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THE CONSTITUTION AND ON-SITE INSPECTION

Kevin C. Kennedy*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const. amend. IV

The executive Power shall be vested in a President of the United States of America . . . . [H]e shall take Care that the Laws be faithfully executed . . . .

U.S. Const. art. II, §§ 1 & 3

I. INTRODUCTION

After years of thrust, feint, and parry,¹ an agreement between the United States and the Soviet Union banning all intermediate-range and short-range nuclear weapons was signed by President Reagan and General Secretary Gorbachev in Washington on December 8, 1987.² Besides eliminating an entire category of nuclear weapons for the first time ever, the United States and the Soviet Union will also introduce an unprecedented innovation in arms control verification measures: intrusive, on-site inspection (OSI).³ Although for some time OSI seemed little more

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1. See S. Talbott, Deadly Gambits 21-208 (1984). (Since the inception of nuclear weapons, the United States and the Soviet Union have attempted to gain the upperhand in the struggle for nuclear weapon supremacy).


3. N.Y. Times, Dec. 9, 1987, at 10-12. See Dean, Military Security in Europe, 66 Foreign Aff. 22, 25 (1987) [hereinafter Dean], where the author comments that “the verification measures which the Administration has proposed — and which the U.S.S.R. seems likely to accept — . . . will break new ground in allowing on-site inspection . . . . With that new ground broken under the INF agreement, the author foresees that its stringent verification requirements should open the way for measures to verify reduction of conventional forces as part of a future Mutual and Balanced Force Reductions agreement between NATO and the Warsaw Pact.” Id. at 35.

The Soviet Union has accepted one other on-site monitoring provision to date, that being the Treaty on Peaceful Nuclear Explosions (PNE) concluded in 1976. Article IV of the PNE Treaty authorizes temporary, on-site inspection of peaceful nuclear explosions; however, the Soviet Union has never declared an intention to conduct the type of explosion that would trigger such inspection. See Utgoff, On-Site, Automated Monitoring: An Application for Reducing the Probability of Accidental Nuclear War, in PREVENTING

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than a stalking horse in the intermediate-range nuclear force (INF) talks, in the end OSI became the centerpiece verification measure in the INF treaty. In a dramatic break from past practice, compliance with an INF treaty will thus be verified by methods other than national technical means (NTM) of verification enshrined in SALT I and SALT II. With the stroke of a pen the Soviet Union and the United States have repealed decades of history by authorizing reciprocal on-site verification.

Considering the high probability that OSI will re-emerge as an issue in future arms control negotiations involving other weapon systems, the issue of OSI transcends the INF negotiation.

Nuclear War 126, 127 (B. Blechman ed. 1985) [hereinafter Utgoff].

4. See N.Y. Times, Dec. 9, 1987, at 24; see also Christian Sci Monitor, Oct. 22, 1987, at B (“[Secretary of State] Shultz indicated that differences remain with the Soviets over the process of destruction of the INF warheads and the inspections that would be permitted in order for both sides to verify the treaty.”). The disagreements identified by some sources included “the amount of time that can elapse between the moment either side demands the right to make an inspection and the time their inspectors are actually permitted access to the sites they want to examine . . . , how many people may perform an inspection, and which side will provide air transport to the inspection site.” Christian Sci. Monitor, Nov. 6, 1987, at 7, col. 1.

5. “National technical means of verification” euphemistically refers to satellite reconnaissance, radars, and other information collection techniques short of espionage and on-site inspection.


The subject of on-site inspection has been broached on other arms control fronts as well. For example, in negotiations to eventually conclude a comprehensive test ban treaty, negotiators have floated a trial balloon of placing one country's seismic sensors at the other country’s nuclear test sites to monitor compliance with such a treaty. W. Rowell, Arms Control Verification, A Guide to Policy Issues for the 1980s 59-60, 63 (1986) [hereinafter Rowell]. The negotiations for Mutual and Balanced Force Reductions (MBFR), begun in Vienna fourteen years ago to reduce the level of conventional forces of NATO and the Warsaw Pact, contemplate verification measures that include on-site inspections by an international consultative commission comprised of NATO and Warsaw Pact representatives. See Dean, supra note 3, at 30, 32. This commission, as envisioned by the Warsaw Pact, would “carry out on-site inspection of [force] reductions and supervise destruction of armaments.” Id. at 32. In addition, a U.S. draft chemical weapons treaty provides for on-site inspection. Rowell, supra at 33.

8. Id.; see Dean, supra note 3, at 25, where the author states that on-site verification
During the SALT I and SALT II regimes, it was a fortuitous coincidence that verification technology was adequate to monitor compliance without resort to intrusive on-site inspections. ICBM missile silos, nuclear-armed submarines, and intercontinental bombers were large enough to be monitored by reconnaissance satellites, radar, and other NTM technologies. The advent of more stealthy weapons technologies such as the cruise missile tremendously complicate the verification picture, particularly when such weapons have both a conventional and nuclear capability, as does the cruise missile. The advanced technology or "stealth" bomber, the Midgetman mobile missile, and the recently deployed Soviet SS-24 mobile ICBM are other examples of emerging, and in the case of the SS-24 already deployed, weapon systems that will impede the arms control negotiation process even further because of the extreme difficulty of verifying compliance with any treaty which places limits on or bans such weapon systems. In the opinion of some, these new technologies spell the end to arms control. More optimistic appraisals of the future of arms control conclude that verification technologies will keep pace with weapons systems. But even the most ardent arms control advocates recognize that such weapons technologies herald a new era in which the now-familiar NTM verification regime will have to be supplemented to some extent by OSI.

The United States for some time stated that an INF treaty had to include monitoring provisions that go beyond NTM verification techniques to include OSI. Among the OSI measures to be introduced are initial on-site inspections at missile operating bases and missile support facilities, followed by short-notice (sixteen hour) challenge inspections at those installations for a measures made part of an INF treaty will not only break new ground but "will be worthwhile . . . for application to future arms control agreements." See also Nye, Farewell to Arms Control? 65 FOREIGN AFF. 1, 5 (1986) ("Verification provisions for mobile or cruise missiles will require cooperative measures that go beyond all precedent.").

9. See Christian Sci. Monitor, Oct. 22, 1987, at 8, col. 2 ("Shultz indicated that there are serious obstacles, especially the problem of verifying a strategic arms reduction ["START"] agreement. He said that verifying such an agreement will be 'vastly more complicated' than even an INF agreement.")


11. That their Soviet counterparts were prepared to do the same appeared equally true. See Mendelsohn, supra note 7, at 26, where Yuli Vorontsov, First Deputy Soviet Foreign Minister, is quoted as saying, "According to the U.S. proposal the inspectors will be sent only to the gates of the enterprises [where missiles are produced]. We propose that they should also be granted access inside the enterprise."
thirteen year period.\textsuperscript{12} Although OSI inspections will not include walk-throughs of private contractor facilities where INF missiles are stored, assembled, and manufactured, one private contractor facility, the Hercules Plant No. 1 in Utah, has been specifically identified in the INF treaty as the U.S. missile production facility to be continuously monitored under a perimeter inspection scheme.\textsuperscript{13}

While the Soviets have put their security obsessiveness on hold and have actually agreed to such intrusive verification measures, United States negotiators find themselves thrown on the horns of a dilemma. American negotiators must now shoulder the task of securing Senate approval of an arms control treaty that is arguably “adequately” verifiable,\textsuperscript{14} but that is at the same time arguably at odds with the Constitution. In this latter con-

\begin{itemize}
  \item \textsuperscript{12} The on-site verification provisions were summarized in the N.Y. Times:
    
    Thirty days after the treaty goes into force, each party will have the right to conduct inspections at all missile operating bases and missile support facilities to verify the number of missiles, launchers, support structures and support equipment. These inspections shall be complete no later than 90 days after the treaty goes into force.
    
    For 13 years after the treaty goes into force, the parties shall have the right to inspect certain missile-production installations by means of continuous monitoring. Twenty such inspections per calendar year can be conducted in the first three years of the treaty, 15 per year for the next five years, and 10 per year in the last five years.

    N.Y. Times, Dec. 9, 1987, at 25. See Mendelsohn, \textit{supra} note 7, at 27. The author notes that State Department officials envisioned little need for OSI if both sides agreed to remove all intermediate-range and short-range nuclear missiles. \textit{Id.} at 28. Nevertheless, some OSI would still be needed, according to the State Department, in order to verify the baseline inventory of missiles, to monitor dismantlement and destruction of missiles, and to monitor “suspicious activities during and after the transition to zero.” \textit{Id.}


    14. For a discussion of the “adequate verification” standard and its various meanings, see Rowell, \textit{supra} note 7, at 82-91; Earle, \textit{Verification Issues from the Point of View of the Negotiator}, in \textit{Arms Control Verification, The Technologies That Make It Possible} 14-19 (K. Tsipis, D. Hafemeister, P. Janeway eds. 1986). For the evolution of the Soviet position on OSI, see Utgoff, \textit{supra} note 3, at 127; \textit{Christian Sci. Monitor}, Oct. 26, 1987, at 32, col. 5 (“The Soviets... agreed to allow up to 10 on-site inspections yearly, for the first five years of the [INF] treaty, of so-called ‘suspect sites’ — areas where either side suspects the other may have secreted missiles or continued to build weapons in violation of an INF treaty”); \textit{Christian Sci. Monitor}, Nov. 6, 1987, at 7, col. 1 (“The US was demanding 15 inspections a year for 10 years; the Soviets wanted 10 inspections a year for three years”); Mendelsohn, \textit{supra} note 7, at 26, where the author quotes General Secretary Gorbachev as stating, “Verification of the destruction or limitation of arms should be carried out both by national technical means and through on-site inspections.” \textit{See also} \textit{Library of Congress, Congressional Research Service, Verifying Arms Control Agreements: The Soviet View} (1987).
nection, OSI poses at least two constitutional problems. The first concerns the Fourth Amendment's prohibition against warrantless and unreasonable searches. Given the heavy involvement of the private sector in the development, testing, and production of nuclear weapons systems for the U.S. Department of Defense, a significant constitutional question is raised implicating the Fourth Amendment's prohibition against unreasonable searches. The incorporation of on-demand, on-site inspection provisions in an arms control treaty will make life very complicated for the Reagan administration.

A second constitutional problem stemming from on-demand is that OSI measures under either an INF or any other arms control treaty concerns the delegation of Executive Branch authority to agents of a foreign government to conduct warrantless, on-site inspections on U.S. territory. Inspections conducted by Soviet officials at private commercial premises located in the United States will be tantamount to the exercise of governmental authority within the United States by persons not officers or agents of the Executive Branch of the United States, thus raising an improper delegation issue. Is a search of private property by Soviet agents consistent with the Fourth Amendment? Is such a search consistent with Article II's requirement that the Executive Branch alone be responsible for ensuring that the laws of the United States are faithfully executed?

The following pages outline these two constitutional problems and discuss the thorny difficulties they pose for arms control negotiators generally. The Fourth Amendment question is considered first.

II. FOURTH AMENDMENT LIMITATIONS ON THE TREATY-MAKING POWER

To what extent is the treaty-making power of the United...
States limited by the Bill of Rights? The starting point for any such inquiry is, of course, Article VI of the Constitution, the Supremacy Clause, which provides in part, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”

At an early date arguments were advanced that treaties were not subject to any constitutional prohibitions or limitations on governmental power. This argument was premised on a very close reading of the text of the Supremacy Clause, where “Laws” have to be made pursuant to the Constitution, but where treaties are made under “the Authority of the United States.” In the view of some, this different textual treatment was not insignificant. Indeed, to many, this disparate treatment suggested that treaties were not subject to the restrictions on governmental power contained in the Constitution. Professor Louis Henkin has elaborated:

One can suggest reasons why the Framers might have intended not to subject treaties to any constitutional limitations. They might have thought that in its international relations the United States should be equal and sovereign, not hampered by restraints that limit what the federal government can do within the national family. It might have appeared particularly unacceptable that an individual be able to assert his particular grievance in order to have a treaty declared unconstitutional by the courts, frustrating important national interests and invite perhaps grave international consequences.

Notwithstanding this cogent argument for having a treaty-making power free of constitutional restrictions, the view that the treaty-making power is subject to constitutional limitations has prevailed. It first gained acceptance from the Supreme Court in *Geofroy v. Riggs*, where, in dicta, Justice Field stated that “[t]he treaty power . . . is in terms unlimited except by those restraints which are found in that instrument [the Constitution] against the action of the government . . . . It would not be contended that it extends so far as to authorize what the Constitut-

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17. U.S. Const. art. VI, § 2.
20. 13 U.S. 258 (1890).
tion forbids . . . ."21 It was not until 1957, however, that the Supreme Court squarely addressed and finally resolved this question.22 In Reid v. Covert,23 Justice Black stated unqualifiedly that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."24

Although the treaty-making power is subject to the Bill of Rights guarantees,25 Professor Henkin has written that “[e]ven the ‘preferred freedoms’ of the First Amendment . . . are not absolute but are ‘balanced’ against, and might be outweighed by, important public interests,”26 suggesting that the national interest in war and peace might be given conclusive weight in a legal contest between the First Amendment and an arms control treaty abridging the freedom of press. Regarding the Fourth Amendment prohibition against unreasonable searches, Professor Henkin has further concluded that “the national interest in maintaining an important disarmament system and in gaining inspection rights in other countries might render ‘reasonable’ some intrusive inspections of private establishments and records.”27 Under what circumstances Professor Henkin’s “might” becomes a “shall” is far from certain. It is clear, however, that the dimensions of the OSI scheme contemplated by the United States and the Soviet Union under an INF treaty runs up against the body of Fourth Amendment case law developed by the U.S. Supreme Court under the rubric “administrative searches.”

III. ADMINISTRATIVE SEARCHES UNDER THE FOURTH AMENDMENT

The protective sweep of the Fourth Amendment to the U.S. Constitution is broad, applying not only to searches and seizures intended to ferret out evidence of a crime but generally to any

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23. 354 U.S. 1 (1957). The Court issued no opinion. In delivering the judgment, Justice Black was joined by three other Justices, but none of the other Justices questioned his analysis.
24. 354 U.S. at 16.
25. Henkin, Foreign Affairs, supra note 18, at 254 (“In principle, then, the Bill of Rights limits foreign policy and the conduct of foreign relations as it does other federal activities.”)
26. Id. at 254-55 (footnotes omitted).
27. Id. at 255 (footnote omitted).
governmental intrusion on private property. Businesses as well as residences enjoy the protections of the Fourth Amendment. This was plainly acknowledged by the U.S. Supreme Court in See v. City of Seattle:

The 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. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

While recognizing that commercial establishments also come under the Fourth Amendment’s protective umbrella, the “probable cause” showing for issuing a warrant to conduct an administrative search is less stringent than the showing of probable cause required before a warrant will issue in a criminal context. Administrative search warrants may be issued, for example, authorizing an area search upon a showing that the condition of the entire area is in violation of some health or safety regulation. The issuance of administrative search warrants does not “depend upon specific knowledge of the condition of the particular dwelling,” thereby setting administrative search warrants apart from the specific, particularized probable cause showing required in order to obtain a search warrant in the criminal setting. The See decision, together with its companion case, Camara v. Municipal Court of San Francisco, thus greatly reduced the showing of probable cause needed to secure an administrative search warrant from that required in criminal cases. The Supreme Court added that since the controlling

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31. See Camara, 387 U.S. at 538-39.
32. Id.
33. Id.
34. 387 U.S. 523 (1967).
35. See HALL, supra note 28, at 357-58; Greenberg, The Balance of Interests Theory
standard is one of reasonableness, there is no constitutional prohibition against prompt, warrantless administrative inspections in emergency situations.\(^{36}\) Foreshadowing future case law developments, the Court also suggested in the See opinion that “accepted regulatory techniques [such] as licensing programs prior to operating a business” might escape the warrant requirement altogether.\(^{37}\)

Within five years of the Camara and See decisions, the contours of a “regulated industry” exception to the warrant requirement began to take shape, although this exception got off on a left-footed start. In Colonnade Catering Corp. v. United States,\(^{38}\) the Supreme Court struck down a warrantless search of a catering business by federal agents who had probable cause to believe that a violation of federal liquor laws had occurred there.\(^{39}\) Answering the question reserved in See whether warrantless searches of a licensed business were permissible under the Fourth Amendment, in a dissent, Chief Justice Burger noted that although they were dealing with the liquor industry, “long subject to close supervision and inspection,”\(^{40}\) Congress had not set a standard of reasonableness for searches and seizures that included forcible entries without a warrant.\(^{41}\) Instead, the Court found, Congress resolved the issue by making it an offense for a licensee to refuse entry to an inspector.\(^{42}\)

Two years after the Colonnade Catering decision, and in an apparent about-face, the Court handed down its decision in Biswell v. United States.\(^{43}\) In Biswell, the Court approved the warrantless search of business premises owned by a pawnbroker who was also a federally licensed gun dealer.\(^{44}\) The Court reasoned that “[w]hen 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 am-
munition will be subject to effective inspection."\(^{45}\)

The Colonnade-Biswell pronouncements on the regulated industry exception to the administrative warrant requirement received a resounding judicial imprimatur in 1981 in Donovan v. Dewey.\(^{46}\) In that case the Court was asked to pass on the constitutionality of section 103(a) of the Federal Mine Safety and Health Act of 1977\(^{47}\) which authorized warrantless mine inspections by federal inspectors at regular intervals to insure compliance with mine safety and health standards. In Dewey, a mine owner refused a federal inspector permission to complete his inspection of the owner’s mine without a warrant. On appeal the Supreme Court sustained the constitutionality of section 103(a)’s “right of entry to, upon, or through any coal or other mine” without any advance notice,\(^{48}\) against the challenge that it was violative of the Fourth Amendment prohibition against unreasonable searches.\(^{49}\) Writing for the Court, Justice Marshall first explained that the “[g]reater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home . . . .”\(^{50}\) Citing the Court’s Colonnade and Biswell decisions in support, and distinguishing the Court’s opinion in Marshall v. Barlow’s, Inc. where the Court invalidated a warrantless Occupational Safety and Health Act (OSHA) inspection scheme,\(^{51}\) Justice Marshall had no quarrel

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\(^{45}\) Id. at 316. Considering the factual similarity of Biswell and Colonnade Catering, the difference in results may be attributable to the change in Court personnel since the Colonnade decision. Joining the Court since Colonnade Catering were Justices Rehnquist, Blackmun, and Powell. See also Biswell, 466 U.S. at 318 (Douglas, J., dissenting).


\(^{48}\) Id.


\(^{50}\) Dewey, 452 U.S. at 598-99.

\(^{51}\) 436 U.S. 307 (1978). In that case, the Court invalidated a provision of the Occupational Safety and Health Act that permitted warrantless inspections of all commercial premises subject to OSHA requirements. Troubled by the sweeping coverage of that Act (generally applicable to businesses engaged in interstate commerce), coupled with its lack of standards to guide inspectors either in their selection of businesses to be inspected, the Court was compelled to conclude that that Act “devolves almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search.” 436 U.S. at 323. Accordingly, the Court concluded that a warrant was required in order to conduct an OSHA inspection, noting that some statutes “apply only to
with the reasons advanced by Congress for authorizing warrant­
less mine inspections. The mining industry being one of the
most hazardous in the United States, a system of warrantless
inspections was deemed necessary because advance notice of an
inspection would allow safety hazards to be concealed. Inspec­
tions would therefore fail as a deterrent. In addition, because
the Act was tailored to one industry and because the regulation
imposed was sufficiently pervasive, mine owners were on notice
that they would be subject to inspection. Moreover, in view of
the statutory requirement that all surface mines be inspected bi­
annually and that all underground mines be inspected four
times annually, “the Act establish[ed] a predictable and guided
federal regulatory presence, ... rather than leaving the fre­
quency and purpose of inspections to the unchecked discretion
of Government officers.” Accordingly, the Supreme Court en­
dorsed Congress’ broad power to authorize warrantless inspec­
tions of a closely regulated industry.

a single industry, where regulations might already be so pervasive that a Colonmade­
Biswell exception to the warrant requirement could apply.” Id. at 321. See Rader, OSHA
Warrants and Administrative Probable Cause, 33 BAYLOR L. REV. 97 (1981); Rothstein,
OSHA Inspections After Marshall v. Barlow’s, Inc., 1979 DUKE L.J. 63; Shipley, War­
nantless Administrative Inspections After Marshall v. Barlow’s, Inc., 40 OHIO ST. L.J. 81
(1979); Comment, Defining Contours of OSHA Inspection Warrants, 48 BROOKLYN L.
REV. 105 (1981); Comment, When Are Administrative Inspections Warranted? 50 U.
52. 452 U.S. at 602 n.7.
53. Id. at 602-03.
54. Id. at 603. “[I]t is the pervasiveness and regularity of the federal regulation that
ultimately determines whether a warrant is necessary to render an inspection program
reasonable under the Fourth Amendment.” Id. at 606.
56. In the course of the Dewey opinion the court intimated that persons doing busi­
ness in a pervasively regulated industry impliedly consent to warrantless searches of
their premises: “The Act itself clearly notifies the operator that inspections will be per­
formed on a regular basis. Moreover, the Act and the regulations issued pursuant to it
inform the operator of what health and safety standards must be met in order to be in
compliance with the statute.” 452 U.S. at 605. But see Collins & Hurd, Warrantless
(“such awareness is not the functional equivalent of implied consent because its source is
merely the adoption of the legislation, not the informed choice by one subject to the
legislation”).
Not surprisingly, one of the most highly regulated industries in the United States is
the nuclear power and materials industry. Congress has authorized the Nuclear Regula­
tory Commission to promulgate regulations providing for inspections of nuclear power
activities. 42 U.S.C. § 2201(o) (1982). The Commission has created a comprehensive in­
spection scheme permitting unannounced, warrantless facility inspections at reasonable
times. See 10 C.F.R. §§ 21.41, 21.51, 30.51-.53. 34.28. 40.61-.63, 50.70-.72, 60.71-.73,
71.62-.63, 75.42. At least one district court has sustained the validity of such unan-
The common theme for sustaining warrantless administrative searches in the administrative search decisions has been the "long tradition of close governmental supervision and inspection" which diminishes whatever reasonable expectations of privacy a business might have. "[A] business, by its special nature and voluntary existence," the Court has written, "may open itself to intrusions that would not be permissible in a purely private context." "Certain industries have such a history of government oversight," the Court has added, "that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." Thus, because of the pervasive governmental regulation of many businesses, the government has its thumb on the scales when courts are asked to strike the balance between the privacy interests of businesses and the government's need for conducting warrantless inspections. In *Marshall v. Barlow's, Inc.*, the Court explained that "[t]he reasonableness of a warrantless [administrative] search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." The upshot of the *Colonnade-Biswell-Dewey* line of cases is that warrantless searches are deemed by the courts to be more necessary, less intrusive, and thus less objectionable when conducted within closely regulated industries.

In short, the linchpins that emerge from these decisions for sustaining warrantless searches of heavily regulated industries are the certainty and regularity of such inspections. The requirement of certainty goes to a business owner's reduced expectation of privacy, thus validating a warrantless search. The requirement of regularity serves as a check on arbitrary searches by government officials. Nevertheless, while recognizing Congress'
broad power to regulate enterprises engaged in interstate commerce, the Court warned that inspections of commercial property may be unreasonable if "unnecessary for the furtherance of federal interests" or if their occurrence is "so random, infrequent, or unpredictable that the owner . . . has no real expectation that his property will from time to time be inspected by government officials."63

Against this backdrop, the following discussion examines the extent to which the U.S. defense industry fits under the "closely regulated industry" rubric.64

IV. A PROFILE OF THE U.S. NUCLEAR DEFENSE INDUSTRY

Considering the intimate link between U.S. national security and the activities of the U.S. defense industry, there can be little question that the U.S. defense industry falls squarely within the closely regulated industry exception to the administrative warrant requirement of the Fourth Amendment. In broad brush, the U.S. nuclear defense industry contracts with two Executive Branch departments, the Department of Defense (DOD), which oversees the design, testing, and manufacture of nuclear weapon delivery systems, and the Department of Energy (DOE), which supervises nuclear warhead design and production.65 The DOD and DOE work hand in glove, with the DOD setting the characteristics and requirements for nuclear warheads and the DOE meeting those specifications.66 Unlike the delivery systems which are in the main designed and manufactured at private contract facilities, nuclear warheads are designed, tested, and manufactured at U.S. government owned-contractor operated (GOCO) complexes.67 The rationale for GOCO complexes is that the Atomic Energy Act of 195468 classified as "Restricted

64. The only other industry that could lay claim to more pervasive government oversight is the nuclear energy industry.
66. Id. at 3.
67. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 5. The Atomic Energy Act of 1954, as amended, provides that the United States shall be the owner of all production facilities which produce special nuclear materials, such as plutonium and uranium 235. 42 U.S.C. §§ 2061(a), 2014(aa) (1982).
Data" to all information concerning the design or manufacture of nuclear warheads. To that end, all facilities involved in the development, testing, and production of nuclear warheads are owned by the United States.

Nuclear warhead components are manufactured at seven DOE-owned facilities. Seven private contractors currently operate at those seven facilities.

All contracts for the research, development, or production of “special nuclear material” (e.g., plutonium and uranium 235) must contain a provision submitting all activities of the contractor to inspection by DOE employees. The nuclear and non-nuclear components of a nuclear warhead are sent to the Pantex Plant near Amarillo, Texas, where final assembly of the warhead is done by the Mason & Hanger-Silas Mason Co. The complete disassembly of a nuclear weapon permanently withdrawn from the weapons stockpile also occurs at the Pantex Plant. The operations at the Pantex Plant would make it the object of special interest to Soviet on-site inspectors.

The thousand of contractors and subcontractors who design, test, and produce nuclear weapon delivery systems for the DOD stand in sharp contrast to the comparatively few contractors who perform similar functions for the DOE in nuclear warhead production. Despite the tremendous number of DOD contrac-

69. The Atomic Energy Act of 1954, as amended defines “Restricted Data” as all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy . . . .
70. See U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 146.
71. The seven weapons production facilities are the Rocky Flats Plant, Golden, Colorado; Y-12 Plant, Oak Ridge, Tennessee; the Savannah River Plant, Aiken, South Carolina; the Mound Facility, Miamisburg, Ohio; the Pinellas Plant, St. Petersburg, Florida; the Kansas City Plant, Kansas City, Missouri; and the Pantex Plant, Amarillo, Texas. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 12, Table 1.3.
72. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 28, Table 2.1
75. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 40.
76. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 40, 41.
77. See U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, Appendix A, for a list
tors and subcontractors, DOD contract performance at privately-owned facilities is closely regulated. For example, Congress has enacted provisions governing major weapon systems, such as those designed to deliver nuclear warheads, obligating defense contractors to guarantee design, manufacture, and performance requirements of the particular weapon system for which they are responsible. In addition, Congress has authorized plant inspections of all defense contractors performing under a cost or a cost-plus-a-fixed-fee contract. Of course, the

of all private contractors and subcontractors involved in nuclear warhead research, development, and production for the DOE.

78. See U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 146 (DOD contracts with “thousands of contractors and subcontractors producing components and integrated systems and providing services”). The defense contractors responsible for the development and production of the more important nuclear weapon delivery systems include Boeing and General Dynamics, both of which are responsible for developing and manufacturing the cruise missile; Northrop International and General Electric, which are responsible for developing the stealth bomber (known euphemistically as the advanced technology bomber or ATB); Martin Marietta, which is producing the MX missile; General Dynamics, which manufactures the Trident submarine; and Rockwell International, which is responsible for developing and manufacturing the offensive and defensive avionics for the B-1B bomber. See T. COCHRAN, W. ARKIN, M. HOENIG, NUCLEAR WEAPONS DATABOOK, U.S. NUCLEAR FORCES AND CAPABILITIES 124, 161, 162, 173 (1984) [hereinafter U.S. NUCLEAR FORCES AND CAPABILITIES]; C. CAMPBELL, NUCLEAR WEAPONS FACT BOOK 92-93, 104, 108-09 (1984).

It has been estimated that critical components of an intercontinental ballistic missile (e.g., high-precision gyroscopes, gas turbines, liquid-propellant rocket engines, airframes) are manufactured at some 200 plants within the United States. WIESNER, Inspection for Disarmament, in ARMS CONTROL: ISSUES FOR THE PUBLIC 4-7, 4-8 (L. Henkin ed. 1961). The number of plants in the United States with the potential for manufacturing such critical components was established to be about 70,000 in 1947. Id. at 4-8. In 1984 researchers for the Natural Resources Defense Council identified the following number of major contractors involved in the production of nuclear weapon delivery systems:

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<th>System</th>
<th>Number of Contractors</th>
</tr>
</thead>
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<tr>
<td>Minuteman II ICBM</td>
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<td>Minuteman III ICBM</td>
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<td>10 prime contractors</td>
</tr>
<tr>
<td>Pershing 111 Intermediate-Range Missile</td>
<td>5 prime contractors</td>
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</tbody>
</table>

U.S. NUCLEAR FORCES AND CAPABILITIES, supra at 113, 116, 124, 142, 161, 162, 173, 176, 289, 293. This list does not include the dozens of subcontractors involved in the manufacture of components for each of these weapon systems.

80. 10 U.S.C. § 2313(a). That section provides:

An agency named in section 2303 of this title [the Department of the
mere fact that Congress has authorized plant inspections of defense contractor facilities does not answer the question whether warrantless inspections are permitted. In Barlow’s, Inc., for example, Congress had given the Occupational Safety and Health Commission a comparably broad mandate to search business premises for health and safety violations hazardous to employees. Yet in Barlow’s, Inc., the Supreme Court struck down that authorization to the extent it purported to authorize warrantless inspections. The extent to which warrantless inspections may be conducted at defense contractor facilities is considered in the next part of the article.

V. WARRANTLESS SEARCHES AT DEFENSE CONTRACTOR FACILITIES

Given the highly regulated nature of the defense industry, coupled with the important national interest in successfully negotiating to conclusion and subsequently enforcing arms control treaties, are warrantless administrative inspections of defense contractor premises reasonable when conducted for the purpose of ensuring compliance with an arms control treaty? To the extent OSI entails verification that the fissile material is removed from a nuclear warhead and that the nuclear warhead is de-

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Army, Navy, and Air Force, inter alia] is entitled, through an authorized representative [emphasis added], to inspect the plant and audit the books and records of [such contractor].

See also 10 U.S.C. § 2406 (Supp. IV 196), requiring a defense contractor to make available “in a timely manner to any authorized representative of the head of an agency records of the contractor’s cost and pricing data . . . “

Of course, governmental functions are from time to time delegated to the private sector. For example, in Stauffer Chemical Co. v. E.P.A., 647 F.2d 1075 (10th Cir. 1981), a challenge was made to the Environmental Protection Agency’s interpretation of the Clean Air Act which provides that the Administrator of the EPA “or his authorized representative . . . shall have a right of entry” to conduct Clean Air Act inspections. 42 U.S.C. § 7414(a)(2). The Tenth Circuit held that private contractors hired by the EPA to conduct these inspections are not “authorized representatives” within the meaning of that Act. 647 F.2d at 1079. Contra Bunker Hill Co. Lead & Zinc Smelter v. E.P.A., 658 F.2d 1280 (9th Cir. 1981). See also United States v. Stauffer Chemical Co., 464 U.S. 165 (1984).

82. 436 U.S. 307, 325. If a defense contractor refuses access to its business records, a subpoena may be issued by the Director of the Defense Contract Audit Agency requiring production of such records. 10 U.S.C. § 2313(d)(1) (1985). A refusal to obey must then be enforced in an appropriate federal district court. Id. § 2313(d)(2). Conceivably, a defense contractor could move to quash the subpoena arguing that the request is overly broad or that the government must make some showing of cause. Compare Bowsher v. Merck & Co., 460 U.S. 824 (1983), where the Court concluded that the right of access to business records was not unlimited.
stroyed, such inspections would presumably take place at GOCO facilities where nuclear warheads are designed, tested, produced, and retired. Inspections at GOCO nuclear warhead facilities arguably present no Fourth Amendment issues insofar as searches of the facility, as opposed to searches of the person, are concerned for the simple reason that no private property interests are at stake. To the extent that private contractors operating at GOCO facilities have any colorable Fourth Amendment claim, it would seem limited to searches of the person. Even then, however, considering the extremely sensitive nature of the defense contracting work they perform, it might be fairly concluded that all contractor personnel have impliedly consented to searches once they enter a GOCO nuclear warhead facility. In view of the numerous decisions sustaining airport searches as implied consent searches, the rationale of those decisions would seem to apply a fortiori to GOCO nuclear warhead facilities.

In contrast with the DOE's close relationship with its private contractors, the DOD has entered into nuclear weapon defense contracts with thousands of defense contractors and subcontractors who perform much of their work at privately-owned facilities. Searches at privately-owned facilities raise at least two constitutional questions. The first turns on the regularity of such inspections, identified by the Supreme Court as being a critical check on arbitrary government inspections. On-demand, intrusive OSI without prior notice is deemed essential from a confidence-building perspective, given the considerable risks of speedy alteration or disguise. But while the element of surprise is critical to effective OSI, preserving that element is clearly at

83. U.S. NUCLEAR WARHEAD PRODUCTION, supra note 65, at 5.
84. See e.g., United States v. Clay, 638 F.2d 889 (11th Cir.), cert. denied, 451 U.S. 917 (1981); United States v. Legato, 480 F.2d 408 (9th Cir.), cert. denied, 414 U.S. 979 (1973). For a criticism of the implied consent theory when applied in the context of airport security searches, see 4 W. LAFAVE, SEARCHES AND SEIZURES § 10.6 (1987) [hereinafter LAFAVE].
85. Searches of civilians at military installations have been analogized to the airport search cases. See e.g., United States v. Miles, 480 F.2d 1217 (9th Cir. 1973). Searches at military installations have also been upheld on an implied consent theory. See e.g., United States v. Ellis, 547 F.2d 883 (5th Cir. 1977); United States v. Mathews, 431 F. Supp. 70 (W.D. Okla. 1976); See also United States v. Burrows, 396 F. Supp. 890 (D. Md. 1975) (the greater the national interest involved, as in the case of a top-security installation, the more the courts may weigh that factor in the scales when deciding whether the constitutional right against unreasonable searches has been violated). For a criticism of this implied consent theory in the context of military installations, see LAFAVE, supra note 84, § 10.7(d), at 49.
odds with ensuring some measure of certainty and regularity of inspections; two factors cited by the Supreme Court in Dewey as critical checks on arbitrary governmental intrusions and therefore key elements to sustaining the warrantless inspection schemes such as the one before the Court in that case. Having the parties identify specific defense industry facilities of the other party that would be subject to inspection would ameliorate the constitutional objection that warrantless searches of such facilities are not sufficiently certain. But a restricted site inspection regime could prove futile because operations can always be covertly relocated. In addition, specific facility identification by one part of the other’s facilities runs the genuine risk of compromising intelligence gathering sources and capabilities.

In Dewey the Court also made reference to warrantless inspections that may be constitutional if necessary “for the furtherance of federal interest.” What the precise metes and bounds of this vague prescription are is impossible to tell. Arguably, arms control measures are one such federal interest. But this standard, if one can call it that, proves far too much. It is virtually impossible to draw any constitutional line over which the government may not cross employing such a “federal interest” test. By definition, any interest of the United States is a “federal interest.”

Even assuming the constitutionality of warrantless on-site inspections at defense contractor facilities under the “closely regulated industry” exception to the warrant requirement, a further complication of constitutional dimensions is presented by warrantless on-site inspections under an INF or other arms control treaty. That complication concerns keeping such inspections limited to the defense industry. Even if the number of annual on-demand, on-site inspections are capped — as they are under the INF treaty — as long as the location of inspections is not likewise restricted to private or public facilities dedicated to nu-

86. Article XI(6) of the INF treaty identifies the Hercules Plant No. 1, located in Magna, Utah, as one private contractor facility to be continuously monitored. N.Y. Times, Dec. 9, 1987, at 25, col. 4. However, inspections at this plant will be non-intrusive. The Protocol on Verification provides that inspection activities at this plant shall be portal/exit inspections only. N.Y. Times, Dec. 9, 1987, at 25, col. 5. Hercules, Inc., is responsible for production of the Pershing II propulsion system. U.S. NUCLEAR FORCES AND CAPABILITIES, supra note 78, at 293. The Pershing II is the U.S. INF missile subject to removal and destruction under the treaty.

87. 452 U.S. 594, 599.

88. The Court has, of course, drawn just such a line in its Barlow’s decision.
clear weapons development or manufacture, warrantless searches might be conducted at private business premises not within the closely regulated industry exception. Whether by design or blind luck, INF negotiators created in effect two categories of facilities which will be subject to inspection. If these categories are closely adhered to, the potential problem of inspections at business premises not within the closely regulated industry exception might be obviated. The first category includes declared facilities, that is, those facilities that are involved in the deployment, production, or testing of INF missiles, all of which — with the exception of the Hercules Plant — are government owned and operated.\(^{89}\) (These facilities have been identified through a Memorandum of Understanding in which each side has specified all such facilities of the other.)\(^{90}\) The second category would cover so-called “suspect” sites, that is, “additional facilities which could be used for INF missiles in an unauthorized way,”\(^{91}\) such as nuclear weapon storage facilities. In order to prevent the “suspect” site category from becoming an opening wedge for searches throughout the entire United States, the two sides have characterized a suspect site as a “missile support facility,” and includes ballistic missile production and storage facilities,\(^{92}\) facilities which are government owned or if privately owned would likely fall within the closely regulated industry exception to the warrant requirement.

Any suggestion by the United States to restrict searches to government-owned or government-controlled facilities only — as it has done in its draft chemical weapons treaty\(^{93}\) — would clearly have been a nonstarter for the Soviet Union, given the congruence of the Soviet government and the Soviet defense industry. But the effort made by the negotiators of the INF treaty to circumscribe OSI by limiting intrusive inspections to government owned and operated facilities, thereby attempting to save it from possible constitutional infirmities, may in the end prove

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89. Under Article XI(6) of the treaty, the Hercules Plant No. 1 is the only such declared facility.


91. ARMS CONTROL TODAY 3 (Oct. 1987) (interview with Paul H. Nitze, special adviser to President Reagan on arms control matters). Article XI(3) of the INF treaty permits OSI at “missile support facilities,” which are defined in Article II(9) as including any “launcher storage facility.” N.Y. Times, Dec. 9, 1987, at 24, 25.


93. See ROWELL, supra note 7, at 33.
to be OSI’s undoing. From the perspective of confidence-building and deterring violations, carte blanche, on-demand OSI anywhere within the territory of the United States and the Soviet Union would be not only desirable but essential. Any inspection regime which falls short of permitting unrestricted access anywhere in the territory of either treaty signatory arguably would render on-site inspections virtually worthless as an arms control verification method on any level — detection, deterrence, or confidence-building. At the same time, however, such an unbridled inspection scheme would run a substantial risk of being in violation of the Fourth Amendment as being neither regular nor certain in application, the constitutional minima identified by the Supreme Court for sustaining warrantless inspections, and then only for warrantless inspections of closely regulated businesses. A warrantless, on-site inspection scheme that covered all businesses, closely regulated and not, would fail to pass constitutional muster.

Even assuming the constitutionality of such warrantless searches under the Fourth Amendment, a residual constitutional question is whether agents of a foreign government may execute such warrantless inspections without usurping the constitutionally assigned functions of ensuring that the laws of the U.S. are executed by the Executive Branch.

VI. WARRANTLESS SEARCHES BY SOVIET INSPECTORS

Article II of the Constitution grants to the President the executive power of the government, “the general administrative control of those executing the laws, including the power of appointment and removal of executive officers — a conclusion con-

95. In Marshall v. Barlow’s, Inc., the Court struck down a warrantless inspection scheme created by Congress under the Occupational Safety and Health Act which permitted such inspections of any business subject to OSHA regulations (i.e., any business affecting interstate commerce). The Court found the closely regulated business exception to be inapposite, noting that “few businesses can be conducted without having some effect on interstate commerce.” 436 U.S. at 314.

The Court’s conclusion in Barlow’s casts considerable doubt on the continued vitality of Professor Henkin’s conclusion that “Congress may impose inspection — a limited regulation — on all industry as ‘necessary and proper’ to make effective the regulation of armaments under the treaty power.” HENKIN, ARMS CONTROL, supra note 16, at 75.
96. See Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) (warrant required to conduct inspections unless some recognized exception applies).
firmed by his obligation to take care that the laws be faithfully executed."97 The power to appoint subordinates was deemed essential in order to carry out the day-to-day business of government,98 hence the authority given under the Appointments Clause.99 The execution of the laws of the United States is the sole responsibility of the President and his duly appointed delegates. This responsibility includes ensuring that the treaty obligations of the United States, which are also the supreme law of the land,100 are faithfully carried out.

No legal fiction could alter the undeniable fact that Soviet officials selected by the Soviet Union to conduct on-site inspections of U.S. defense contractor facilities are not officers, agents, or representatives of the government of the United States. It would be patently absurd, not to mention politically suicidal, to contend otherwise. Yet, unless Soviet inspectors are cloaked in an Executive Branch mantle, there is an insoluble dilemma. On the one hand, contending that Soviet officials have a limited right of access to U.S. defense contractor facilities to monitor American compliance with an arms control treaty arguably constitutes an improper delegation of Executive Branch power to agents of a foreign government because they would be conducting a Fourth Amendment search, an Executive Branch function.101 On the other hand, unless Soviet inspectors are by some legal fiction deemed to be officers, agents, or representatives of the United States government, to the extent that Soviet officials seek entry to private property located within the United States to police U.S. compliance with an arms control treaty, they have no right of access to such property absent consent of the

98. See Meyers v. United States, 272 U.S. 52, 171 (1926): “But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws [emphasis added].”
99. U.S. CONST. art. II, § 2, cl. 2. Such “officers of the United States,” according to the Supreme Court, include “any appointee exercising significant authority pursuant to the laws of the United States.” Buckley v. Valeo, 424 U.S. 1, 126 (1976). Appointees exercising significant authority can only be appointed with the advice and consent of the Senate, according to the Court. Id. Arms control inspectors arguably would not fall within this category of appointee.
100. HENKIN, FOREIGN AFFAIRS, supra note 18, at 164-65.
Considerations of political ideology aside, it is not difficult to imagine that defense contractors would be extremely reluctant to give their consent to such searches, considering the commercial and industrial secrets they would have an interest in protecting from disclosure to the Soviet "competition." Unwanted disclosure of proprietary information would certainly furnish reason enough for strong resistance from the U.S. defense industry to uninvited and unrestricted tours by Soviet officials of their facilities.

Whether defense contractors could be required to give their consent to unwelcome on-site inspections by Soviet officials as a condition to being awarded a defense contract depends on whether such a requirement would place an unconstitutional condition on the award of a government contract. The standard

102. Professor Henkin perceived the contours of this dilemma, but did not resolve it fully. Writing in the specific context of an arms control and disarmament regime, Professor Henkin wrote:

[T]he United States could agree to abolish existing armies and armaments, and to refrain from the raising of armies, and from the manufacture, possession or research and development of armaments in the future. It could agree to create a complex international organization to provide comprehensive inspection that would abolish the secrecy of governmental operations, require full reporting, and subject government installations, activities and files to unlimited surveillance, and its officials to international interrogation. Within large limits it could subject the activities of its citizens also to relevant, reasonable limitations and surveillance like those imposed by Congress through domestic regulatory programs. Issues of improper delegation could be wholly avoided if international authority, regulation and administration were brought to bear only on the Government of the United States rather than directly on individuals in the United States.

HENKIN, FOREIGN AFFAIRS, supra note 18, at 195-96 (footnote omitted, emphasis added). Professor Henkin then discussed the constitutional infirmities of an international organization established to police the Baruch Plan, had that Plan been implemented:

That proposal might have given to an international authority power to regulate the activities not only of the Government of the United States but of mining companies, manufacturers, scientists, laborers, and citizens generally. A body with such powers and functions, it would have been argued, would be exercising governmental authority within the United States, assuming functions of the President and Congress. Again, constitutional objections would have been eliminated if the United States Government stood between the international authority and the individual, if the requirements of the Authority were imposed and enforced by the Government in the same ways as other treaty obligations or the regulations of its own administrative agencies.

Id. at 196.

103. See HENKIN, ARMS CONTROL, supra note 16, at 94-96. The Protocol on Verification provides that "[i]nspectors shall not disclose information received during inspections except with the express permission of the inspecting Party." N.Y. Times, Dec. 9, 1987, at 25, col. 2 (emphasis added). This provision, of course, affords private contractors no protection whatsoever with regard to appropriation of trade secrets.
for determining whether such a consent requirement would be valid is whether it would "needlessly chill the exercise of basic constitutional rights . . . . [T]he question is whether that effect is unnecessary and therefore excessive."104 Given that there is no constitutional right to be awarded a government contract, a defense contractor would not be put to the Hobson's choice of foregoing one constitutional right in order to protect another. Does that mean that a defense contractor could be required to abandon all Fourth Amendment guarantees in order to receive a government contract? It is arguable that such a clause would sweep too broadly and therefore be constitutionally excessive in view of the low probability that an actual arms control violation would be detected as a result of on-site inspection.105 Any means-end test would therefore not likely be satisfied. Nevertheless, considering the highly regulated character of the U.S. defense industry, coupled with the fact that rejection of a government defense contract containing a consent-to-inspection clause would not entail penalizing the exercise of some other constitutional right, it is arguable that defense contractors could be legally put to such a choice. Even though Fourth Amendment rights would be sacrificed under such a clause, it would have the salutary purpose of advancing the cause of nuclear arms control and disarmament by building confidence between the superpowers and by deterring arms control violations.106 Under a balancing test, the latter interests might be deemed sufficiently weighty to overcome any Fourth Amendment objections.

In any event, the Fourth Amendment issue notwithstanding, a defense contractor's consent to inspection by Soviet officials would not obviate the closely related constitutional question of improper delegation of executive power to agents of a

105. See ROWELL, supra note 7, at 61-63, 151 (1986); SCOVILLE, The Application of Verification Tools to Control of Offensive Strategic Missiles, in ARMS CONTROL VERIFICATION, THE TECHNOLOGIES THAT MAKE IT POSSIBLE 207 (K. Tsipis, D. Hafemeister, P. Janeway eds. 1986) ("On-site inspections rarely add to national technical means, but sometimes as a last resort they can add confidence in compliance after the consultation process on an ambiguous event has been exhausted.")
106. Depending on the bargaining leverage of the private contractor, it might be problematic for the United States to exact a consent-to-search clause from a defense contractor. Given the huge amounts of money the government has invested in procuring weapons systems from the private sector, the defense industry is certainly not without some leverage and might strongly resist pressures to accede to a consent clause. That the United States for its part might insist upon a consent-to-search clause as a sine qua non of every defense contract is not beyond the realm of possibility.
foreign government. Even if contractual consent to search could be obtained from a defense contractor, governmental authority would still be exercised within the United States by persons other than officers of the United States. Defense contractors have no more power to cure this constitutional defect by consent or waiver than litigants have to confer subject matter jurisdiction on a federal district court where none otherwise exists. Litigants in federal court cannot consent to subject matter jurisdiction where none exists; a contrary result would violate Article III's limitations on the power of the federal judiciary. By the same token, U.S. defense contractors cannot vest Soviet agents with Executive Branch power by consent; any contrary suggestion would be at loggerheads with Article II's limitations on the power of the national executive.

It has been suggested that placing officials of the United States between Soviet inspectors and defense contractors might be one way of salvaging an arms control on-site inspection scheme from constitutional infirmities.107 Still, as long as on-site inspections are on demand under the INF treaty,108 the role of the Soviet players in such an inspection regime will hardly be indirect. On the contrary, they will trigger the inspection and they will conduct the inspection, even if escorted by U.S. officials. Whatever buffer is placed between defense contractor and Soviet official, it will be minimal at best and arguably nothing more than a legal fig leaf insufficient to cover its unconstitutionality.

VII. CONCLUSION

Professor Henkin's balancing test for evaluating the constitutionality of a treaty vis-a-vis the Bill of Rights finds some support in the Supreme Court opinion on the "pervasively regulated industry" exception to the warrant requirement. While warrantless, on-site inspections at private defense contractor facilities might arguably pass constitutional muster under the closely regulated industry exception to the administrative warrant require-

107. This is a suggestion made by Professor Henkin. See Henkin, FOREIGN AFFAIRS, supra note 18, at 195-96. The Protocol on Verification provides for in-country escorts, but the Soviet inspectors are given virtually free rein when conducting an inspection. See N.Y. Times, Dec. 9, 1987, at 26, cols. 1-2.

108. Protocol on Verification to the INF Treaty, N.Y. Times, Dec. 9, 1987, at 26, col. 1. On-demand inspections can be made on sixteen hours' notice under the Protocol. Id.
ement, even under that exception the government has not been given carte blanche by the Court. Unless such warrantless searches are in some measure certain and regular, they would accord government too much discretion, thereby opening up the possibility for arbitrary and capricious governmental action. To the extent OSI is not limited by treaty to defense contractor facilities, there is a genuine risk that unannounced searches will be attempted at business premises that do not fall within the administrative warrant exception, thereby running afoul of the Fourth Amendment. Finally, searches conducted by Soviet inspectors within the territory of the United States at private premises arguably constitute the exercise of an Executive Branch function — the execution of a Fourth Amendment search — by persons who are not Executive Branch officers, agents, or employees. In sum, OSI may open two otherwise barred doors, the first leading to an unconstitutional delegation of governmental authority, the second to a serious violation of the Fourth Amendment's prohibition against unreasonable searches.