

The United States is a nation of inventors and entrepreneurs. How do we balance the commercial need to maintain trade secrets and intellectual property rights versus the “government’s need to know?” This issue is particularly important for biotechnology research, since biotechnology facilities can be “dual purpose”—performing legitimate research while creating biological or chemical weapons.

Increased security seems tied to corresponding decreased personal freedom. While we all might agree that the criminals don’t deserve privacy at the expense of our safety, what if we were the ones being investigated? One example is the case of suspected biological or chemical weapons producers.

In the 1990s, the United Nations Security Council required the destruction of nuclear, chemical and biological weapons in Iraq. It created a special commission (UNSCOM) to perform on-site inspections to identify and destroy such material. UNSCOM was to have unrestricted freedom of movement without advance notice. However, Iraq refused to allow inspection teams access to some facilities. Many believed those refusals were because Iraq was hiding its biological and chemical weapons. Iraq, however, claimed the inspections were undermining its national sovereignty.

Would we allow such inspections in the United States?

The United States has signed the Chemical Weapons Convention (CWC), an international treaty prohibiting the use and possession of chemical weapons and also requiring inspections to ensure compliance. This requirement means that both public and private facilities that have the capability of producing chemical weapons are subject to inspection. In the United States, the Fourth Amendment protects against unreasonable searches and seizures--warrants must be obtained upon probable cause. The CWC does not include such a provision. If the United States refused inspections without prior warrants, it would violate the treaty and set the stage for other nations to do so as well.

Some contend that exceptions have always been made for warrantless inspections. One such exception occurs when the inspection is for administrative searches of closely regulated industries. Although some chemicals are produced almost exclusively for weapons and therefore would represent a closely regulated industry, the CWC includes more general chemicals as well. Schedule 3 chemicals include toxic chemicals used for many non-weapons purposes, while “other” chemicals are even more broadly defined as any non-explosive hydrocarbons. There may be as many as 11,000 facilities in the United States alone producing these types of chemicals.

Another exception already in place for warrantless inspections is when inspections are for national security purposes. If the United States refused an inspection allowed by the CWC on the grounds that without a warrant such a

search is unconstitutional, national security *could* be harmed. The country could face economic sanctions, generate the censure of the international community, and bolster other nations' rights to refuse inspections. How dangerous would it be to allow the "national security" exception to be used? On one hand, national security might truly be at issue. On the other, almost anything could be deemed to be a risk to national security. How many constitutional freedoms are you willing to give up as someone else defines "national security?"

What about the loss of confidential business information?

An additional significant concern is that inspection teams may learn confidential business information during inspections. Confidential business information gives companies competitive advantages because it is not widely known. Companies invest heavily in research and development with the expectation that they alone will have rights to the knowledge gained. If through reporting requirements or inspections, competitors learn that information, the original company would have lost any advantage of its initial investment into R&D. Clearly, companies do not want their confidential information made public.

The concern is heightened beyond the mere inadvertent slip of information. The United States currently leads the world in many technological fields. Industrial espionage is a common practice of some foreign governments. These inspections may be prime opportunities to gain knowledge of improved practices from the United States. Thus U.S. firms could develop new technologies; foreign inspectors could then obtain that information and bring it back to their countries' firms, which would then compete with U.S. companies.

The need for protection against weapons of mass destruction is essential, given their ability to destroy mankind. Inspections seem to be necessary, given evidence that countries have agreed not to produce such materials, yet have done so. Still, inspections themselves are problematic. With enough notice, a plant may be able to cover up its illegal activities. Without notice a plant may not be afforded its constitutionally guaranteed (in the United States) right to be free from warrantless searches. Additionally, companies could lose costly confidential business information to competitors. United States' compliance with international treaties is mandatory for us, if we expect others to comply. Compliance with international treaties may be incompatible with our expectation that our civil and property rights be protected. Where should the line be drawn?

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Questions for Discussion:

1. The federal government acknowledges the need to exempt information from availability to anyone through the Freedom of Information Act. However, this exempted information will probably be available to inspectors within the US government and other commercially competitive nations participating in biochemical weapons treaties. This information is therefore isolated, possibly in encrypted form, and could be very attractive for professional cybercriminals to locate and attack. Should this information be deleted immediately upon inspection or stored for benchmarking against future inspections? This is particularly critical since many chemicals and biological agents are dual purpose—with a harmless commercial use as well as a WMD use.
2. If a foreign inspector violates his trust and shares US trade secrets with his or her country or other competitors, what sanctions should be applied? Should this be an extraditable offense?
3. What safeguards should be used to certify inspectors to raise the comfort level of inspected companies—in the US and abroad? —Lie detector tests? -- Random inspections which might include bank account or income tax audits? Bonding or other sureties against theft or damage by the inspector's country of origin?
4. Some experts and industry members believe that tighter criteria should be used to select companies for inspection—criteria which would indicate that the company has the propensity to serve as a national or international security threat such as previous dealings with countries known to have weapons of mass destruction (e.g. Iraq) or even previous armaments or national security-related government contracts. Do you believe that national security could be safeguarded by a restricted inspection program?
5. It is clear that national security involves some willingness to suspend basic rights and freedoms for the public safety. The search warrant has been a key protection against self-incrimination in the U.S. that is not commonly applied in other countries. Nor, in the case of countries of concern, such as Iraq, would we be willing to await a warrant to conduct a search. What are we risking by complying with warrantless searches in response to a treaty? Do you worry that the federal government could invoke the treaty to investigate a U.S. firm without substantial proof of a national security threat? Would you be comfortable if the officers of a U.S. company were extradited for trial by an international court based on a warrantless search?

