerations, may also arise, but these issues are handled elsewhere in the Convention and are outside the scope of my talk.

3.1.2 Consent to Searches

Second, where private property must be inspected, obtaining consent is the most natural approach and is likely to be successful most of the time. Certainly it is reasonable to expect that most people will consent to CWC inspections most of the time both because of their respect for law and because of their fear of being perceived by the public or the federal government as uncooperative.¹⁹ Consent may be obtained as needed on a case-by-case basis, or it may be obtained in advance.

The most important type of consent to CWC inspections for legal purposes is the consent of federal government contractors. The federal government is an enormous purchaser of goods and services. Consent to CWC inspections can lawfully be made a condition of some of those contracts, even for contracts already in existence.²⁰ For example, this is the mechanism whereby affirmative action is advanced by the federal government as a national policy, and, thus, ample precedent exists for use of this method.

Two major restrictions exist on use of this tool. First, the condition must be authorized by law. This could take the form of an Executive Order, an amendment to the Federal Acquisition Regulations, a statute, or simply a unilateral contract-by-contract amendment. The device that is chosen depends not on constitutional considerations, but on questions of cost and liability. Because the Administration's proposed implementing legislation does not provide for consent to CWC inspections to become a condition of any federal government contracts, one has to assume that this type of consent will not be legislated if it is used at all.

19. However, enactment of the proposed Job Creation and Wage Enhancement Act of 1995, which is part of the Republican Contract with America, might change this pattern. This bill would require that each person "that is the target of a Federal investigative . . . action shall, upon the initiation of an inspection . . . directed against that person, have the right * * * (2) to be advised as to whether the person has a right to a warrant" H.R. 9, 104th Cong., 1st Sess., § 8101(a)(2), 141 Cong. Rec. ____ (1995) [*hereinafter* Proposed Job Creation and Wage Enhancement Act of 1995]. Assuming that an inspection under the CWC constitutes an investigation "directed against [a] person" and not against the United States, it is possible that informing a facility owner of the right to a search warrant would result in a lower rate of consent than might be expected at present.

20. See Tanzman, *supra* note 16, at 58-62.

Second, the contract that is burdened with the condition must be rationally related to the purpose of the condition; otherwise, the so-called "unconstitutional conditions" doctrine might invalidate the condition.²¹ But the bottom line is that consent to CWC inspections of all types can probably be extracted from all weapons producers under federal contract, as well as all chemical suppliers to the federal government. Practitioners who represent such clients may need to consider how to make such consent as painless as possible in terms of compensation and liability.

3.1.3 Restrict Injunctive Relief

Third, while judicial interference with the CWC is unlikely because of the national security and foreign affairs implications, a legislative ban on injunctions against CWC inspections is generally conceded to be necessary to eliminate this risk. Instead, the subject of the inspection should be permitted to seek monetary damages to compensate for any losses that actually result.

A legislative ban on injunctions has strong statutory precedent.²² The Anti-Injunction Act,²³ for example, is not unconstitutional²⁴ even though it bars injunctions against the collection of any federal tax, however wrongly imposed.²⁵ Similarly, the Norris-LaGuardia Act²⁶ prohibits injunctions against certain ongoing labor disputes.

Ensuring that injunctions will never be granted against CWC inspections requires that the implementing legislation make an alternative remedy available to victims of unreasonable searches. As Justice Marshall wrote in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."²⁷ Failure to provide such a remedy may interfere with the goal of verifying CWC compliance because the judiciary

21. See *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

22. See generally Tanzman & Kellman, *Legal Implementation of the Chemical Weapons Convention: Integrating International Security with the Constitution*, 22 N.Y.U. J. INT'L. L. & POLITICS 475, 499-503 (1990).

23. 28 U.S.C. § 7421.

24. Cf. *Linn v. Chivatero*, 714 F.2d 1278, 1282 (5th Cir. 1983), *later app.*, *Linn v. Chivatero*, 790 F.2d 1270 (5th Cir. 1986), *reh. den. en banc*, *Stassi v. Chivatero*, 798 F.2d 1412 (5th Cir. 1986) (Anti-Injunction Act does not bar plaintiff's suit in equity to recover records retained by the U.S. Internal Revenue Service in violation of Fourth Amendment).

25. The Act's underlying purpose is to allow the federal government to collect taxes without the threat of judicial intervention; a taxpayer's suit for a refund is the sole avenue for redress. *South Carolina v. Regan*, 465 U.S. 367 (1984); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).

26. 29 U.S.C. § 101.

27. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

would otherwise be compelled to rule that the victim of a constitutional violation has no remedy whatsoever — risking a determination that a CWC inspection would be unconstitutional.²⁸

Unfortunately, the Administration's proposed implementing legislation only included half of the picture: it would ban injunctions against CWC inspections,²⁹ but makes no provision for damages as a substitute remedy. This is the single biggest weakness in this bill, and one that ought to be of concern to anybody whose facility might be subject to a CWC inspection. Understanding the significance of this omission requires me to return briefly to the FTCA.³⁰

The FTCA establishes general circumstances where the federal government has consented to suit.³¹ The FTCA's waiver of sovereign immunity is limited by thirteen exceptions, of which two are relevant to this discussion. First, the United States is not liable for any claim based upon the performance of a "discretionary function" by a federal official.³² Second, the federal government is not responsible for damages caused by the commission of various intentional torts, including violations of Fourth Amendment rights, so long as the commission was in good faith.³³

28. "[F]orbid[ding] the federal courts to issue all constitutionally adequate remedies for a particular category of claims raises serious problems. . . . [T]he court in question must be empowered to grant relief that is at least reasonably effective." Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 85 (1981).

29. Proposed CWC Implementation Act of 1994, *supra* note 2, § 406(c).

30. See generally Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597 (1990) (explaining FTCA operation, especially discretionary function exemption).

31. 28 U.S.C. §§ 1346(b), 2680. A suit under the FTCA should be distinguished from an action against the offending officials in their personal capacity. The decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation*, 403 U.S. 388, 397 (1971), established that persons who are subject to searches in violation of the Fourth Amendment are entitled to recover damages personally from those who carry out the unconstitutional search. The difference between a *Bivens* suit and an action under the FTCA is that damages in a *Bivens* suit would be paid personally by the responsible government official, whereas the federal government would be responsible for paying the plaintiff who wins an FTCA case. As to when either or both of these remedies may be available for a similar offense, see *Carlson v. Green*, 446 U.S. 14 (1980).

32. 28 U.S.C. § 2680(a). "A public administrator 'has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.'" WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 360 (2d ed. 1988), *quoting* K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1980). "The discretionary function exception thus should clarify the distinction between the formulation of policy by high-ranking officials and the routine implementation of policy by subordinates." Kellman, *supra* note 30, at 1605.

33. *Norton v. United States*, 581 F.2d 390, 395 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). These acts include "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h), *amended by* Pub. L. 93-253, § 2 (1974).

Addition of a new subsection to the FTCA specifically consenting to suit for unconstitutional or wrongful arms control verification inspections would remove a legal barrier to enforcement of a person's right to damages. This would eliminate one major justification a judge may have for blocking operation of the treaty's implementing legislation for lack of any other remedy. Furthermore, it would assure those whose commercial rights might be violated that the federal government will compensate them appropriately.

A similar approach with application to federal searches beyond CWC inspections is taken in the proposed Job Creation and Wage Enhancement Act of 1995, which is part of the Republican Contract with America. This bill includes a provision entitling "each person that is the target of a Federal investigative or enforcement action * * * (7) to be reimbursed for unreasonable damages."³⁴ It is unclear whether an inspection under the CWC would make a facility owner a "target" of this search because the action arguably would be directed by the OPCW against the United States, rather than against the facility owner. However, if enacted, this or a similar provision might result in the sort of damages remedy that seems essential to assuring the constitutionality of the CWC.

3.1.4 Rely on Inspection Methods That Are Not Fourth Amendment Searches

Fourth, the federal government could rely on the plain view doctrine to justify CWC verification. Sensors that are very selective for chemical weapons agent and nothing else, and which have a large enough range that they can be deployed without entering the grounds of a commercial facility would probably not invade Fourth Amendment rights because no reasonable expectation of privacy would be invaded by detecting contraband from outside one's commercial property.³⁵ In other words, it would be in plain view. Furthermore, they could threaten those businesses less than inspections by persons because less opportunity for mischief would be created. I realize that no sensor that meets these tough requirements is known on the market today, but the future might bring forth such a device. Its development would be a worthy subject of government research funding, but the Administration's proposed implementing legislation does not provide for this.

3.2 FOURTH AMENDMENT ISSUES AND SPECIFIC TYPES OF CWC INSPECTIONS

Now that we have peeled away the outer layers of the problem that cover the entire area of CWC inspections, we are left with the more particular Fourth Amendment issues that are raised by specific types of inspections.

34. Proposed Job Creation and Wage Enhancement Act of 1995, *supra* note 19, § 8101(a)(7).

35. Tanzman, *supra* note 16, at 55-58.

3.2.1 Systematic Inspections

Systematic inspections will occur at three kinds of facilities: chemical weapons storage facilities, chemical weapons production facilities, and facilities that possess chemicals for research purposes on Schedule 1, which basically includes chemical weapons. They are the most intrusive inspections because the greatest degree of access is permitted to inspectors due to the fact that these facilities are the most important to control from the treaty's standpoint. Not only will inspectors be able to enter these facilities, question their occupants, examine their records, and take samples, but they are also entitled to "unimpeded access" to all parts of these facilities and chemicals they contain.

The first two types of facilities — the storage installations and current production factories — are government owned and therefore should not create Fourth Amendment problems. I do not know the ownership status of the third type of facility — that is, one that might possess Schedule 1 chemicals for various research purposes. If those are government owned facilities, then they not covered by the Fourth Amendment. I assume that if they are not government owned, they will be government contractors, in which case then their government contract could easily require them to consent to OPCW inspections under the Convention. Thus, I do not see any Fourth Amendment problems requiring additional legislation that would be created by systematic inspections.

3.2.2 Routine Inspections

"Routine" is a term used to describe three similar types of verification inspections of facilities that must be declared by the United States along with the other State Parties. Without getting into the details of what must be declared, the Convention contains a series of lists, or Schedules, that catalogue chemicals that could be used to make chemical weapons. Each schedule collects chemicals that pose a different type or degree of risk to the Convention.

The intrusiveness of the inspections that are permitted at these declared facilities varies with the risk to the Convention posed by the chemicals they contain. In general, routine inspections permit inspectors to enter and examine the factories that produce the scheduled chemicals, to take various samples and photographs, to examine records, and to question facility personnel.³⁶ On one extreme, the facilities with the most worrisome chemicals must permit all of these inspection activities and the United States must enter into a so-called "facility agreement" for each such factory that spells out inspection details.³⁷ On the other extreme, the particulars of inspections of those

36. CWC, *supra* note 1, Verification Annex, pt. II(E), ¶¶ 45-58 (at pp. 73-77).

37. *Id.*, Verification Annex, pt. VI(E), ¶ 25 (at p. 129) (facilities possessing Schedule 2 chemicals); Verification Annex, pt. VII(B), ¶ 17 (at p. 135) (facilities possessing Schedule 3 chemicals).

declared facilities in this country containing chemicals of least concern are subject to negotiations between the OPCW and the United States.³⁸

Notwithstanding the variations between the various types of routine inspections, they share one common characteristic that makes these inspections the most problematic of the group: although the Convention contains some wiggle room for negotiation in individual circumstances, inspections may not be refused even though we know that most of these facilities are not government owned and presumably a fair number of them are not government contractors. In other words, routine inspections may be inconsistent with the usual Fourth Amendment warrant requirement because the United States will be unable to refuse an inspection and remain in compliance if a warrant were not granted by an independent magistrate for any reason.

It should be noted that the Administration's proposed implementing legislation provides for warrants.³⁹ It empowers any official already authorized to issue search warrants also to issue search warrants for CWC inspections if requested,⁴⁰ but includes no provision requiring the federal government to apply for them. It may be that the federal government will always request warrants for CWC inspections and that no warrant request ever will in fact be declined, but it is worthwhile exploring alternative approaches to avoiding the compliance problem that might result if a warrant is requested but not obtained.

The Fourth Amendment requires routine inspections to protect reasonable expectations of privacy in the face of this government intrusion even though the government's inability to obtain a search warrant cannot restrict the search. However, as I mentioned earlier, one of a small group of exceptions to the usual search warrant requirement can be adapted to the needs of CWC routine inspections. This is the so-called "pervasively regulated industries exception," and it is fair to expect that the federal government would turn to this exception if necessary.

Beginning in 1970, the Supreme Court began ruling that certain commercial property could be searched for administrative purposes without warrants when the government regulates it with an especially heavy hand. Exactly what defines a pervasively regulated industry is unclear, but generally they have involved potential danger to public health or safety, a link to crime, or financial transactions. What is a little bit counter-intuitive about pervasive regulation is that this doctrine holds that very intrusive and specific inspection requirements provide the moral equivalent of the protections of a search warrant procedure.

38. *Id.*, Verification Annex, pt. IX(B), ¶ 17 (at p. 147).

39. Proposed CWC Implementation Act of 1994, *supra* note 2, § 406(a).

40. *Id.* § 406(a)(2). The bill also would authorize federal district courts to "compel the taking of any action required by or under this Act or the Chemical Weapons Convention." *Id.* § 405(a)(2).

A three-part test was formulated by the Court in its 1987 decision in *New York v. Burger* that a warrantless inspection scheme must pass in order to qualify for this exception:

1. A substantial government interest must guide the regulatory scheme pursuant to which the inspection is made;
2. the warrantless inspections must be necessary to further the regulatory scheme; and
3. the regulatory law must perform the two basic functions of a warrant, which are: (a) it must advise the owner that the inspection is being made pursuant to law and has a properly defined scope; and (b) it must limit the discretion of the inspecting officers.

If routine inspections under the CWC can meet these three tests, then search warrants are not needed.

The Administration's proposed implementing legislation appears to meet the three parts of the *Burger* test. First, the Congressional findings state that the verification procedures in the Convention are crucial to its success.⁴¹ Second, the fact that the CWC does not account for refusal of routine inspections would meet the requirement of demonstrating that a warrantless scheme is necessary; otherwise, the United States would not be able to benefit from the verification resulting from warrantless routine inspections in other State Parties. Finally, the actual inspection procedures — part three of the *Burger* test — are already embodied in the CWC inspection provisions and appear to be appropriately limited in scope and in the discretion of inspectors. In addition, the proposed implementing legislation buttresses what is already in the Convention by requiring the federal government to present credentials and an official notice to the subject of an inspection.⁴²

3.2.3 Challenge Inspections

Because of careful wording in the Convention, challenge inspections should create no constitutional privacy problems. Challenge inspections are intended to fill in the gaps that may be left after systematic and routine inspections. They may be invoked by any State Party for "the sole purpose of clarifying and resolving any questions concerning possible non-compliance. . .",⁴³ and may be stopped only by a three-fourths vote of the Executive Council that will govern day-to-day operations of the OPCW.⁴⁴

41. Proposed CWC Implementation Act of 1994, *supra* note 2, § 3(3).

42. *Id.* §§ 401(b), 401(c).

43. CWC, *supra* note 1, art. IX, ¶ 8 (at p. 31).

44. *Id.*, art. IX, ¶ 17 (at p. 34).

Challenge inspections may occur at facilities where chemical weapons are located or were produced and which are subject to systematic inspections, at declared facilities where routine inspections already take place, or at the infinitely larger group of undeclared facilities or locations, which could theoretically include any type of government, commercial, or residential property.⁴⁵

Although the reach of challenge inspections is broader than the others, the inspections are less intrusive. A complex series of negotiations precedes each challenge inspection that defines the area to be inspected.⁴⁶ During this period, the site itself may be secured and commercial or government vehicles that seek to exit may be searched.⁴⁷ Inspectors at the perimeter of the inspected site have the right to use certain monitoring instruments and to take wipes, air, soil, or effluent samples.⁴⁸ The inspected State Party is allowed to negotiate the extent of inspector access — through a process called "managed access" — in order to protect national security and to comply with "any constitutional obligations it may have with regard to proprietary rights or searches and seizures."⁴⁹ Nevertheless, the inspected State Party must grant some access within the perimeter of the requested site⁵⁰ and must "make every reasonable effort to demonstrate its compliance" with the Convention.⁵¹

Because the range of potential inspection sites is so great, a pervasive regulation scheme would not work for challenge inspections. But it appears that implementing legislation containing what is called an "administrative search scheme" would create the legal grounds for access.

An administrative search scheme is a system of searches to assure compliance with a government regulatory system.⁵² In contrast to searches of facilities that are pervasively regulated, which are a type of administrative search requiring no warrant,⁵³ the usual administrative search scheme relies on the government investigators to procure

45. The CWC states that: "Each State Party as the right to request an on-site challenge inspection of *any* facility or location in the territory or in *any* other place under the jurisdiction or control of any other State Party. . . ." *Id.*, art. IX, ¶ 8 (at p. 33) (emphasis added).

46. *Id.*, Verification Annex, pt. X, ¶¶ 14-21 (at pp. 152-54).

47. *See id.*, Verification Annex, pt. X, ¶¶ 23-31 (at pp. 154-55).

48. *Id.*, Verification Annex, pt. X, ¶¶ 36(a), 36(b) (at p. 156).

49. *Id.*, Verification Annex, pt. X, ¶ 41 (at p. 159).

50. *Id.*, Verification Annex, pt. X, ¶ 38 (at p. 156).

51. *Id.* art. IX, ¶ 11(a) (at p. 33).

52. Koplow, *supra* note 7, at 305-06.

53. *Id.* at 308.

warrants before they search. The important difference between administrative searches and criminal searches is that administrative searches require fewer procedural protections because their goal is compliance with a legislative scheme, rather than punishment of wrongdoers.⁵⁴ For example, building code inspections are a classic administrative search scheme because searches are determined not by individual suspicion, but, rather, by such characteristics as the age of buildings or the time since a prior inspection.⁵⁵

I would be less than candid if I told you that administrative searches are a perfect fit for challenge inspections. They are not, because selection of subjects for administrative searches has not usually been based on suspicion, whereas challenge inspections are suspicion based. However, my concern is mitigated for two reasons. First, since it appears that challenge inspections can accommodate refusal by a magistrate to issue a warrant without resulting in United States noncompliance with the Convention, the inability to demonstrate administrative probable cause and obtain a warrant would not be as significant as the inability to grant a routine inspection. Second, the trend of court decisions seems to be in the direction of allowing more administrative searches based on suspicion⁵⁶ even though the logic of many of those cases strikes me as questionable. Therefore, I believe that it was constitutionally sound for the Administration to embody in its proposed implementing legislation an administrative search scheme that applies to challenge inspections, especially in view of the fact that this is part of a larger regulatory scheme that apparently includes pervasive regulation of declared facilities.

4 CONCLUSIONS

While not every potential privacy problem posed by the CWC can be predicted, it is beyond question that the American judiciary will accord great respect to deliberate efforts by Congress to harmonize the protection of Fourth Amendment rights with national security interests. As enforceable chemical weapons control becomes a reality, the ability to resolve the issues I have discussed today will demonstrate that the United States Constitution can endure as a pillar of civilized world order. Ultimately, I believe that American constitutional democracy has the strength and flexibility to accomplish international arms control under law.

54. *Id.* at 333.

55. *See id.* at 308.

56. *See* *Martin v. International Matex Tank Terminals-Bayonne*, 928 F.2d 614, 624, *citing* *Marshall v. Horn Seed Co., Inc.*, 647 F.2d at 102. *See also* *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982) (probable cause exists where there is a reasonable belief that a violation has been or is being committed and not upon a desire to harass the target of the inspection). However, mere boilerplate assertions that there are reasonable grounds to be suspicious will not support the issuance of a warrant. *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373 (7th Cir. 1979).