Constitutionality of Warrantless On-Site Arms Control Inspections in the United States

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Introduction

The Reagan Administration considers verifiability of Soviet compliance to be an essential feature of any arms control agreement it would be willing to make with the Soviet Union.1 While numerous methods of

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arms control verification exist, on-site inspections might be a means of ensuring that all parties are strictly observing the provisions of an agreement. As a result, Reagan Administration arms control negotiators have pressed the Soviets to agree to on-site inspections in several of the agreements under discussion. In addition to the Soviet Union's historical opposition to on-site inspection, based in part upon fears of espionage, the U.S. Constitution's limitations on governmental power are also potential obstacles to on-site inspection in this country. The purpose of this article is to examine the constitutionality of on-site inspections as contained in one of these agreements—the Draft Convention on the Prohibition of Chemical Weapons (Draft Convention).

The Draft Convention, presented by the United States to the multilateral Conference on Disarmament in Geneva, Switzerland, on April 18, 1984, is the most far-reaching Reagan Administration proposal for on-

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2. See Krepon, Arms-Treaty Verification: A Political Problem, Technology Review, May-June 1986, at 34, 46-47 (discussing both advanced monitoring techniques and cooperative measures as alternative means of verification). See generally Heckrotte, A Soviet View of Verification, BULL. OF THE ATOMIC SCIENTISTS, Oct. 1986, at 12 (discussing Soviet reluctance to submit to "intrusive" verification measures); Newcombe and Newcombe, Chemical and Biological Weapons Inspection, PEACE RESEARCH REVIEWS, May 1982, at 55 (comprehensive review and bibliography of proposals that have been advanced for verification inspections pursuant to treaties regulating chemical and biological weapons).


4. See Rowney, supra note 1.


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site inspection. Sometimes called the “poor state’s weapons of mass destruction,” chemical weapons—already banned in wartime by the Geneva Protocol of 1925—are considered by the Reagan Administration to be undergoing a resurgence in use that demands additional international regulation.

In a 1984 speech to the Conference, Vice President George Bush pointed out that chemical weapons pose a basic dilemma for international negotiators:

[T]hese insidious chemical weapons are virtually identical in appearance to ordinary weapons; plants for producing chemicals for weapons are difficult to distinguish from plants producing chemicals for industry and, in fact, some chemicals with peaceful utility are structurally similar to some chemicals that are used in warfare. So verification is particularly difficult with chemical weapons.

The Vice President urged the Conference to agree to the American treaty proposal, which he characterized as containing “an entirely new concept for overcoming the great obstacle that has impeded progress in the past toward a full chemical weapons ban, namely, the obstacle of verification.”

7. The text itself is incomplete, with many items intentionally left blank for the negotiators to fill in as agreement is reached. See, e.g., id., art. III(2)(b). Of particular importance to this discussion is Annex II of the Draft Convention, which purports to flesh out the verification provisions. The first sentence of Annex II reads: “Provisions along the following lines should be included:”. Id.


9. Chemical Warfare: Arms Control and Proliferation, Joint Hearing Before the Senate Comm. on Foreign Relations and the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the Senate Comm. on Governmental Affairs, 98th Cong., 2d Sess. 9 (1984) [hereinafter Hearings] (statement of Kenneth L. Adelman, Director, U.S. Arms Control and Disarmament Agency). See generally Ember, Worldwide Spread of Chemical Arms Receiving Increased Attention, CHEMICAL AND ENGINEERING NEWS, Apr. 14, 1986, at 8, which puts the number of nations possessing chemical weapons at between 15 and 31. The United States, the Soviet Union, France, and Iraq are known to possess them; Egypt, Syria, Libya, Israel, Ethiopia, Burma, Thailand, China, Taiwan, North Korea, and Vietnam are reported to possess them; and Iran and South Korea are reportedly seeking them. Id. at 8-11. Formal negotiations between the United States and the Soviet Union on chemical weapons began in 1977, and moved to the Forty Nation Conference on Disarmament in 1980. Statement by the U.S. Representative (Fields) to the Conference on Disarmament: Chemical Weapons Convention, April 26, 1984, reprinted in DOCUMENTS ON DISARMAMENT, supra note 6, at 353, 354.

10. Address by Vice President George Bush to the Conference on Disarmament: Chemical Weapons Convention, April 18, 1984, reprinted in DOCUMENTS ON DISARMAMENT, supra note 6, at 299, 300.

11. Id.
would “open for international inspection on short notice all . . . military or government-owned or government-controlled facilities” of each party. Acknowledging that “openness entails burdens for every State . . . including the United States of America,” the Vice President asserted that on-site inspection is “the sine qua non of an effective chemical weapons ban.”

Verification is a concept that has become inextricably entwined with arms control. It is a shorthand term for all means by which a party to a treaty satisfies itself through objective evidence that other parties are, in fact, complying with treaty commitments. Its origins lie both in skepticism that nations will observe the arms control treaties into which they

12. Id. at 303.
13. The American Ambassador to the Conference on Disarmament elaborated on the extent of this burden in a speech to the Conference. Referring to one of the types of on-site inspection that the Draft Convention would create, he noted:

My Government recognizes that these special on-site inspection procedures will require an unprecedented degree of openness on the part of all countries that pose a risk to sensitive activities not related to chemical weapons. . . . [T]he United States has decided that the benefits flowing from such an inspection scheme greatly outweigh the risks. . . . The United States seriously considers that any risks can be minimized and managed through appropriate procedures for initiating and conducting special on-site inspections. . . . I want to assure all delegations in the Conference on Disarmament that my Government did not take the decision lightly to include this “open invitation” provision in our draft convention. There should be no question that the United States is willing to accept the consequences of these provisions.

Statement by the U.S. Representative (Fields) to the Conference on Disarmament: Chemical Weapons Convention—Compliance, July 19, 1984 [hereinafter Statement by the U.S. Representative], reprinted in DOCUMENTS ON DISARMAMENT, supra note 6, at 531, 533.

14. Address by Vice President Bush, supra note 10, at 304. Curiously, a representative of the Chemical Manufacturers’ Association was quoted recently as stating in reference to the Draft Convention that “industry wouldn’t object to on-site inspections and to scrutinization of records” because the current recordkeeping burden is so great that compliance inspections would not make it greater, although he noted concern about “safeguards to protect intellectual property.” Ember, supra note 9, at 16. A number of other chemical industry representatives have expressed concern about the degree to which the Draft Convention protects proprietary and confidential information. See Marshall, Progress on a Chemical Arms Treaty, 238 SCIENCE 471, 472 (Oct. 23, 1987); Ember, Global Chemical Experts Offer Advice for Chemical Weapons Treaty, CHEMICAL AND ENGINEERING NEWS, July 27, 1987, at 16. See generally Hearings, supra note 9 (discussing verification problems). The West German view was expressed more directly. The Representative of the Federal Republic of Germany reacted to the Draft Convention’s verification provisions by stating:

We are . . . concerned that the mechanisms envisaged for the verification of nonproduction, as laid out in the United States draft, should not entail unnecessary burdens for the civilian chemical industry. In the Federal Republic of Germany, the chemical industry is an important pillar of our overall economic performance. It is therefore a legitimate consideration to seek to avoid intrusive measures that would not directly raise the level of effectiveness of verification.

Statement by the Representative of the Federal Republic of Germany (Wegener) to the Conference on Disarmament: Conference Procedures and Chemical Weapons Convention, Apr. 26, 1984, reprinted in DOCUMENTS ON DISARMAMENT, supra note 6, at 364, 368.

15. See M. KREPON, supra note 5, at 14-27.
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enter and in fear of the military consequences of undiscovered cheating. On-site inspection has historically been a very controversial means of verifying arms control treaties. Verification of the major nuclear weapons treaties of the past has been accomplished without on-site inspection, mostly by such “national technical means” as surveillance satellites, remote seismic networks, radars, and electronic intercepts—devices typically based in the territory of the nation seeking to verify the treaty, or in orbit, in international waters, or on the soil of other nations.

If on-site inspection is the sine qua non of a chemical weapons treaty today, advances in weapons technology and recent political developments suggest that this may become true for some future nuclear weapons agreements as well. With the increasing accuracy of land-based strategic weapons, enhancing Intercontinental Ballistic Missile (ICBM) survivability through concealment, deception, active defense, increased missile mobility, or some combination of these measures has become more and more essential. These improvements in mobility, concealment, and deception may create imperatives for future nuclear weapons treaties to include intrusive verification provisions similar to those in the Draft Convention. Indeed, the Reagan Administration’s position on verification of nuclear weapons treaties explicitly recognizes that this trend will require methods of verification that go beyond national technical means.

The recently concluded Intermediate Nuclear Forces (INF) agreement between the United States and the Soviet Union illustrates the Reagan Administration’s view of this problem, as well as the trend toward on-site inspection as its solution. Among the weapons that are included in this

16. Id. at 14; Adam, supra note 5, at 42, 54.
17. See Adam, supra note 5, at 74; M. KREPO, supra note 5, at 20-27.
18. Adam, supra note 5, at 43.
20. The principal technological threat to U.S. strategic forces at the moment is increasing missile accuracy. This has made possible an attack on hard targets (such as missile silos) at a cost that is easily commensurate with the value of the target. The result has been decreased ICBM survivability and a perceived increase in strategic instability, as one side or the other may find a first strike a viable option. The chief U.S. response has been to harden its land-based missile silos . . . . Scowcroft, Technology and Strategic Forces, in SCIENCE AND SECURITY: THE FUTURE OF ARMS CONTROL 1 (W. Wander, R. Scribner, and K. Luongo eds. 1986).
21. Id.; see also Adam, supra note 5, at 43. The need for a mobile, concealable land-based missile is offered as the major justification for the proposed development of the “Midgetman” missile. See Scowcroft, supra note 20, at 1-2.
23. Intermediate Nuclear Forces Treaty, supra note 5; see also S. Goldman, P. Gallis & J. Vogas, VERIFYING ARMS CONTROL AGREEMENTS: THE SOVIET VIEW 95-96 (Congres-
agreement are Soviet mobile SS-20's and American Ground-Launched Cruise Missiles and Pershing II's, the concealability of which makes verification of the level of their deployment difficult. During the period in the negotiations when the Soviet Union insisted that both sides be allowed to retain the capability to manufacture and deploy a limited number of missiles, then Defense Secretary Weinberger contended that on-site inspections of Soviet SS-20 factories would be "an absolute essential" in order to verify that the limits would be observed. Even when the Soviets agreed to eliminate INF weapons altogether, thereby obviating the American problem of accurately tracking the number of SS-20's that would be manufactured, the United States still asserted that on-site inspections of a less intrusive nature would be required, and they were included in the treaty. In any event, the original American position on INF verification apparently is indicative of the present American position on the verification needs, including on-site inspection, of a Strategic Arms Reduction Treaty (START), as well. Consequently, important lessons may be learned by reviewing those constitutional issues raised by the on-site inspection provisions of the Draft Convention that may also apply to nuclear weapons treaties.

The importance of these issues has become apparent recently, since the Soviets have demonstrated an increasing willingness to discuss on-site arms control inspections under General Secretary Mikhail Gorbachev. On August 6, 1987, the Soviet Foreign Minister stated in an address to the Geneva Conference on Disarmament that "the Soviet delegation at the negotiations on [a chemical weapons treaty] will proceed from the need to make legally binding the principle of mandatory challenge inspections."

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24. Intermediate Nuclear Forces Treaty, supra note 5, arts. II(2), III.
27. Id. at 28.
28. Intermediate Nuclear Forces Treaty, supra note 5, art. XI.
29. Flournoy, A Rocky START: Optimism and Obstacles on the Road to Reductions, ARMS CONTROL TODAY 7, 13 (Oct. 1987).
30. Vice President Bush asserted: "If the international community ... joins us in subscribing to [open invitation verification inspections], ... [w]e will have set a bold example for overcoming barriers that impede effective arms control in other areas." Address by Vice President Bush, supra note 10, at 304.
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spections without right of refusal." General Secretary Gorbachev has proclaimed that "the Soviet Union has no objection to any verification procedures" in the context of a treaty to eliminate all nuclear weapons. Indeed, in July 1986 the Soviets, as part of a pilot program to demonstrate the verifiability of a comprehensive nuclear weapons test ban, allowed a private American environmental organization to place three seismic monitoring stations on Soviet territory in the vicinity of the country's largest nuclear test site. In September 1987 the Soviets invited a delegation of Western observers, including three members of the U.S. Congress, to tour and photograph a giant radar under construction near Krasnoyarsk that the Reagan Administration has asserted violates the Anti-Ballistic Missile Treaty. One month later, the Soviets invited representatives of 45 nations, including the United States, to visit a chemical weapons production facility at Shikany and view an assortment of nineteen types of chemical weapons.

This movement by the Soviets away from their historical opposition to on-site inspection is part of what one U.S. diplomat claims is a long-term maturing of Soviet attitudes toward negotiating in general. If American constitutional law permits only relatively unintrusive on-site verification inspections, then perhaps an area of United States/Soviet agreement on the scope of on-site inspection can more easily be reached. This


On August 11, 1987, the Soviet Representative to the Conference on Disarmament elaborated on this position, emphasizing:

In our view the procedure of challenge inspections must securely ensure that no fact of violating the Convention and the consequences of such violation can be concealed by a state. . . . The fact that we have adopted the principle of mandatory challenge inspections does not however mean that we can disregard a possible disclosure of sensitive data, which can happen during such inspections, especially in case of abuse.


33. Adam, supra note 5, at 42-43.


37. Adam, supra note 5, at 70, 74 (quoting Warren Heckrotte, U.S. technical advisor on nuclear test ban talks from 1961 through the late 1970s).
would not be the first time a confluence of interest had its source in contradictory values.38

The remainder of this article consists of four sections. The first section describes the on-site inspection provisions of the Draft Convention. The second section analyzes the Fourth Amendment issues raised by these provisions. The third section explores remote monitoring methods of arms control verification that may minimize Fourth Amendment problems, the feasibility of using the Spending Power to induce consent to on-site inspections by federal contractors, and a possible statutory solution. The last section presents the conclusions that this review suggests.

I. On-Site Inspection in the Draft Chemical Weapons Convention

The Reagan Administration has described the Draft Convention as a comprehensive ban on “the possession, production, acquisition, retention or transfer of chemical weapons.”39 If the Draft Convention were adopted, the possession of chemical weapons,40 as well as the facilities that manufacture their raw materials,41 would be strictly limited.42 All parties would be required to declare and destroy existing chemical weapons stockpiles43 and production facilities.44

38. Jack Sprat Could eat no Fat,
   His Wife could eat no Lean;
   And so, betwixt them both,
   They lick’d the platter clean.


39. Address by Vice President Bush, supra note 10, at 300.

40. The Draft Convention defines the term “chemical weapons” to include, inter alia, super-toxic lethal, other lethal, and other harmful chemicals, and their precursors, except for those chemicals intended solely for permitted purposes . . . and except for those chemicals which are not super-toxic lethal, or other lethal, chemicals and which are used by a Party for domestic law-enforcement and riot control purposes or used as a herbicide . . . .

Draft Convention, supra note 6, at art. II(1)(a). Each of the terms “super-toxic lethal chemical,” “other lethal chemical,” “other harmful chemical,” and “toxic chemical” are defined in technical language relating to their potential for harming humans. Id., art. II(2)-(5). “Precursors” are chemicals that can be “used in production of a super-toxic lethal chemical, other lethal chemical, or other harmful chemical.” Id., art. II (6).

41. The term “chemical weapons production facility” includes buildings and equipment designed, constructed, or used since January 1, 1946, for producing any toxic chemical for chemical weapons or certain precursors, or for filling chemical weapons. Id., art. II(10).

42. Article III of the Draft Convention specifies the activities that would be permitted. For example, each party would be allowed to possess no more than one metric ton of super-toxic lethal chemicals or certain precursors, id., art. III(2)(a), and any production of these could only take place at a single facility with a limited manufacturing capacity. Id., art. III(2)(b).

43. Id., art. V(1)(e).

44. Id., art. VI(1)(g).
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A. The Enforcement Framework

The Draft Convention contemplates the creation of a specialized bureaucracy to enforce its provisions. A “Consultative Committee,” made up of one representative from each party, would be established with the responsibility to “oversee the implementation of the Convention, promote the verification of compliance with the Convention, and carry out international consultations and cooperation among Parties to the Convention.”\textsuperscript{45} The Consultative Committee would delegate to an “Executive Council” the authority to make most day-to-day decisions.\textsuperscript{46} The Executive Council would be made up of representatives of the Parties elected to two-year terms by the Consultative Committee, plus representatives of the five permanent members of the United Nations Security Council (China, France, the Soviet Union, the United Kingdom, and the United States) who become Parties to the treaty.\textsuperscript{47}

Compliance with the Draft Convention would be reviewed by two subordinate bodies of the Consultative Committee: the “Fact-Finding Panel”\textsuperscript{48} and the “Technical Secretariat.”\textsuperscript{49} The Fact-Finding Panel would consist of representatives of the United States, the Soviet Union, and three others elected by the Consultative Committee.\textsuperscript{50} The Panel’s major responsibility would be to respond to requests by a party for information, which would require reviewing available information, conducting necessary inquiries, and making “appropriate findings of fact,”\textsuperscript{51} including “considering reports on special on-site inspections . . . and overseeing ad hoc inspections . . .”\textsuperscript{52}

The Technical Secretariat would consist of an administrative staff, including “technically qualified” inspectors,\textsuperscript{53} that would carry out on-site inspections for the Fact-Finding Panel and provide other technical and administrative assistance.\textsuperscript{54}

The Draft Convention would allow on-site inspections of various facilities located within the jurisdictions of signatories. Three types of on-site inspection would be permitted: systematic international on-site verification inspections, special on-site inspections, and ad hoc on-site inspec-

\textsuperscript{45} Id., art. VII(2).
\textsuperscript{46} Id., art. VII(3).
\textsuperscript{47} Id., annex I, § B(2)(a)-(c).
\textsuperscript{48} Id., annex I, § C(1).
\textsuperscript{49} Id., annex I, § D.
\textsuperscript{50} Id., annex I, § C(2).
\textsuperscript{51} Id., annex I, § C(3)(a).
\textsuperscript{52} Id., annex I, § C(1).
\textsuperscript{53} Id., annex I, § D(3).
\textsuperscript{54} Id., annex I, § D(1).
The remainder of this section will describe briefly each of these types of inspection.

B. Systematic International On-Site Verification Inspections

Since the Draft Convention contemplates the destruction of most existing stocks of chemical weapons and the dismantling of the facilities that produce them, it would require that so-called systematic international on-site verification inspections be permitted at predetermined stages of this process. Thus, inspections of each party's declared chemical weapons inventory and storage facilities would take place before, during, and after closure and destruction. In addition, the Draft Convention prescribes systematic international on-site inspections where activities occur that the treaty specifically would allow, such as the maintenance of certain limited chemical weapons and permitted chemical weapons precursors.

Although the Draft Convention does not specify in great detail the procedures for systematic international on-site inspections, it does give some parameters. Both persons and instruments would be allowed as part of the inspection procedure. Inspections could include sampling of materials, as well as examination of records. The Draft Convention envisions random inspections and inspections triggered by particular events.

C. Special On-Site Inspections

Unlike systematic international on-site verification inspections, special on-site inspections pursuant to Article X of the Draft Convention osten-
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sibly require justification by the party who requests them. The requesting party is only entitled to an inspection of the facilities of another party in order to "clarify and resolve any matter which may cause doubts about compliance or gives rise to concerns about a related matter which may be considered ambiguous...." Thus, some level of suspicion regarding compliance with the Draft Convention appears to be contemplated as a prerequisite to a special on-site inspection. However, the approval of only a single member of the Fact-Finding Panel is necessary to trigger such an inspection. Since that Panel includes both the United States and the Soviet Union, an objective review process for these requests cannot realistically be intended. In effect, special on-site inspections are to be available on demand.

Once a special on-site inspection has been initiated, the party being inspected must "provide the inspection team unimpeded access to the location or facility" within 24 hours of notification. The inspection team is to consist of one person from each member State of the Fact-Finding Panel, except the State that is the subject of the inspection. The results of the inspection are to be presented in a written report.

Special on-site inspections would be considerably more intrusive than systematic international on-site verification inspections. Any party to the treaty would be empowered to request a special on-site inspection of any military or other "location or facility" owned by any other party. In addition, the Draft Convention would open for special on-site inspections, "as set forth in Annex II, locations or facilities controlled by the Government of a Party." Annex II, in turn, is vague regarding which installations are "controlled by the Government of a Party," stating only that the treaty in its final form should include

the relevant facilities used for the provision of goods and services to the Government of a Party. It is intended that this provision reach any location or facility that in the future might be suspected of being used for activities in violation of this Convention. The specification of such locations and facilities should be a reasonable one.

68. Draft Convention, supra note 6, art X(1).
69. The power of a member of the Fact-Finding Panel to request a special on-site inspection is termed a "right." Id.
70. Id., annex I, § C(2)(c).
71. Id., art. X(2)(b).
72. Id., art. X(4).
73. Id.
74. Id., art. X(1(a)-(b). It appears that the Draft Convention also would allow special on-site inspections at facilities where systematic international on-site verification inspections had already taken place.
75. Id., art. X(1)(b).
76. Id., annex II, § B(H)(2).
It is therefore not clear from the text of the Draft Convention whether or to what extent private firms in the United States would be subject to special on-site inspections.\textsuperscript{77}

The political and legal importance of this ambiguity cannot be overestimated. At the time the United States proposed the Draft Convention in Geneva, the Soviet Union immediately protested that the document "is built on a blatantly discriminatory basis, and places States with different social systems in unequal situations"\textsuperscript{78} because it would treat capitalist nations differently from socialist countries. The Soviet Ambassador to the Geneva Convention took the position that the proposed treaty language would not subject the private firms of capitalist nations to on-site inspections.\textsuperscript{79} This prompted the United States Representative to the Conference on Disarmament to respond:

The statement has been made that, since the [special on-site inspection] provision applies to government-owned or government-controlled facilities, it discriminates against some economic and political systems. The argument seems to be that, since the civilian chemical industries in some socialist countries are owned by the government, these facilities would be subject to article X, whereas the chemical industries in the United States or other western countries, since they are privately owned, would not be covered by article X. . . . Article X covers not only those locations and facilities that are owned by the government, but also those controlled by the government, whether through contract, other obligations, or regulatory requirements. The privately-owned chemical industries of the United States are so heavily regulated by the United States Government that this equates to the term \textit{controlled} as used in the draft convention. Thus, the private chemical industry of the United States is fully subject to the inspection provisions of article X.\textsuperscript{80}

Because the Soviet reaction strongly suggests that it will not enter into a chemical weapons treaty involving on-site verification inspections unless privately-owned firms in the West are subject to inspection to the same extent as government-owned firms in the Eastern bloc, and because the Reagan Administration has made on-site inspections a condition of

\textsuperscript{77} However, the policy of including facilities that "might be suspected" of treaty violations certainly suggests that a broad range of installations would be subject to special on-site inspections. This is reinforced by the procedure for ordering such inspections, which permits a single party to request one and provides for no impartial review. \textit{Id.}, art. X(I).

\textsuperscript{78} Statement by the Soviet Representative (Issraelyan), to the Conference on Disarmament: Chemical Weapons [Extract], Apr. 26, 1984, \textit{reprinted in} DOCUMENTS ON DISARMAMENT, \textit{supra} note 6, at 359, 361.


\textsuperscript{80} Statement by the U.S. Representative, \textit{supra} note 13, at 531, 534 (emphasis in original).
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American approval, it will be assumed for the remainder of this analysis that all U.S. chemical companies—regardless of whether they actually produce weapons—and all privately-owned firms holding government contracts, are included in "locations or facilities controlled by the Government of a Party" and would be subject to special on-site inspections.

In addition to questions regarding state and private ownership or control, problems of extraterritoriality also arise. It is unclear whether overseas subsidiaries of American chemical companies or government contractors would be included among those "controlled by the Government" within the meaning of the Draft Convention, and, hence, subject to special on-site inspections. The terms of the Draft Convention itself purport to be very far-reaching, not only prohibiting activities undertaken by a party in direct contravention of its terms, but also making it a violation to "assist, encourage, or induce, directly or indirectly, anyone to engage in activities prohibited to Parties under this Convention." The underlying policy of the Draft Convention clearly is to obligate a party to abide by its terms in the broadest possible circumstances, but the terms of the proposal itself do not state whether it would apply beyond the territory of a party.

Nor can the question of whether the Draft Convention would apply extraterritorially to the foreign subsidiaries of American firms be definitively answered using principles of international law, due to the unsettled state of the law in this area. Under the so-called "territorial principle" the United States would appear not to have jurisdiction over any firm located outside of its territory. The "nationality principle," however, creates the possibility that the United States could permit special on-site inspections of foreign subsidiaries of American chemical firms or government contractors, presuming there is no conflict with the law of the nation in which the firm is located. The nationality principle rationalizes the assertion of jurisdiction by a nation over its nationals, even when they

82. See Statement by the U.S. Representative, supra note 13, at 534, in which the American position on the Draft Convention is stated: "No imbalance in inspection obligations is either desired, intended, or contained. . . ."
83. Draft Convention, supra note 6, art I(d).
are located in other states. Indeed, a major use of the nationality principle is to regulate the conduct of foreign subsidiaries of American corporations, through such means as the antiboycott provisions of the Export Administration Act of 1979. An answer to the question of extraterritoriality in this field will have to await resolution of the issues surrounding the external reach of the U.S. Constitution, and the relationship of parent corporations to subsidiary corporations in transnational law, and is thus beyond the scope of this article.

D. Ad Hoc On-Site Inspections

Ad hoc on-site inspections are similar to special on-site inspections, but apply to different kinds of locations and facilities. The justification required for an ad hoc on-site inspection is identical to that for a special on-site inspection, but approval must be obtained from the Fact-Finding Panel, either by consensus or vote, before the inspection may take place. Moreover, the party to be inspected may refuse access, albeit only “for the most exceptional reasons,” and then only accompanied by a full explanation of the reasons for the refusal and a detailed, concrete proposal for an alternative means of resolving the concerns which gave rise to the request. Other features of ad hoc on-site inspections, such as the composition of the inspection team, are not specified.

Ad hoc on-site inspections apply to “any location or facility not subject to” systematic international on-site verification inspections or special on-site inspections. Thus, “locations or facilities” unrelated to chemical weapons production and unregulated by the government would be open to ad hoc on-site inspections. Even if the Soviet assertion that special on-site inspections would be visited only on government-owned

85. Marcuss & Richard, supra note 84, at 443. A corollary to the question of whether the United States could consent to on-site arms control inspections of a foreign subsidiary of an American firm is whether such a foreign subsidiary would be entitled to Fourth Amendment protection. While the Fourth Amendment certainly would protect an American citizen abroad from unreasonable searches by agents of the U.S. government under color of federal law, it is unclear whether this would extend to subsidiaries that are foreign citizens. Note, The Extraterritorial Application of the Constitution—Unalienable Rights?, 72 VA. L. REV. 649, 659-71 (1986).
86. Marcuss & Richard, supra note 84, at 444, 448-52. Generally, the antiboycott statute precludes persons subject to its jurisdiction from refusing to do business with anyone pursuant to an agreement with, requirement of or on request or behalf of a boycotting country. It also outlaws boycott-based refusals by such persons to employ any United States person because of race, religion, sex or national origin. Note, The Extraterritorial Application of the Constitution—Unalienable Rights?, 72 VA. L. REV. 649, 659-71 (1986).
87. Compare Draft Convention, supra note 6, art. X(1) with id., art. XI(1).
88. Id., art. XI(2)(b), Annex I, A(5).
89. Id., art. XI(2)(b).
90. Id., art. XI(2)(c).
91. Id., art. XI(1).
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firms\textsuperscript{92} is correct, privately owned firms would be subject to ad hoc inspections.\textsuperscript{93}

Guidelines have been proposed that would limit the reach of ad hoc on-site inspections.\textsuperscript{94} The criteria for determining whether to grant a request for an inspection would include whether it would "assist in determining the facts,"\textsuperscript{95} whether the locations to be inspected are carefully limited only to those relevant to the investigation,\textsuperscript{96} and whether the proposed inspection would "limit intrusion to the level necessary to determine the facts."\textsuperscript{97} The omission of such restrictions from the descriptions of the other two types of inspections suggests the breadth of the investigations pursuant to systematic and special inspections that is contemplated by the Draft Convention.

The Draft Convention embodies a very clear and emphatic set of policies requiring intrusive on-site verification inspections of any party. While the proposal was intended to be a preliminary draft subject to future negotiations, the Reagan Administration regards these policies as essential components of any future chemical weapons pact. Therefore, it is reasonable to assume the Draft Convention will become effective as proposed for purposes of an analysis of its constitutional implications in the United States.

II. The Fourth Amendment and On-Site Inspections Under the Draft Convention

The Draft Convention raises important constitutional questions because it would delegate on-site inspection responsibility—an investigative law enforcement function—to an international organization. Because the resolution by American courts of conflicts between treaties and the Bill of Rights has a sparse and checkered history,\textsuperscript{98} it is impossible to predict with certainty how these problems would be viewed by the judiciary. In an attempt to raise and define the issues, this section will analyze the U.S. court decisions that appear to provide the most relevant precedents.

Should an inconsistency between the Draft Convention and the Constitution be argued before a court, the terms of the Draft Convention make clear that the Constitution controls. Article XII obligates each party, \textit{inter alia}, to "take any measures necessary in accordance with its\textsuperscript{92} See supra text accompanying note 79.
\textsuperscript{93} Read broadly, private homes might be included as well.
\textsuperscript{94} Draft Convention, supra note 6, annex II, § B(H)(3).
\textsuperscript{95} \textit{Id.}, annex II, § B(H)(3)(b).
\textsuperscript{96} \textit{Id.}, annex II, § B(H)(3)(c).
\textsuperscript{97} \textit{Id.}, annex II, § B(H)(3)(d).
\textsuperscript{98} \textit{See generally} L. Henkin, \textit{Foreign Affairs and the Constitution} 251-70 (1972).
The real question is whether aspects of the Draft Convention are so inconsistent with the Constitution that this provision would have to be invoked—at potentially enormous political and jurisprudential cost.

A. Fourth Amendment Requirements

The key constitutional question raised by the Draft Convention is whether the Fourth Amendment forbids the on-site inspections that it contemplates. The Fourth Amendment 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.\(^99\)

If on-site inspections under the Draft Convention violate the Fourth Amendment, those subject to inspection might be able to obtain relief from a federal court to prevent such an inspection from taking place.

The formulation usually cited by the Supreme Court in its contemporary Fourth Amendment decisions\(^100\) is Justice Harlan's concurring opinion in *Katz v. United States*.\(^101\) Justice Harlan stated: “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.'”\(^102\) Where these requirements are met, the protections of the Fourth Amendment are triggered.\(^103\)

The protections provided by the Fourth Amendment apply to businesses as well as to individuals in their homes. In *California v. Ciraolo*,\(^104\) the Supreme Court affirmed that the inside of a home is the place “where privacy expectations are most heightened.”\(^105\) The Court has held it to be a “‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”\(^106\) The Court has also interpreted the Fourth Amend-

\(^99\) Draft Convention, *supra* note 6, art. XII (emphasis added); cf. Reid v. Covert, 354 U.S. 1, 17 (1957) (“This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”) (footnote omitted).

\(^100\) U.S. Const. amend. IV.

\(^101\) See, e.g., California v. Ciraolo, 106 S. Ct. 1809, 1811 (1986).


\(^103\) *Id.* at 361.

\(^104\) *Id.*

\(^105\) 106 S. Ct. 1809.

\(^106\) *Id.* at 1812.

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ment to mean that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." Thus, inspections of commercial property pursuant to the Draft Convention must meet the standards that the Supreme Court has developed to determine the reasonableness of such official entries.

The Supreme Court has adopted the general rule that a valid search warrant is a necessary prerequisite to a constitutionally valid search. The justification for this rule is that search warrants may only be issued by a magistrate, who interposes a neutral review process between the government agency seeking the inspection and its subject. Central to this review process is the requirement that the government prove to the magistrate that "probable cause" exists.

The primary Fourth Amendment problem created by the Draft Convention is that it does not provide explicitly for the procurement of search warrants prior to on-site inspections. The language of the Draft Convention is explicit regarding procedures for initiating an inspection, and offers no opportunity for the U.S. Government to obtain a search warrant from an American magistrate before the representatives of the Consultative Committee would be entitled to carry out an inspection. Perhaps the unstated policy behind this is the Reagan Administration's insistence that on-site inspections take place on "short notice" and without interference by the party to be inspected. On-site

110. Camara, 387 U.S. at 532-33.
111. "[P]robable cause is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." Id. at 534.
112. The fact that these inspectors might be foreign citizens employed by an international organization probably would not relieve them of whatever responsibilities the Fourth Amendment otherwise would impose directly on federal employees, because their actions would occur under color of federal law with the active cooperation of the federal government. See Annotation, Application of Fourth Amendment Exclusionary Rule to Evidence Obtained through Search Conducted by Officials of Foreign Government, 33 A.L.R. FED. 342, 347-49 (1977).
113. Nor do the annexes to the Draft Convention imply that on-site inspections in the United States ordinarily would be preceded by a warrant. While mention is made in several places of restrictions on the time, place, and manner of inspections that should be the subject of future negotiations, see, e.g., Draft Convention, supra note 6, annex II, § B(H), the only provision that could reasonably be construed to allow for a warrant is Article XI(2)(c), which would allow a Party to refuse an ad hoc on-site inspection. In theory, the United States could seek a warrant for any location or facility sought to be inspected under Article XI, obtain a magistrate's decision within the requisite 24 hours of such a request by the Fact-Finding Panel, id., and refuse the inspection if the decision is unfavorable. However, this assumes congruence between the level of suspicion sufficient to trigger an ad hoc on-site inspection and the level of probable cause necessary to support a warrant.
114. The Vice President underscored the extraordinary nature of the on-site inspection provisions in stating:
inspections thus would have to qualify for an exemption from the Fourth Amendment's search warrant requirement.

The remainder of this section discusses how the on-site inspection provisions of the Draft Convention would stand up to a challenge alleging that a warrantless inspection pursuant to the Convention violates the Fourth Amendment. First, the outline of a hypothetical lawsuit to enjoin an on-site arms control inspection is considered, including whether a plaintiff could satisfy the demands of standing and justiciability. Second, I address the question whether on-site inspections pursuant to arms control treaties are generally exempt from the Fourth Amendment warrant requirement because they involve foreign affairs. Third, assuming that the Fourth Amendment does require a warrant prior to an on-site inspection under an arms control treaty, I examine the principles underlying the exemptions to the Fourth Amendment warrant requirement that are most likely to be asserted to justify the particular on-site inspections in the Draft Convention. Finally, I analyze each of the three types of on-site inspection contained in the Draft Convention using these principles to determine how a court might decide such a challenge.

B. Posture of a Hypothetical Suit to Enjoin an On-Site Arms Control Inspection

In our hypothetical lawsuit, a private chemical manufacturer seeks an injunction to prevent an on-site inspection. The broad proposition that private plaintiffs could challenge the reasonableness of on-site arms control inspections in federal court finds some support in Supreme Court precedent. If the courts would hear such suits, then plaintiffs who could prove that an on-site arms control inspection violated their Fourth Amendment rights could obtain either damages or an injunction.

This pledge to an "open invitation" for inspections is not made lightly. We make it because it is indispensable to an effective chemical weapons ban. The essence of verification is deterrence of violations through the risk of detection. The "open invitation" procedures will increase the chances that violations will be detected and the chances that, in the event of violations, the evidence necessary for an appropriate international response can be collected. That is the heart of deterring violations.

Address by Vice President Bush, supra note 10, at 303.


116. The Supreme Court, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), announced that damages are available to plaintiffs to compensate for violations of Fourth Amendment rights by agents of the federal government. The Court held, however, that damages would be available only to the extent that the individual plaintiff was hurt. The fact that constitutional rights, rather than mere common law or statutory rights, might be at the root of the action would thus not add to the compensation. Roth-
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Before a federal court would reach the remedy issue, however, the plaintiff would have to clear preliminary hurdles posed by the doctrines of standing and justiciability.\textsuperscript{118} The Court recently summarized, in \textit{Valley Forge Christian College v. Americans United for Separation of Church and State},\textsuperscript{119} its precedents on standing as requiring, “at an irreducible minimum,” a plaintiff “to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” . . . and that the injury “fairly can be traced to the challenged action” and “is likely to be redressed by a favorable decision.”\textsuperscript{120} A chemical manufacturer about to be inspected could allege that trade secrets or other confidential competitive information or processes to which the public is not permitted access might be compromised by the admission of foreign inspectors, and that this injury could only be prevented by enjoining the inspection.

\textsuperscript{117} In Marshall v. Barlow’s, Inc., 436 U.S. 307 (1978), the Court upheld the grant of an injunction against an attempted search that it found to contravene the Fourth Amendment. Injunctions have historically been a more likely remedy than damages in constitutional litigation. Rotenberg, \textit{supra} note 116, at 85. A plaintiff’s allegation that there is no adequate remedy at law for injuries inflicted by an unconstitutional search would be bolstered by the decision in Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982), which held that an injunction would lie against federal government disclosure of certain trade secrets. \textit{Id.} at 970. In Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986), the Court stated that “the right to be free of appropriation of trade secrets is protected by law.” \textit{Id.} at 1823.

In recent years, the Supreme Court has limited the injunction remedy by requiring plaintiffs to prove “great and immediate” harm in addition to the traditional requirement of demonstrating irreparable injury. City of Los Angeles v. Lyon, 461 U.S. 95, 106 (1983); see also Rotenberg, \textit{supra} note 116, at 85. It seems unlikely, however, that the notion of “special factors counselling hesitation in the absence of affirmative action by Congress” noted in \textit{Bivens}, 403 U.S. at 396, would be an obstacle to an injunction under current law because such a suit would not involve the creation of a new remedy; it would merely involve the application of a long-recognized remedy to a new fact situation. Nevertheless, it is possible that the Court would extend such an exception to obviate a suit like this one. \textit{Cf.} Bush v. Lucas, 462 U.S. 367 (1983) (judicial relief denied for violation of federal employee’s First Amendment rights where Congress has provided administrative forum).

\textsuperscript{118} \textit{See generally} Note, \textit{Congressional Nuclear Freeze Proposals: Constitutionality and Enforcement}, 23 \textit{Harv. J. on Legisl.} 483, 486-519 (1986). While it is unclear whether this hypothetical lawsuit would be ripe prior to the announcement that the plaintiff chemical manufacturer was to be the subject of an on-site inspection, \textit{cf.} Boyle v. Landry, 401 U.S. 77, 80-81 (1971), it is evident that once the decision to search its premises has been made, the dispute would be ripe for resolution. \textit{Cf.} Marshall v. Barlow’s, Inc., 436 U.S. 307.

\textsuperscript{119} 454 U.S. 464 (1982).

\textsuperscript{120} \textit{Id.} at 472 (citations and footnote omitted).
Such a claim would appear to meet the standing test set out in *Valley Forge*.121

The question of whether such a lawsuit would be justiciable is more difficult. The standard most often cited for determining what constitutes a non-justiciable political question is contained in *Baker v. Carr* :122

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.123

Several of the considerations noted in *Baker* suggest that our hypothetical case could involve a nonjusticiable political question. Foreign affairs has traditionally been considered an area in which Executive Branch power is preeminent, in part because of the importance of the U.S. government speaking with a single voice in international matters.124 It could be argued that merely hearing a claim to prevent the domestic enforcement of what the United States regards as an essential element of an arms control treaty could create “embarrassment”125 for the President. Furthermore, the inspection provisions of a chemical weapons treaty would presumably have been debated in the Senate prior to ratification. A “political decision” that such inspections were in the national interest would thus “already [have been] made”126 by the two branches charged

121. For example, it might be claimed that disclosure of trade secrets arising out of an inspection of the plaintiff chemical manufacturer would harm its competitive position, either in the domestic or the world market. Cf. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152 (1970).
122. 369 U.S. 186 (1962).
123. Id. at 217.
124. See Goldwater v. Carter, 444 U.S. 996, 1003-04 (Rehnquist, J., concurring) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936)). See generally Note, Whether the President May Terminate A Mutual Defense Treaty Without Congressional Approval Under the Constitution is a Non-Justiciable Political Question, 29 Drake L. Rev. 659 (1979-80). In *Dow*, however, the Court refused to approve a lower court injunction against aerial photography by an agency of the federal government that might record trade secrets, apparently because the Court was not convinced that the government would reveal them to competitors. 106 S. Ct. at 1823. The Court noted: “If the Government were to use the photographs to compete with Dow, Dow might have a Fifth Amendment ‘taking’ claim.” Id.
126. Id.
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with making and conducting foreign policy.\textsuperscript{127} Such a decision, on the sensitive issue of arms control, might be thought to engender an “unusual need” for Judicial Branch deference.\textsuperscript{128}

Other factors, however, suggest that our hypothetical case might be justiciable. The presence of a foreign affairs component in a lawsuit does not in itself require a court to invoke the political question doctrine in the face of a constitutional claim.\textsuperscript{129} Such a case would allege a violation of private rights that could not be remedied under present law outside the judiciary. This was exactly the factor noted by the plurality in \textit{Goldwater v. Carter} as distinguishing it from the kind of “dispute between coequal branches of government” that the four justices considered in that case to be non-justiciable.\textsuperscript{130} Thus, the outcome of a motion to dismiss because of non-justiciability would be uncertain. It will be assumed for the remainder of this article that such a motion would be rejected. It would be unwise to ignore the Fourth Amendment issues inherent in the Draft Convention based on such an unpredictable doctrine.

C. \textit{Foreign Affairs Exemption to the Fourth Amendment Warrant Requirement}

It is possible that searches under treaties generally are exempt from Fourth Amendment challenges to the absence of a warrant. Some early legal theories, and even language in early Supreme Court decisions, suggest that the Bill of Rights itself does not apply to treaties.\textsuperscript{131} Thus, before undertaking any analysis of how the Fourth Amendment warrant requirement applies to specific types of on-site arms control inspections

\textsuperscript{127} See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1951) (Jackson, J., concurring) (when the President acts pursuant to express congressional authorization, “his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate”).


\textsuperscript{129} Baker v. Carr, 369 U.S. at 211 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”). For a critique of the Court’s use of the political question doctrine in international law, see Lobel, \textit{The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law}, 71 \textit{Va. L. Rev.} 1071 (1985): “In general, judicial review should be available for challenges to executive or congressional actions that violate fundamental international law norms. . . . The attempts to justify a blanket rule of judicial abstention on international law challenges to foreign policy are ill-conceived. . . .” \textit{Id.} at 1166-67. Lobel considers “fundamental international norms” to be “the right to life, the prohibition of torture or inhuman or degrading treatment, the freedom from slavery, or the proscription on ex post facto laws.” \textit{Id.} at 1146. Lobel does not include the right to be free from unreasonable searches in this list.

\textsuperscript{130} 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring).

\textsuperscript{131} D. Aronowitz, \textit{Legal Aspects of Arms Control Verification in the United States} 18-19 (1965).
under the Draft Convention, it is necessary to consider whether it would apply to arms control treaties at all.

The Supreme Court has explicitly avoided ruling on whether a "foreign affairs exemption" exists to the search warrant requirements of the Fourth Amendment. Some lower courts, however, have analyzed this question in the context of searches of individuals. This subsection considers whether on-site inspections meet the tests these courts have used for exempting searches from the Fourth Amendment warrant requirement because they involve foreign affairs.

In *United States v. Truong Dinh Hung*, the Court of Appeals for the Fourth Circuit faced the question of whether extensive warrantless bugging and wiretapping by the U.S. Federal Bureau of Investigation (FBI) violated the Fourth Amendment. Truong Dinh Hung was suspected of transmitting classified documents to North Vietnamese diplomats during the Vietnam War. The court concluded that some, but not all, of the eavesdropping was constitutionally valid: "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance." In trying to limit the situations where warrantless foreign intelligence searches are constitutionally justified—compromising individual privacy only where absolutely necessary—the court decided that "[t]he [foreign intelligence] exception applies only to [surveillance of] foreign powers, their agents, and their collaborators. Moreover, even these actors receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution." Thus, the court in *Truong* recognized a limited foreign affairs exemption focused on preventing or punishing espionage.

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132. See, e.g., *United States v. United States Dist. Court for the E. Dist. of Mich. ex rel. Keith*, 407 U.S. 297, 321-22 (1972); *Chagnon v. Bell*, 642 F.2d 1248, 1259 (D.C. Cir. 1980) ("[I]t is plain that the Supreme Court in Keith left unanswered the question whether a foreign agent exception to the warrant requirement exists."); *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

133. 629 F.2d 908 (4th Cir. 1980).

134. *Id.* at 911-12. In *Chagnon*, the court considered the appeal of a civil suit for damages against the Attorney General of the United States arising out of the same facts as *Truong*, but filed by plaintiffs whose conversations with Truong had been overheard in the course of the wiretaps. 642 F.2d at 1253, 1255. The court held that "the acts of the Attorney General were protected by the doctrine of qualified immunity," *id.* at 1266, and affirmed the judgment of the lower court granting the defendant summary judgment. *Id.* at 1251.

135. 629 F.2d at 914 (citations omitted).

136. *Id.* at 916.
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In *Zweibon v. Mitchell*,\(^ {137}\) the District of Columbia Circuit considered whether damages were owed to American citizens because their telephones had been extensively wiretapped without a warrant by the FBI. The purpose of the surveillance was to obtain advance knowledge of both peaceful demonstrations and violent attacks aimed at Soviet offices in New York City.\(^ {138}\) In a lengthy plurality opinion, the court rejected the arguments advanced by the Attorney General for a foreign affairs exemption to the Fourth Amendment warrant requirement.\(^ {139}\) Although acknowledging that its decision turned on the basic question of "whether a warrant requirement will better protect Fourth Amendment rights when foreign intelligence gathering is involved, and whether such a requirement would unduly fetter the legitimate functioning of the Government,"\(^ {140}\) the court decided that the government's arguments "do not suggest that the warrant procedure would actually fetter the legitimate intelligence gathering functions of the Executive Branch."\(^ {141}\) In rejecting the warrant exemption in this case, the court stressed that the Americans whose telephones were tapped were not connected with the foreign government. The plurality opinion emphasized that "[i]t would indeed be anomalous to allow the Government to engage in warrantless surreptitious surveillance of activity, which would otherwise remain private and protected, merely because another government is antagonized by such activity."\(^ {142}\)

Because on-site inspections under an arms control treaty would share elements crucial to the reasoning in both *Truong* and *Zweibon*, it is difficult to predict whether a court would hold such searches exempt from the warrant requirement of the Fourth Amendment. It could be argued that, like the foreign intelligence surveillance at issue in *Truong*, on-site inspections can only be controlled as a practical matter by the Executive

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\(^ {138}\) *Zweibon I*, 516 F.2d at 605, 608-10.

\(^ {139}\) *Id.* at 669-70. Six of the eight judges who heard this case agreed with this holding. In *Chagnon*, 642 F.2d at 1248, the District of Columbia Circuit characterized its earlier holding in *Zweibon I* as restricting the potential reach of the foreign agent exception by explicitly eliminating from its purview surveillance aimed at individuals or domestic organizations not acting on behalf of a foreign power. The *Zweibon I* court never squarely ruled that the putative foreign agent exception to the warrant requirement does not exist.

*Id.* at 1259 (footnote omitted).

\(^ {140}\) *Zweibon I*, 516 F.2d at 633.

\(^ {141}\) *Id.* at 651.

\(^ {142}\) *Id.* at 653.
Branch because of their international sensitivity. Indeed, it may well be that a treaty incorporating on-site inspections would be breached in the view of other signatories if a proposed inspection in the United States required pre-inspection review in an American court to determine whether a warrant would issue. Since termination of such a treaty under these hypothetical circumstances would close the door to reciprocal inspections by the United States of the other signatories, even a court following Zweibon might have to recognize that this would fetter the ability of the Executive Branch to gather intelligence about the activities of those foreign governments.143

On the other hand, the court in Truong only contemplated a foreign affairs exemption that embraced people suspected of conspiring with foreign governments. On-site inspections pursuant to arms control treaties are premised on the concern that the subjects of those inspections might be acting secretly in concert with their own governments, and against the interests of the foreign government seeking an inspection—the opposite of what is normally considered to be espionage. Those few cases that discuss a possible foreign affairs exemption to the Fourth Amendment are thus easily distinguished on their facts from our hypothetical. Therefore, it cannot be assumed that a court would refuse to enjoin a warrantless on-site arms control inspection because it involves foreign affairs.

D. "Pervasively Regulated Industries" Exemption to the Fourth Amendment Warrant Requirement

Assuming that the Fourth Amendment warrant requirement does apply generally to on-site inspection by foreigners pursuant to an arms control treaty, it is possible that an independent exemption might exist based on the nature of the subjects of the inspection.144 Perhaps because the

143. See New Jersey v. T.L.O, 469 U.S. 325, 340 (1985) (no warrant requirement for school officials searching schoolchildren "when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.' " ) (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33). In O'Connor v. Ortega, 107 S. Ct. 1492 (1987), the Court added that each "particular class of searches" implies its own standard of reasonableness. Id. at 1499.

144. The Supreme Court has discussed two other possible exemptions. In Camara, 387 U.S. 523 (1967), the Court recognized an "emergency situations" exemption, such as the need to seize unwholesome food, vaccinate against smallpox, or implement a health quarantine. Id. at 539 (citations omitted). Similarly, in Michigan v. Tyler, 436 U.S. 499 (1978), the Court held that a burning building created "an exigency of sufficient proportions to render a warrantless entry [by firefighters] 'reasonable.' " Id. at 509. Since the possible violation of a treaty would not appear in itself to threaten public safety in such a direct manner, it does not seem likely that a reviewing court would find the emergency situations exception applicable to on-site arms control inspections. Moreover, the "exigency" that might be claimed to justify warrantless on-site inspections under the Draft Convention is one that would be created by the time limits in the treaty itself, rather than something inherent in the threat posed to society by
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Court has not interpreted the Fourth Amendment to protect commercial property from government searches to the same extent as private homes.\(^1\)\(^\text{14}\)\(^\text{5}\) The Court has found the constitutional leeway to create an exemption from the Fourth Amendment warrant requirement where the firm being searched is "pervasively regulated."\(^1\)\(^\text{14}\)\(^\text{6}\) Since the Reagan Administration appears to base its assertion that private American chemical companies could be inspected under the Draft Convention on the fact that the chemical industry is "heavily regulated,"\(^1\)\(^\text{14}\)\(^\text{7}\) it is fair to assume that the federal government would seek to justify all three types of inspections by asserting that the firms are pervasively regulated in the constitutional sense.

*United States v. Biswell*\(^1\)\(^\text{14}\)\(^\text{8}\) illustrates that the pervasively regulated industries exemption is best viewed as the result of an implied social bargain.\(^1\)\(^\text{14}\)\(^\text{9}\) In *Biswell*, a pawn shop dealer who was licensed to sell sporting chemicals was convicted of selling a weapon to a person under 21 years of age. The court held that the dealer was engaged in a "social bargain" with the government to sell weapons in exchange for a license to operate the pawn shop. The court noted that the dealer was subject to the same regulations as other pawn shop dealers, and that the regulation was necessary to ensure the safety of the public.

The second exemption is the so-called "routine inspection" exemption. In *Michigan v. Tyler*, 436 U.S. 499, the Supreme Court considered whether a fire department should have obtained a search warrant to reenter a burned-out building over two weeks after extinguishing the blaze in order to investigate the possibility of arson. Id. at 511. In its opinion, the Court distinguished between the kind of "programmatic" searches typified by routine building inspections and searches like the instant case, which it characterized as "responsive to individual events." Id. at 507. Whereas constitutional reasonableness can be achieved in routine searches by the "broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections," id., investigatory fire searches were found to be sufficiently focused that they justified the requirement of a warrant so that a magistrate could balance the "need for the intrusion on the one hand, and the threat of disruption to the occupant on the other." Id. The Court thus indicated that a heavier constitutional burden faces the government when it seeks to search without a warrant based on suspicion of some criminal wrongdoing than when it seeks to perform a routine search. Id. See generally Note, *Administrative Agency Searches Since Marshall v. Barlow's, Inc.: Probable Cause Requirements for Nonroutine Administrative Searches*, 70 GEO. L.J. 1183 (1982) (detailed discussion of different implications under Fourth Amendment of routine and nonroutine searches) [hereinafter Note, *Administrative Agency Searches*].


147. See *supra* note 80 and accompanying text.


149. The term "social bargain" means an unstated agreement between a citizen and the government in which the citizen is permitted to carry on certain activities that otherwise would be prohibited, in return for accepting restrictions on the enterprise that would be inappropriate for most undertakings. Such social bargains are often struck to enable citizens to conduct activities that are unusually hazardous, but from which society as a whole benefits; the additional regulation that is extracted in return by the government is intended to provide society with a greater degree of protection than it would otherwise be entitled to receive. The term "social contract" is not used in order to avoid the many philosophical controversies that it engenders, although the notion of a social bargain is not unlike a social contract writ small. Compare J. RAWLS, A THEORY OF JUSTICE 16, 112 (1971), with Lyons, *Nature and Soundness*
weapons under the Gun Control Act of 1968\textsuperscript{150} was convicted of the illegal possession of two sawed-off rifles. The weapons were discovered by a Treasury Department agent during a surprise warrantless inspection which was specifically authorized by the Act.\textsuperscript{151} The Court upheld the constitutionality of the conviction, stating that close scrutiny of [firearms] traffic is undeniably of central importance to federal efforts to prevent violent crime . . . and inspection is a crucial part of the regulatory scheme. . . . It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.\textsuperscript{152}

The Court analyzed Biswell's reasonable expectations of privacy as though he had entered into an agreement with the government when he obtained his federal license to sell guns. In return for the license, the Court found that he had implicitly acceded to a greater level of government intrusion than an unregulated line of business might involve. When the Court balanced these limited privacy expectations against the great value of warrantless searches in uncovering violations of the law, it had "little difficulty" determining that the intrusion was constitutional despite the absence of a warrant.\textsuperscript{153}

In \textit{Marshall v. Barlow's, Inc.},\textsuperscript{154} the Supreme Court further developed this social bargain theory by attempting to establish the point at which a business becomes a party to the imputed agreement. The Court faced the question whether the scheme of random warrantless administrative inspections created by the Occupational Safety and Health Act of 1970 (OSHA) satisfied the Fourth Amendment. On one extreme, the Court noted, are businesses like firearms dealerships, where the proprietor has "voluntarily chosen to subject himself to a full arsenal of governmental regulation."\textsuperscript{155} At the other end of the spectrum are those where the proprietor is "not engaged in any regulated or licensed business."\textsuperscript{156} Determination of where OSHA-regulated businesses fall on this regulatory

\textsuperscript{151} 406 U.S. at 311-13.
\textsuperscript{152} \textit{Id.} at 315, 316 (citations omitted).
\textsuperscript{153} \textit{Id.} at 317.
\textsuperscript{154} 436 U.S. 307 (1978).
\textsuperscript{155} \textit{Id.} at 313.
\textsuperscript{156} \textit{Id.}
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continuum required the Court to scrutinize "the degree of federal involvement in employee working circumstances."\textsuperscript{157}

The Court noted that OSHA reached beyond pervasively regulated businesses, like those contemplated in \textit{Biswell}, to include "all businesses in interstate commerce."\textsuperscript{158} It concluded that none "but the most fictional sense of voluntary consent to later searches [can] be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce."\textsuperscript{159} The Court thus made clear that the nature of the business the government seeks to subject to a warrantless search must be such that its owner has, in effect, consented to such searches as a sort of regulatory cost of doing business.

The government argued that regulation of employee health and safety in all businesses operating in interstate commerce was pervasive because those firms with federal government contracts were already required, under the Walsh-Healy Act of 1936, to comply with restrictions involving a minimum wage and maximum employee work hours. The Court rejected this argument. Comparing the relatively short reach of the Walsh-Healy Act to the expansion in "specificity and pervasiveness that OSHA mandates," the Court concluded that the older statute had not "prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail."\textsuperscript{160} In short, the Court decided that federal regulation for limited purposes—minimum wage and maximum hours—does not amount to pervasive regulation for the broader purpose of dispensing with search warrants prior to OSHA inspections. Not all regulation is pervasive regulation.

In \textit{Donovan v. Dewey},\textsuperscript{161} the Court elaborated on the obligations of the federal government under the fictional social bargain it had created to justify warrantless searches of commercial property. The statute at issue in \textit{Dewey}, the Mine Safety and Health Act of 1977,\textsuperscript{162} provided for warrantless safety inspections of underground and surface mines.\textsuperscript{163} The plaintiff Secretary of Labor had appealed the denial of an injunction to prevent the president of a quarrying company from refusing to admit the Department's mine inspector.\textsuperscript{164}

\textsuperscript{157.} \textit{Id.} at 314.  
\textsuperscript{158.} \textit{Id.} at 313-14.  
\textsuperscript{159.} \textit{Id.} at 314.  
\textsuperscript{160.} \textit{Id.}  
\textsuperscript{161.} 452 U.S. 594 (1981).  
\textsuperscript{163.} 452 U.S. at 596.  
\textsuperscript{164.} \textit{Id.} at 597-98.
The Court reaffirmed that statutory inspection schemes could make warrants unnecessary in limited circumstances. At the same time, the Court warned that “warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.” The Court noted that its prior decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

The “certainty and regularity” of the inspection program, combined with the “notorious history of serious accidents and unhealthful working conditions” in the mining industry, tipped the balance between the mine operators’ privacy expectations and the enforcement needs of the statute in favor of the latter.

The Court considered three factors in deciding that the inspection program was sufficiently well-defined. First, inspections were conducted of all, rather than only some, of the subjects of the statute, and their frequency was specified in the statute. Second, the statute contained specific compliance requirements that were provided to each mine operator. Finally, a mine operator could deny entry to an inspector; the inspector then had to obtain an injunction in federal court against future refusals. In concluding that “the Act establishes a predictable and guided federal regulatory presence,” the Court set the standard for determining when warrantless searches of commercial property satisfy the Fourth Amendment’s pervasively regulated industries exemption.

165. Id. at 599-600.
166. Id. at 599 (citation omitted).
167. Id. at 600.
168. Id. at 603.
169. Id.
170. See id.
171. Id. at 603-04.
172. Id. at 604.
173. Id. at 604-05.
174. Id. at 604.
E. Analysis of the Constitutionality of On-Site Inspections Under the Draft Convention

Both the subjects and the breadth of inspections under the Draft Convention would differ among systematic international on-site inspections, special on-site inspections, and ad hoc on-site inspections. An application of the criteria developed by the Supreme Court to determine whether these warrantless searches would survive a Fourth Amendment challenge requires separate consideration of each type of inspection.

1. Systematic International On-Site Verification Inspections

Viewed through the lens of Biswell and Dewey, systematic international on-site verification inspections—even though warrantless—appear to comply with the Court's interpretation of the Fourth Amendment. Systematic international on-site inspections would take place at facilities and locations that have declared production and storage of chemical weapons. If they are privately owned, these entities, like those in Biswell, surely are on notice that they have entered a business that is heavily controlled by the federal government, and in which an urgent public interest demands in return a high level of governmental intrusion. Moreover, like the inspection scheme approved in Dewey, the Draft Convention gives very specific parameters regulating most of the occasions on which these kinds of inspections would take place. Although the Draft Convention also permits some random inspections of such firms, Biswell suggests that even surprise inspections of weapons manufacturers would not violate the Fourth Amendment. Finally, like the regulatory schemes in both Biswell and Dewey, the systematic international on-site verification scheme clearly would be central to the success of the treaty.

2. Special On-Site Inspections

If, as is assumed above, special on-site inspections apply to all U.S. chemical companies, regardless of whether they actually produce weapons, and all privately owned firms holding government contracts, the constitutionality of special on-site inspections is more questionable than that of systematic international on-site inspections. The Supreme Court decision in Dow Chemical Co. v. United States indicates that the chem-

175. See supra text accompanying notes 56-67.
176. See supra note 14 and accompanying text. In addition, it appears that the so-called "routine" exemption to the Fourth Amendment, as discussed by the Supreme Court in Michigan v. Tyler, 436 U.S. 499 (1978), would support warrantless systematic on-site inspections. See supra note 144.
177. See supra text accompanying notes 78-82.
The Dow case arose out of an investigation of the plaintiff chemical manufacturer by the U.S. Environmental Protection Agency (EPA). The EPA sought to determine whether the firm’s power houses were emitting excessive air pollutants. Acting without a warrant, the EPA hired an aerial photographer equipped with a $22,000 precision aerial mapping camera to take pictures of Dow’s premises. When Dow learned of the overflight, it brought suit against the EPA, seeking to enjoin the agency from “disseminating, releasing or copying the photographs already taken.”

The Court held that the overflight was not a search and a warrant was therefore unnecessary. The opinion, however, reviewed the constitutional standards for warrantless searches of commercial property and concluded: “Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that that expectation is one society is prepared to observe.”

While the Court was referring to a single litigant in a dispute over a domestic environmental statute—and not the entire chemical industry in the context of a major arms control treaty—this language directly contradicts the position of the U.S. Representative to the Conference on Disarmament that the chemical industry is so extensively regulated that it should be considered “government controlled.” To the extent that special on-site inspections permit warrantless entries into chemical man-

179. The Supreme Court’s decision in Tyler, 436 U.S. 499, would seem to argue against warrantless special on-site inspections. See supra note 144.
180. 106 S. Ct. at 1828 (Powell, J., dissenting).
181. Id. at 1822 (citation omitted).
182. Id. at 1827.
183. Id. at 1825 (citation omitted). The dissent agreed with the majority that a warrant would be required to search the interior of Dow’s buildings. Presenting a more detailed discussion than the majority of the reasons why the exemption for pervasively regulated industries did not apply in this case, the dissent emphasized that “the exception is based on a determination that the reasonable expectation of privacy that the owner of a business does enjoy may be protected by the regulatory scheme itself.” Id. at 1830-31 (Powell, J., dissenting) (citation omitted). Cf. Note, Administrative Searches—The Ninth Circuit Expands the Closely Regulated Industry Exemption to the Fourth Amendment, 1985 ARIZ. ST. L.J. 973 (fishing vessels subject to warrantless on-site inspections in order to determine whether porpoises were being killed illegally).
184. See supra text accompanying note 80.
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manufacturing plants that are otherwise uninvolved in the chemical weapons industry, Dow suggests that they would be unconstitutional.

Even if the language quoted above from Dow is discounted as dictum, the pervasive regulation exemption to the warrant requirement may require expansion to encompass special on-site inspections. In both Biswell and Dewey, the pervasive regulation justifying warrantless searches was of activities directly in the line of business of the firms being inspected, and was created in the federal statute authorizing such inspections as a response to the nature of those activities. In contrast, the pervasive regulation that is asserted to support warrantless special on-site inspections is said to exist already, by virtue of other, presumably unrelated, federal laws.185

But since many chemical factories, such as pesticide or fertilizer producers, have no connection to chemical weapons manufacturing, they might not be considered to be on notice for constitutional purposes of on-site inspection for chemical weapons involvement. The Court in Barlow's did not decide whether pervasive regulation in one area would justify warrantless inspections for other purposes. However, its refusal to premise a determination that all employers in interstate commerce are pervasively regulated on a federal regulatory statute that, on its face, affected only government contractors strongly implies that pervasive regulation in one area does not necessarily amount to pervasive regulation for all possible governmental purposes. Therefore, a reviewing court would have to decide whether the exemption requires some nexus between the policy goals of the pervasive regulation and those said to justify the warrantless inspections.

Even if some or all of the chemical industry were found to be pervasively regulated, the almost complete absence of parameters in the Draft Convention governing the conduct of warrantless searches might be constitutionally fatal. Unlike the regularly scheduled safety inspections that the Court approved in Dewey, special on-site inspections may be as frequent or infrequent as the needs of the individual members of the Fact-Finding Panel require. Moreover, the Draft Convention does not give the subjects of those inspections any right to refuse entry; the easy access to federal court which the statute in Dewey provided186 would be unavailable. Special on-site inspections thus appear to suffer from being potentially "so random, infrequent, or unpredictable"187 that the federal government would be unable to live up to its obligations under the im-

185. Id.
186. See supra text accompanying note 173.
plied social bargain that the Supreme Court has constructed to justify warrantless searches of pervasively regulated businesses.

3. Ad Hoc On-Site Inspections

If special on-site inspections are of dubious constitutionality, ad hoc on-site inspections are surely constitutionally deficient. The best argument for the constitutionality of ad hoc on-site inspections is that they are not really warrantless searches at all because the Fact-Finding Panel must approve a party's demand prior to such a search.\textsuperscript{188} It could be asserted that this process provides an effective substitute for a neutral review of proposed searches as contemplated by the Fourth Amendment.\textsuperscript{189} In any case, the U.S. representative could always veto an unreasonable inspection.\textsuperscript{190}

Supreme Court precedent concerning the separation of powers, however, provides little support for the proposition that an international organization could sufficiently simulate the constitutional protections afforded Americans by the federal judiciary. As early as 1803, the Court declared in \textit{Marbury v. Madison}:

Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . . It is emphatically the province and duty of the judicial department to say what the law is.\textsuperscript{191}

As recently as 1974, the Court added, in \textit{United States v. Nixon}:

Notwithstanding the deference each branch must accord the others, the judicial power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.\textsuperscript{192}

A Court that is unwilling to permit decisions interpreting the U.S. Constitution to be made by other branches of our own government seems unlikely to allow that power to be delegated to an international Fact-

\textsuperscript{188} See supra text accompanying note 88.
\textsuperscript{189} See supra text accompanying notes 109-111.
\textsuperscript{190} See supra text accompanying note 90.
\textsuperscript{191} 5 U.S. (1 Cranch) 137, 167, 177 (1803).
\textsuperscript{192} 418 U.S. 683, 704 (1974).
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Finding Panel, whose only American representative would presumably be a diplomat serving at the pleasure of the President.\textsuperscript{193}

Even if an international organization could be empowered to evaluate the reasonableness of on-site arms control inspections under the U.S. Constitution, the review process contemplated for ad hoc on-site inspections in the proposed Chemical Weapons Treaty would probably be inadequate. Most important, although the U.S. representative could exercise veto power over any proposed inspection, the Fact-Finding Panel on which the representative serves would be constituted as part of a law enforcement agency with a mission to “promote the verification of compliance with the Convention.”\textsuperscript{194} This would create in the U.S. representative exactly the same kind of conflict of interest that the Supreme Court has recognized as leading to bias on the part of domestic police in favor of searches.\textsuperscript{195} In \textit{Katz v. United States},\textsuperscript{196} the Court noted:

\begin{quote}
the Constitution requires “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .” “Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,” and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are \textit{per se} unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.\textsuperscript{197}
\end{quote}

The Fact-Finding Panel could not be expected to offer the type of protection against unreasonable searches provided by a court.

If review by the Fact-Finding Panel is not an effective substitute for a warrant, then ad hoc on-site inspections suffer deficiencies similar to those discussed above surrounding special on-site inspections. Because ad hoc on-site inspections would apply to all “locations or facilities” not covered by special on-site inspections, the subjects of ad hoc on-site inspections would not be entities manufacturing or storing chemical weapons,\textsuperscript{198} nor would they be under government control. Surely such enterprises could not be on notice that being \textit{uninvolved} in the chemical weapons industry makes them fair game for warrantless searches to assure U.S. compliance with a chemical weapons treaty. Finally, even if a court were somehow to find that the firms to be inspected under this provision are pervasively regulated, ad hoc on-site inspections are no

\begin{itemize}
\item \textsuperscript{193} Compare \textit{Katz v. United States}, 389 U.S. 347, 359-60 (1967) (Douglas, J., concurring) with \textit{id.} at 362-64 (White, J., concurring).
\item \textsuperscript{194} Draft Convention, \textit{supra} note 6, art. VII(2).
\item \textsuperscript{195} \textit{Johnson v. United States}, 333 U.S. 10, 13-14 (1948).
\item \textsuperscript{196} 389 U.S. 347 (1967).
\item \textsuperscript{197} \textit{Id.} at 357 (citations and footnotes omitted; ellipses and brackets in original).
\item \textsuperscript{198} \textit{See supra} text accompanying notes 91-93.
\end{itemize}
more certain or regular than are special on-site inspections. Such searches would stand an even slimmer chance of surviving constitutional scrutiny where the contemplated search is of a "location or facility" that is not commercial property.

III. Minimizing Potential Fourth Amendment Conflicts

The preceding section establishes that under existing law, systematic international on-site verification inspections are probably compatible with the Fourth Amendment. The constitutionality of special on-site inspections is uncertain, however, and it is unlikely that an ad hoc on-site inspection of certain facilities apparently covered by the Draft Convention would survive a Fourth Amendment challenge. If a U.S. court enjoined the inspection process after the treaty had been ratified, the

199. Ad hoc on-site inspections resemble the general warrants that the King of England relied upon to search the businesses of colonists before the Revolutionary War. It was the reaction to such warrants that gave rise to the Fourth Amendment:

An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.

The Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance...[that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.

200. A court is even less likely to approve ad hoc on-site inspections if the Draft Convention is read to include private homes among the "locations or facilities" they could reach. See supra note 93 and accompanying text. In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court declared:

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.... The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589-90; see also Camara v. Municipal Court, 387 U.S. 523 (1967) (Fourth Amendment warrant requirement includes administrative searches of homes). The sorts of "exigent circumstances" that can justify a warrantless search include "violence, ... [a] movable vehicle, ... an arrest or imminent destruction, removal, or concealment of the property." United States v. Jeffers, 342 U.S. 48, 52 (1951). This definition implicitly assumes a case-by-case judicial analysis of the facts of each search. The idea of an entire new category of warrantless home searches is thus directly at odds with Fourth Amendment jurisprudence.
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international consequences could be significant. It is therefore appropriate to analyze whether more constrained methods of arms control verification would be more likely to clear the Fourth Amendment hurdle, as well as whether government contracts or statutes could be changed to avoid conflict between the right to be free from warrantless searches and the national interest in mutually verifiable arms control agreements. This analysis could assist verification not only of a chemical weapons treaty, but of agreements limiting nuclear and conventional weapons as well.

A. Remote Monitoring as an Alternative to On-Site Inspections

In *Dow Chemical Co. v. United States* the Court held that “the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.” The Court thus opened the door to verification methods that are not searches under the Fourth Amendment—methods that would not even raise the question of whether warrants are needed.

The question in *Dow* was whether the company’s outdoor plant site was entitled to Fourth Amendment protection from government surveillance using professional aerial photography equipment. Characterizing the dispute as line-drawing between the outdoor areas that are entitled to “much the same kind of privacy as that covering the interior of a structure” and those that are “open fields” which “do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from governmental interference or surveillance,” the Court emphasized that “[w]hat is observable by the public is observable without a warrant, by a Government inspector as well.” Noting the large size of Dow’s site, the firm’s failure to shield its structures from aerial viewing, and the fact that the photographs were taken from public airspace where any airplane traveler could have viewed the facility, the Court was not persuaded by the company’s assertion of a privacy interest.

201. This analysis, of course, does not imply that these methods could suffice to verify a given arms control treaty. That is a political and technical matter, as well as a legal one. This section merely suggests approaches that maximize the constitutional acceptability of verification.


203. 106 S. Ct. at 1827.

204. *Id.* at 1825.

205. *Id.* (citation omitted).

206. *Id.* at 1826 (citation omitted).

207. *Id.* at 1826-27.
The Court also devoted considerable discussion to the degree of technological sophistication of the airplane's photographic equipment:

Highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.208

Thus, it appears that the Court has indicated that it will not require search warrants under the Fourth Amendment where government aerial photographers are located in public airspace, the facility is open to public view, and the photographs taken lack a high degree of detail.

It seems apparent from this decision that any area to which the public generally has access would be a constitutionally appropriate place to locate remote sensing devices. Under this test, a satellite would arguably be an acceptable place from which to conduct arms control verification. While it is true that the opinion in Dow singled out satellite technology as a government surveillance technique that might be viewed as a search within the meaning of the Fourth Amendment, one can imagine future public access to orbital space comparable to that available today to airplane travelers. More important, the Court in Dow appears to have been more concerned about the intrusive sensing devices than can secretly be carried on board satellites than with the location of the satellites themselves.

The opinion establishes a standard by which to evaluate whether a given sensing device is sufficiently intrusive so that its operation would amount to a search under the Fourth Amendment. In comparing the operation of the aerial camera in Dow to the human eye, the Court identified human senses as the benchmark for making this determination. The Court was willing to tolerate a sensing device that would provide substantial enhancement of human vision,209 although it indicated that it would review future cases in terms of how far beyond ordinary perceptual abilities the sensing device in question extended. Since machines presumably can be designed to be incapable of picking up the breadth of information that a human being can extract from a given situation, this approach may permit relatively powerful remote monitoring devices to

208. Id. (footnote omitted).
209. Id. at 1829 (Powell, J., dissenting).
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survey commercial property without crossing the Fourth Amendment threshold.

Yet the opinion in *Dow* seems anomalous in equating "highly sophisticated surveillance equipment not generally available to the public"210 to devices that would intrude on a reasonable expectation of privacy. The intrusiveness of mechanical devices can be thought of as being comprised of two elements: sensitivity and selectivity. Sensitivity is "the ability of the output of a device or system to respond to an input stimulus."211 Selectivity, in this context, is the ability to receive some signals while rejecting others.212 A device that is sensitive but not selective is generally more intrusive than one that is both sensitive and selective because the unselective device will detect a wider range of data than its selective counterpart. For example, a microphone that picks up a broad spectrum of sound (i.e., is relatively unselective at a given decibel level) is more intrusive that one which only picks up high-frequency sounds (i.e., is relatively selective).

Devices that closely emulate the human senses may be more intrusive than those that are more selective, even if the more selective devices also are more sensitive. This is because a device designed so that it selectively detects only evidence of a violation of the law could not gather the breadth of wholly irrelevant data that a more human-like instrument could collect from the same scene. Since Supreme Court precedent implies that no reasonable expectation of privacy inheres in evidence of illegal conduct,213 a perfectly selective device could be constitutionally unintrusive, where an unselective device resembling human senses would invade privacy. For example, if one can imagine a machine with the ability to detect and measure from an airplane in very small concentrations the extent of the supposed air pollutants that the EPA sought to locate in *Dow*—and only those pollutants—Dow Chemical Company would have had a less compelling claim that the data thus gathered compromised its privacy than it had regarding the photographs in issue in the case. The photographs depicted the air pollution plumes at the factory site similarly to the way a person with especially good eyes would see them from an airplane, along with all kinds of information pertaining to

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210. *Id.* at 1826.
212. More precisely, selectivity is "the ability of a radio receiver to separate a desired signal frequency from other signal frequencies some of which may differ only slightly from the desired value." *Id.*, *Selectivity*, at 243.
213. *Cf.* California v. Ciraolo, 106 S. Ct. 1809, 1812-13 (1986); Oliver v. U.S., 466 U.S. 170, 182 n.13 (1984) ("Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post ‘No Trespassing’ signs.").
trade secrets. Our hypothetical air pollution detector, in contrast, would only have revealed data on one aspect of the operations (albeit in more detail), in which a reasonable expectation of privacy would be much more difficult to contrive. Thus, instruments designed to be more selective than the equivalent human senses might pose less of a threat to Fourth Amendment values.\(^{214}\)

However, such selective devices may be both more sophisticated and less available to the public. Not only can selectivity sometimes be an expensive and difficult attribute to produce, but this characteristic may limit the size of the economic market for its use. Thus, few people may come into contact with such advanced devices, but, contrary to \textit{Dow}, they may be less intrusive than unselective and more commonly available counterparts. A more precise formulation of what the Court in \textit{Dow} seems to have intended would take account of the fact that technical sophistication does not always amount to intrusiveness.

\textit{Dow} creates the possibility that using remote monitoring instruments to verify arms control treaties may pass constitutional review where on-site inspections could not.\(^{215}\) Since the major Soviet objection to on-site inspections has been fear that such visits would be used for intelligence gathering, selective remote monitoring devices may be greeted with a great deal less trepidation.\(^{216}\) These devices could pave the way for an internationally acceptable means of treaty verification by allaying Soviet fears of espionage as well as complying with Fourth Amendment restrictions against government intrusion.

\section*{B. Contractual Consent to Special On-Site Inspections}

While federal government contractors are a small subset of the firms that would be subject to special on-site inspections under Article X of the Draft Convention,\(^{217}\) modifying the treaty proposal to include only federal contractors might avoid the problem of relying on the “pervasive regulation” exemption to justify some of the contemplated warrantless on-site inspections. It is possible that contractors could be explicitly required to consent to such searches under the terms of any contract they


\(^{216}\) See Adam, \textit{supra} note 5, at 44.

\(^{217}\) Article X subjects to special on-site inspection all “facilities controlled by the Government of a Party.” See \textit{supra} text accompanying notes 75-82.
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enter into with the federal government. This subsection will analyze whether the Constitution erects a barrier to requiring such consent as a condition of contracting with the government, as well as whether a court is likely to find consent in existing government contracts.

In *Zap v. United States*, the Supreme Court decided that a government contractor could waive its Fourth Amendment right to protection from warrantless searches. The petitioner's contract with the U.S. Navy included a clause permitting the government to inspect his accounts and records. When government agents subsequently began a warrantless audit of his records, Zap protested the search. These records were crucial to the government's case against him for presenting false claims, and Zap moved to suppress the evidence the warrantless search provided. Holding that the search was valid, the Court stated: "[W]hen petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." The Court thus looked to the terms of the contract to determine whether the contractor had consented to the warrantless search, and did not even require that the waiver of Fourth Amendment rights be explicit.

Furthermore, the federal government can demand commitment to a contract clause that is itself unrelated to the goods or services being provided under the contract. *Fullilove v. Klutznick* tested the constitutionality of a federal statute requiring that a percentage of all government funds for public works construction projects be awarded to minority business enterprises. The decision stressed:

Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.

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219. 328 U.S. at 627.

220. *Id.* at 624.

221. *Id.* at 628.

222. 448 U.S. 448 (1980).

223. *Id.* at 474 (citations omitted).
The Court concluded that the goal of expanding minority access to federal funds in this manner is a valid exercise of the Congressional Spending Power because Congress is empowered to regulate minority subcontracting by private government contractors directly, even without resort to a contract clause.\textsuperscript{224}

Requiring waiver of Fourth Amendment protections against warrantless on-site verification inspections as a condition of contracting with the government would go beyond the kind of contract clause approved in either \textit{Zap} or \textit{Fullilove}. First, it would be a contract term unrelated to the performance of the contract itself, thus requiring a court to extend the holding in \textit{Zap} to embrace searches beyond the scope of the “business documents related to those contracts.”\textsuperscript{225} Second, it would require the waiver of a constitutional right, a situation which \textit{Fullilove} did not present. Indeed, it might be argued that \textit{Fullilove} is distinguishable because Congress might not be empowered directly to legislate the warrantless inspection of government contractors, as it could the racial subcontracting practices of public works contractors. Whether the Court would be prepared to combine the holdings in \textit{Zap} and \textit{Fullilove} to approve warrantless special on-site inspections of government contractors remains to be seen.

\textit{Snepp v. United States}\textsuperscript{226} suggests that the national security implications of an arms control treaty might bridge this gap. In \textit{Snepp}, the Court faced a dispute between the U.S. Central Intelligence Agency (CIA) and former agent Snepp. After resigning his position, Snepp wrote a book about the CIA which he refused to submit to the CIA for prepublication review as required by his employment contract.\textsuperscript{227} The Court held that the damages due to the CIA for breach of the contract should include the profits from the sale of the book,\textsuperscript{228} and reaffirmed the Court of Appeals finding that the contract was valid even though it restricted his First Amendment right to free speech.\textsuperscript{229} The Court noted the government’s “compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service,” and found that “the agreement that Snepp signed is a reasonable means for protecting this vital interest.”\textsuperscript{230}

\textsuperscript{224} \textit{Id.} at 475-76.
\textsuperscript{225} 328 U.S. at 628.
\textsuperscript{226} 444 U.S. 507 (1980) (per curiam).
\textsuperscript{227} \textit{Id.} at 507-08.
\textsuperscript{228} \textit{Id.} at 516.
\textsuperscript{229} \textit{Id.} at 509 n.3.
\textsuperscript{230} \textit{Id.} (citation omitted).
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Requiring consent to warrantless special on-site inspections as a condition of contracting with the government has a much more tenuous relationship to most government purchases than the relationship between the condition in Snepp's contract and his employment. It can be inferred from this decision, however, that the national security interest in arms control would be a powerful argument in favor of the constitutionality of such contractual conditions. This analysis suggests that a consent clause could probably be constitutionally included in government contracts.

Assuming that some kind of clause consenting to special on-site inspections can constitutionally be included in government contracts, it seems unlikely that the government could rely on the inspection clauses in existing contracts. A similar problem was at issue in Bowsher v. Merck & Co., Inc.\(^{231}\) In Bowsher, the U.S. General Accounting Office (GAO) sought access to confidential cost records of a pharmaceutical firm which sold goods to the federal government under a contract containing statutorily-required clauses "granting the Comptroller General the right to examine any directly pertinent records involving transactions relating to the contract."\(^ {232}\) The Supreme Court upheld the plaintiff pharmaceutical firm's refusal to grant the requested access because the records contained "indirect costs" such as research and development expenses. These expenses were deemed to be separate from costs related to the particular contracts.\(^ {233}\) The opinion noted that the purpose of the statute requiring the inclusion of the contract clause in question was "to assess the reasonableness of the prices paid by the Government and to detect inefficiency and wastefulness."\(^ {234}\) The Court concluded that in enacting this law, "Congress was apparently willing to forgo the benefits that might be gained from permitting the GAO broad access to the contractor's business records in order to protect those contractors from far-reaching government scrutiny of their nongovernmental affairs."\(^ {235}\) If the Court was not persuaded to interpret the statute in question to allow a U.S. agency—which was empowered to look at the records of direct costs attributable to the government contracts at issue—to examine indirect cost records, it is unlikely that the Court would interpret analogous government contracts\(^ {236}\) to allow the agent of an international organization the kind of free reign contemplated by special on-site inspections in

\(^{231}\) 460 U.S. 824 (1983).
\(^{232}\) Id. at 827-28.
\(^{233}\) Id. at 840-841.
\(^{234}\) Id. at 843.
\(^{235}\) Id. at 842.
\(^{236}\) See, e.g., 48 C.F.R. § 52.246-8(c) (1986). This section sets out a standard contract clause to be included in cost reimbursement contracts for research and development under the Federal Acquisition Regulations System, and states, inter alia:
the Draft Convention. It is therefore prudent to assume that a clause expressly granting such consent would be required.

C. Minimizing Fourth Amendment Problems By Statute

If remote means of treaty verification cannot be found that eliminate the need for intrusive on-site inspections, and a need is found to inspect firms other than those that would consent to warrantless searches in order to do business with the federal government, an alternative means of minimizing the possibility of a wrenching constitutional challenge might be through new federal legislation limiting remedies for Fourth Amendment violations so as not to defeat the purposes of the Draft Convention’s on-site inspections. This analysis first requires an understanding of the extent to which such a convention would entail separate federal legislation to implement its provisions. Following this discussion, I explore possibilities for a federal statute whose specific goal would be to define remedies for Fourth Amendment violations that would not undermine the purposes of on-site inspection.

The question of whether an arms control treaty would be self-executing, i.e., would not require passage of a separate federal statute to implement its provisions, is important for determining how to structure the remedies that might be available for Fourth Amendment violations arising out of on-site inspections of private firms. If the Draft Convention is non-self-executing, then a political forum involving both Houses of Congress is guaranteed for debating and deciding the proper outcome of the conflict between the need for on-site inspections and the constitutional right to be free from unreasonable searches. On the other hand, if the Draft Convention is self-executing, then affirmative Congressional action beyond the treaty ratification process would be required to legislate a resolution of this potential dispute.

The test for determining whether a treaty is self-executing is not well defined. The overriding consideration is said to be the intent of the parties to the agreement, although treaty language often omits any statement in this regard. However, when a treaty requires the United

The Government has the right to inspect and test all work called for by the contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or its subcontractors engaged in the contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

238. For example, the United States Senate could express a reservation that such a treaty would not take effect until the enactment of implementing legislation. Id. at 159.
239. See id. at 158.
240. See id.
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States to perform a future act—especially one generally accepted as requiring explicit Congressional action, such as appropriating funds, enforcing a criminal law, or declaring war—then implementing federal legislation is a prerequisite.241

Viewed in this rather diffuse light, it appears that the on-site inspection provisions of the Draft Convention, or any other arms control treaty granting foreign parties a similar right to conduct on-site inspections, would be self-executing. First, while the text of the Draft Convention does not specifically state whether it is to be self-executing,242 the on-site inspection provisions do not require the United States to perform future acts in this country; rather, they confer rights on other parties. Second, the obligations that would be imposed on the United States are not among those that are generally accepted as requiring explicit congressional action. Third, the subject matter involves both national security and foreign affairs, where the power of the President is at its zenith. It is fair to assume that any federal legislation to mitigate the potential conflict between the on-site inspection provisions in the Draft Convention and the Fourth Amendment would have to be initiated in Congress, apart from the ratification process itself.

A federal statute intended to mitigate constitutional conflict between the Fourth Amendment and on-site arms control inspections would have to limit the availability of injunctions to prevent an unconstitutional inspection pursuant to a treaty. If a statute were to make damages the only available remedy, then the federal government could simply “buy itself out”243 of the potential embarrassment of a federal court enjoining an international organization from carrying out the terms of an arms control treaty. Such a statute, if constitutional, would largely resolve the problems identified above. This section analyzes whether such a limitation on remedies would be constitutionally acceptable.

It is important at the outset to distinguish between denial of court jurisdiction to hear a constitutional claim and limitation of the available remedies. No statute that purported to eliminate court jurisdiction to


242. The text of the Draft Convention offers little support for either position. Article XII requires each Party to “take any measures necessary in accordance with its constitutional processes to implement this Convention.” Draft Convention, supra note 6, art. XII. But the very question that must be decided to determine whether the Draft Convention would be self-executing is what the constitutional test mandates.

hear a plaintiff's claim seeking relief from alleged unconstitutional conduct could be expected to be upheld.\textsuperscript{244} Congress, however, is empowered by the Constitution to legislate new remedies to constitutional violations.\textsuperscript{245} In \textit{Aetna Life Ins. Co. v. Haworth},\textsuperscript{246} the Supreme Court wrote:

In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict.\textsuperscript{247}

Thus, Congress has broad power to enact a federal statute providing other remedies besides injunctions for the putative victims of unconstitutional on-site arms control inspections.

One possible approach would be to amend the Federal Tort Claims Act.\textsuperscript{248} At present, this statute provides for recovery of damages for \textit{Bivens}-type constitutional violations from "investigative or law enforcement officers of the United States government."\textsuperscript{249} However, by its terms, it might not apply to employees of the Technical Secretariat. Therefore, this statute could be changed to provide explicitly for recovery of damages for unconstitutional on-site arms control inspections.

The harder question is whether the power to provide such new remedies carries with it the authority to eliminate injunctive relief at the same time. The Court has repeatedly stated that the availability of a damages remedy under the \textit{Bivens} doctrine\textsuperscript{250} may be limited by Congress.\textsuperscript{251} In \textit{Bush v. Lucas},\textsuperscript{252} which denied the plaintiff a damages remedy, the Court presented its most recent discussion of how it would approach the issue of statutory limitation of remedies:

When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even

\begin{itemize}
  \item 244. \textit{See, e.g., Redish & Woods, supra} note 115, at 76-81.
  \item 245. \textit{See Dellinger, supra} note 243, at 1543-52.
  \item 246. 300 U.S. 227 (1937).
  \item 247. \textit{Id.} at 240 (citations omitted).
  \item 249. 28 U.S.C. § 2680(h) (Supp. 1987); \textit{see also} Carlson v. Green, 446 U.S. 14, 19-20 (1980).
  \item 250. \textit{See supra} note 116.
  \item 252. 462 U.S. 367 (1983).
\end{itemize}
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by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.\textsuperscript{253}

The Court openly invited Congress to substitute its own remedy for unconstitutional conduct in place of those remedies the judiciary would otherwise provide.

\textit{City of Los Angeles v. Lyons}\textsuperscript{254} indirectly suggests that this deference to Congress might translate into a willingness to uphold a statute depriving plaintiffs of the right to obtain an injunction against an unconstitutional on-site inspection. In \textit{Lyons}, the Court held that the plaintiff did not have standing to obtain an injunction against the Los Angeles Police Department's practice of using chokeholds during routine arrests.\textsuperscript{255} While the decision did not actually reach the question of the appropriate remedy, the tone of the Court's opinion reveals no particular attachment to injunctions as a remedy.\textsuperscript{256} For example, the Court emphasized that a damages remedy would sufficiently deter future unconstitutional conduct even if injunctive relief were unavailable.\textsuperscript{257}

Nevertheless, the outcome of a constitutional challenge to a statute eliminating injunctive relief cannot be guaranteed. Neither \textit{Bush} nor \textit{Lyons} is directly on point. In addition, the view that the remedy for a constitutional violation can be determined exclusively by Congress is disputed by a number of commentators, who have argued that the Constitution independently obligates the judiciary to select the most appropriate remedy for a constitutional violation, regardless of what Congress may legislate.\textsuperscript{258} Therefore, developing a federal statute to defuse the

\textsuperscript{253.} Id. at 378.
\textsuperscript{254.} 461 U.S. 95 (1983).
\textsuperscript{255.} Id. at 105-110.
\textsuperscript{256.} See Rotenberg, supra note 116, at 102-03 (discussing how the Court in \textit{Lyons} might have fashioned an injunction in this case had it chosen to do so).
\textsuperscript{257.} Id. at 112-13.
\textsuperscript{258.} See, e.g., Steinman, Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights, 83 Mich. L. Rev. 269 (1984):

If plaintiff is afforded a remedy under the legislative scheme, then the court should independently determine whether the remedy adequately vindicates plaintiff's constitutional rights. ... [I]f an individual's constitutional rights have not yet been violated, but the risk to him is sufficiently great that he meets the requirements of standing, a case or controversy, and the like, the relief afforded should take the form of prospective relief. A legis-
ated remedy not 'facing in the right direction' would be constitutionally inadequate. Id. at 283 (emphasis in original; footnotes omitted); Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 85 (1981) ("[F]orbidding the federal courts to issue all constitutionally adequate remedies for a particular category of claims raises serious problems. ... [T]he court in ques-
constitutional confrontation inherent in on-site inspection schemes would require great care.\textsuperscript{259}

Moreover, it remains to be seen whether Congress would vote to approve such a statute. The restriction of remedies for constitutional violations has aroused considerable Congressional controversy in the context of proposals to alter the exclusionary rule, to curtail federal court enforcement of prohibitions on prayer in public schools, and to prevent federal courts from restricting state abortion regulatory laws.\textsuperscript{260} The private firms whose right to injunctive relief would be limited could be expected to resist. Thus, while the Court has indicated a willingness to entertain statutory remedies for constitutional violations that substitute for those that the judiciary might otherwise provide, Congress may be unwilling to approve them in the first place.

A bill to validate warrantless on-site arms control inspections might stimulate a searching inquiry into the entire subject. In view of the importance of on-site inspections both to national security and to constitutional jurisprudence, the public debate this could engender would be valuable. A decision on how best to balance these important concerns should be made with the broadest possible input.

\textbf{Conclusion}

On-site arms control inspections are a double-edged shield. They may offer greater assurance that the parties to an arms control treaty are complying with the treaty's provisions. At the same time, however, they increase the risk of intrusion into the privacy of those to be inspected.

\textsuperscript{259} Rotenberg, \textit{supra} note 116, at 108-09, suggests: The Court needs to rethink the role of Congress concerning private remedies for constitutional wrongs. Ideally, the Court should protect remedies from congressional restrictions—whether they take the form of jurisdictional, substantive right, or remedy limitation. . . . The suggested limitation on Congress is only directed to its power to reduce private remedies below a due process minimum of appropriate relief. It is conceivable, therefore, that Congress could legislate appropriate relief in such a way that the Supreme Court would defer to congressional judgment in establishing an orderly remedial package.

\textsuperscript{260} See \textit{supra} sources cited in note 258.
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The Draft Convention on the Prohibition of Chemical Weapons, proposed by the United States in 1984, includes on-site inspection provisions that raise serious Fourth Amendment questions. Insofar as the draft treaty language, the proposed annexes, and contemporary statements by American officials do not mention that obtaining a search warrant is a precondition for carrying out any of the three types of inspection which would be permitted, it must be assumed that the treaty does not intend to require search warrants. Thus, if the Draft Convention were to be ratified, its terms would not contemplate that a U.S. court could interpose the neutral review process ordinarily required by the Fourth Amendment prior to forced entry of private American commercial property by officials of an international organization.

It is possible that the Fourth Amendment warrant requirement would not be an obstacle to such a treaty because searches involving foreign affairs may be exempt from the usual warrant requirement. This difficult issue has been explicitly avoided by the Supreme Court, and the lower courts that have addressed it have split over how to strike the balance between the deference due the Executive Branch in matters involving foreign affairs and the privacy rights of citizens. If the Draft Convention enters into force, a reviewing court could be faced with the unpalatable choice of approving wide-ranging warrantless inspections by foreigners, or ruling that the key enforcement mechanism of an arms control treaty is unconstitutional.

Another exemption developed by the Supreme Court to permit warrantless searches of commercial property requires that the firms subject to inspection be part of a "pervasively regulated" industry. The case law in this area indicates that the determination of whether a given industry is pervasively regulated requires consideration of whether a social bargain can be implied between the federal government and the industry, in which the industry is regarded as having consented to warrantless inspections as a regulatory cost of doing business. Under this exception, the government inspections must be carried out pursuant to a carefully delineated inspection scheme embodied in law, which assures that inspections are both certain and regular.

Two of the three types of on-site inspections contained in the Draft Convention appear to be constitutionally defective under the pervasively regulated exemption to the Fourth Amendment warrant requirement. While the test for pervasive regulation appears to be met by the firms that would be subject to systematic international on-site verification inspections, the same cannot be said for those that would be searched under the Draft Convention's special and ad hoc on-site inspection provi-
sions. Language in *Dow Chemical Co. v. United States*261 contradicts the notion put forward by American officials that special on-site inspections of the domestic chemical industry would be permissible because the industry is heavily regulated. The case against ad hoc on-site inspections is even stronger because the subjects of these inspections would be those least involved in the chemical weapons industry. Moreover, special and ad hoc on-site inspections are consciously designed to permit open-ended inspections on "short notice," and are neither certain nor regular.

Two methods of arms control verification suggested in this article could help avoid these legal problems. First, remote monitoring conducted from areas to which the general public has access with instruments that are not intrusive appears to be a promising starting point. Remote monitoring might have the added advantage of accommodating Soviet worries about espionage. Second, it is likely that federal government contractors could legally be induced to consent to on-site inspections in their contracts with the government, although this is more problematic with existing contractors insofar as their old contracts would probably require modification.

It is also time to recognize that effective arms control verification will require public involvement. If on-site inspections are a desirable form of verifying future treaties, then their impact on American society and business should be understood and evaluated by elected officials. Indeed, the Supreme Court may be more likely to uphold an on-site inspection scheme if Congress has carefully considered and approved—even if it has chosen to limit—the remedies that could be obtained for unreasonable searches. Therefore, federal legislation should be drafted detailing how such inspections should be carried out and outlining the remedies available in lawsuits contesting the constitutionality of on-site inspections.

As the nations of the world grow more interdependent, it is inevitable that the United States will face difficult choices between the benefits of international accord and the unique protections provided by the Constitution. This analysis demonstrates that even the most universally sought goal may pose contradictions that our form of government is hard-pressed to resolve. Realistic expectations and public debate are the most promising tools to put to the task.

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