1-1960

Arms Inspection and the Constitution

Louis Henkin

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the [Law Commons](#)

Recommended Citation

Louis Henkin, *Arms Inspection and the Constitution*, 11 HASTINGS L.J. 267 (1960).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol11/iss3/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

ARMS INSPECTION AND THE CONSTITUTION*

By LOUIS HENKIN†

Introduction

Disarmament—or, more accurately, the control of armaments—appears daily in the official statements of governments, in United Nations debates, in newspaper headlines. Yet few students of affairs between nations today view the prospects for substantial control of armaments with confidence, whatever their hopes. All would have to agree that in the policies of governments, not least of the United States Government, the efforts to achieve disarmament are, and are likely long to remain, a footnote to a policy of deterrence through strength.

The prospects for achieving any control of armaments, like the reasons for total failure to date, are tangled in the confusions and mysteries of armament and disarmament and their place in the foreign and defense policies of governments. But both past failure and future hopes may be concentrated in the congeries of problems denoted “inspection.” Nations—the United States and the Soviet Union, in particular—have not reached agreement on ways which will satisfy each other that they are living up to the limitations on arms or armies which will have been adopted.

Inspection was not a serious problem in earlier efforts to disarm. Before the First World War, and even later, the “*politesse*” of relations between nations seemed to require at least the pretence that they, like gentlemen, could of course be trusted to keep their agreements. Perhaps there were other reasons; perhaps animosities and fears between principal nations were less acute; perhaps wars were still an extension of international politics, not an unspeakable threat of world destruction; perhaps an illegal

* This article draws principally on one chapter in a study executed by the author for the Legislative Drafting Research Fund of Columbia University, made possible by a grant from the Institute for International Order. The study has been published by Columbia University Press as *Arms Control and Inspection in American Law*, with a Foreword by Professor Philip C. Jessup. The author and the *Journal* are grateful to the Legislative Drafting Research Fund and to Columbia University Press for permission to draw on the study as a basis for this article.

The extensive notes and citation of authorities have been omitted. There is also no attempt to deal with other aspects constituting the bulk of the project. The full scope of the study may be seen from its table of contents: I. Introduction; II. Arms Control Provisions; III. Arms Control and the Constitution; IV. Investigation of Compliance with Arms Control; V. Congressional Implementation of Arms Control; VI. State Laws and Local Cooperation; VII. International Administrative Regulation; VIII. International Tribunals; IX. Conclusion.

A condensed version of this article appeared earlier. Reprinted with permission from the May 1959 issue of *Bulletin of the Atomic Scientists*, 1100 E. 58th Street, Chicago 37, Illinois.

† B.A. 1937, Yeshiva Univ.; LL.B. 1940, Harvard Law School. Associate Director, Columbia University Legislative Drafting Research Fund 1956. Professor of Law, University of Pennsylvania. Admitted to practice New York and before the Supreme Court.

battleship or weapon was less terrifying, or more difficult to keep secret. Or, perhaps nations were naïve, trusting.

Since the Second World War all that has changed. Today we have new, awesome weapons, new methods of concealment; and a distrust of the Soviet Union in a degree also new in contemporary international relations, at least in its avowedness. The United States, if not others, will not agree to disarm unless it can be satisfied that violations by the Soviet Union will be quickly detected. No inspection, no disarmament. In fact, inspection has become immediately independent of and more significant an issue than disarmament. Recent efforts have been directed to inspection without disarmament, or with very little. Agreement, for example, to stop nuclear tests, with inspection to insure compliance, may be desirable but will not itself disarm anyone. The Eisenhower plan in 1955 for exchange of military blue prints and for aerial inspection; the proposal this year for international inspection in the Arctic; consideration of methods to afford warning against surprise attacks—these involve no direct limitations on arms; they contemplate inspection, but only to give each nation some knowledge as to what the other was doing with its armies and its arms.

That inspection is a crucial issue has long been recognized. Lately it has also begun to receive some of the attention it requires. There has been debate as to whether effective inspection is possible and feasible. And there has been discussion as to what it is one needs to know and what are the best methods to obtain such knowledge. Recently there was published a study of the technological problems of inspection executed at Columbia University with the participation of experts from other institutions.¹

So far as appears, however, no one has hitherto paid much attention to a very different order of considerations; what would inspection mean in the United States? What are its implications for the way Americans live under their Constitution and laws? This is, of course, a question for lawyers. Legal, and particularly constitutional, difficulties suggest possible inroads into our ways, habits, and institutions. The citizen will wish to know whether, and how, arms control and inspection will impinge on his freedoms, his rights, his privacies. The makers of United States policy, and our negotiators of international agreements, should wish to know what are the constitutional limitations on their authority to agree to controls and inspection, limitations which may imply also obstacles to getting such agreements accepted by the American people. And if constitutional considerations are relevant to the kind of control agreement, to the kinds of inspection provisions, which the United States can accept, they are relevant also to what the United States can ask of other nations. On the other hand, some elements in an arms control plan, particularly those relating to inspection, may

¹ INSPECTION FOR DISARMAMENT (Melman ed., Col. Univ. Press 1958).

be exaggerated and distorted, and painted, with little warrant, as threatening deep and novel intrusions into American law and American rights. It is important to quiet undue concerns, as well as to alert attention to those which are due.

The Problems

In this article we consider the constitutional problems suggested by inspection in support of an arms control agreement.² Two considerations which relate to arms control and inspection have special importance for an examination of their constitutional implications. The first of these is that any system of arms control and inspection is primarily and fundamentally a system of regulation not of private citizens or industries but of the United States Government itself.

This would be something new for the United States. The United States has laws, precedents and experience for regulating occupations, businesses and other activities in the United States, such as liquor, firearms, narcotics. In some of these, for example narcotics, the United States regulation supports and implements international agreements for cooperative control. In these cases the United States Government desires to maintain control over certain operations by private persons and corporations; there is, so to say, an adversary relation between the government and persons involved in these activities, and United States officials may be generally counted upon to enforce these laws.

The control of armaments by international agreement differs fundamentally. It is principally a regulation of the Government of the United States. Its purpose is to afford other nations "control" vis-à-vis the United States Government, its civil and military authorities; to prevent collusion—and to assure suspicious, hostile foreign governments that there is no collusion—between the United States Government and industry and private persons to circumvent controls which the government does not truly wish to observe. That is what the United States would seek to assure in other countries; that is what others will seek to control here.

And this leads us to the second fact of international life, inherent in any system applied to sovereign and equal nations and particularly important in time of cold war. This is the element of reciprocity, already intimated. Whether an arms control scheme is universal and complete, or—like the Eisenhower air inspection proposal of 1955 and the current efforts to stop testing new weapons—merely preliminary and mainly bilateral, it is clear that both the United States and the U.S.S.R. at least must be parties to it. Inevitably therefore, the control plan will have to operate equally in the

² Constitutional questions suggested by the control plan as a whole, by the prohibitions and limitations which it might contain, are not examined here. See *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* ch. III.

United States and in the Soviet Union. This lies at the heart of all aspects of the disarmament problem, including a study of legal implications of inspection. A system of inspection should be as minimal as is consistent with assurance that violations would be detected. Obviously, fewer limitations on the United States and less inspection and intrusion by foreign officials within the United States would make a control scheme less onerous to the United States, and more acceptable to American authorities, to the Congress and the people; and it would create fewer constitutional and legal problems. But these same American authorities, Congress and people, will wish maximum control and non-Russian inspection in the U.S.S.R., and inevitably, if there is to be agreement, would have to accept reciprocal limitations and inspection in the United States.

In the United States, to return to an example cited, there are established patterns for inspection by federal officers under old and accepted systems of congressional regulation of various industries. It would be simplest from the point of view of the law and the Constitution, as well as for acceptability by Congress and the public, to follow these established patterns and leave implementation of an arms control treaty, so far as private activities are concerned, to American officials and American inspectors. The American government would then be responsible to an international or foreign supervisory body for carrying out inspection and enforcement in the United States in regard to citizens and corporations. The international inspectors can be present to observe and satisfy themselves that the agreement is being kept and that United States officials are neither colluding in nor condoning violations. The Russians, however, may not be content with such indirect inspection and control of American activities. More important, the American people would have doubts about a system of inspection and control in the Soviet Union under which Soviet officials might have substantial opportunity to deceive international supervisors. As a result there may be pressure on the United States to agree, reciprocally, to direct inspection by international or foreign officials, even as to the activities of private persons and establishments.

Similarly, for another example, we may believe that foreign inspectors in the United States should in given circumstances require a search warrant; such a warrant, we may believe, could be obtained from a United States court without fear that such a court would refuse to cooperate and would seek to frustrate the inspectors in their legitimate search. The Russians on the other hand may have no such confidence in our courts. Again, we would probably have no such confidence in the Soviet courts and may therefore insist that inspection in Russia must be without warrant. But that could hardly be obtained without agreement, reciprocally, to search without warrant in the United States.

The negotiating dilemma created by the inevitable reciprocity will, of course, face the Soviet Union as well as the United States. In general, it may be assumed, any agreement reached will represent a compromise between how much control, and how many rights and powers, we wish for international or foreign inspectors in Russia, how few we would like to give to such inspectors in the United States. And the exact "terms" of this compromise will determine how serious are the constitutional problems which it will raise in the United States.

Since no particular control agreement exists, or can be anticipated, one cannot anticipate either what prohibited activities the "inspection" is designed to uncover or what forms of inspection are likely to be provided. For "inspection" is not a single concept denoting a single kind of activity. Those who have negotiated about disarmament in and around the United Nations have spoken of "verification" to cover all methods known, or to be developed, to check whether a nation is violating its agreement to observe whatever controls on armaments are adopted. What we generally think of as inspection—entering into depots or factories to see what is going on—is but one method of "verification." The Columbia Inspection Study concluded that "workable systems of inspection can be designed to ensure compliance with international disarmament agreements." What are some forms of "verification," what are some of the likely components of "systems of inspection?" And what are their implications for our laws and institutions? Here we can only suggest what are the principal constitutional questions, and what the probable answers.

Verification

The search for effective and practical methods of verification has evoked ingenious and perhaps silly suggestions for determining whether a country is violating an arms control agreement and preparing for war. Thus, it has been suggested that the President of the United States (and the chiefs of other states) submit periodically to a lie detector test, or be given "truth serum," and be required to answer questions about the extent of national armaments and the nature of national war plans. Whatever may be said of the desirability, effectiveness, and practicability of such a suggestion it would not run afoul of any provision of the Constitution if the President by treaty agreed to do so. If the President, or a successor President, refused to submit to such tests, although required by treaty, he could not, of course, be compelled to do so. The President himself is probably immune to the process of the courts. He is, however, subject to impeachment for a "high crime" or "misdemeanor" under article II, section 4, of the Constitution.

Other suggestions—for example, an elaborate system for encouraging

informers, paying them large, tax-free fees for information of violations by fellow citizens or government officials—would also raise more questions as to desirability and practicability than of constitutional validity. There are substantial precedents for awards to informers—for example, to those who give information about illegal introduction into the United States of nuclear materials, or about customs and tax evasions.

Leaving aside such indirect aids to knowledge of varying ingenuity and practicability, we get to less singular ways of getting information as to possible violations. An obvious way to get information is, of course, to ask for it. Some measure of verification may be obtained by having governments themselves report on their compliance. The reports may be required to provide details and specifications; for example, how many men are under arms, where they are stationed, the size of the defense budget and its breakdown, details on industrial activity—including the production or use of rare metals, precision instruments, and strategic items—the activities of key scientific personnel, the existence of hospital cases of radiation injuries indicating illegal activity.

To the extent that a nation's word can be trusted, these reports will indicate whether the nation is complying. If the proper questions are asked, indeed the answers themselves may reveal to experts whether they are truthful; they may disclose other information as well, far more than the reporting country may mean to divulge. Such reports, together with statistical information which nations prepare for their own use and which cannot be easily falsified, may give examining experts at the headquarters of an international body strong evidence as to whether a nation is or is not complying with the limitations of the agreement.

So long as we speak only of reports by governments, such submissions, and the requirement in a treaty that they be submitted, present no serious constitutional problems for the United States. Nothing in the Constitution requires secrecy on any aspect of governmental activity; nothing in the Constitution prevents the Executive from collecting and collating data of the kind in question and making it public or reporting it to anyone. Such reporting may be inconsistent with requirements of secrecy in existing laws; these laws, however, can be repealed and would be willingly repealed, we assume, by provisions in the arms control treaty or any implementing legislation which Congress will adopt.

Neither are there major difficulties when, in order for the United States to make the necessary reports to an international or foreign body, the Government of the United States requires reports in turn from its own citizens. The right to require returns and reports from those participating in industries regulated by the federal government has, in general, been upheld in the face of challenge that such requirements constitute deprivations of liberty

or property without due process of law; or that they violate the constitutional privilege against self-incrimination; or that they infringe "the right of the people to be secure in their . . . papers, and effects, against unreasonable searches and seizures." There would seem, therefore, no difficulty in having the United States require reports and returns from persons engaged in activities related to the production of armaments which Congress regulates in implementation of a disarmament treaty. The obligations of the United States under such a treaty confer upon Congress the duty as well as the power to pass necessary legislation to implement it. Such implementation may validly require from owners of uranium mines, for example, reports on the production of their mines; from owners of steel mills information on their production, their customers, and the amounts sold to them; from manufacturers of designated armaments reports on the amounts of arms produced and on their disposition. Probably, the United States could require scientists to disclose any research relevant to an arms control agreement, and doctors and hospitals to report any cases which might indicate radiation or other consequences of unlawful contact with regulated materials. And the United States Government can transmit such information required from its citizens to an international body.

Voluntary reports by governments do not by themselves, however, afford an adequate check on their compliance with disarmament controls. Fortunately, the scientific and technological advances which have engendered new weapons, and new methods for concealing them, have also produced some methods for detecting what others would hide. Radar, seismic or acoustic instruments, other developed or to-be-developed devices, can, we are told, detect the flying of planes, the explosion of bombs, and other activities or conditions which might violate an arms control agreement. And fortunately, these, too, raise no serious constitutional difficulties. Whether such monitoring stations and devices are established within or without the United States, the United States can agree that they should be operated, without being troubled constitutionally. Aerial inspection, too—which has figured prominently in all United States inspection proposals, including the Eisenhower plan in 1955 for exchanging military blueprints with the Russians—raise no important concerns for constitutional rights. There is nothing in the Constitution, we have said, which would bar the United States from agreeing to give, and actually giving, to a foreign power information, including maps, sketches and statistics, about its arms and armies. And there is no constitutional obstacle to agreement on the part of the United States that Soviet (or international) planes may fly over American territory and take photographs of anything. Such an agreement is within the power of the treaty-makers. It does not violate any rights reserved to the States or any liberties of the citizens.

Violation Detection

Unfortunately, neither mechanical devices known to date, nor aerial photographs, can detect all possible violations of the probable prohibitions or limitations in a control agreement. And even where a photograph or a mechanical device provides a record which gives a basis for suspicion that there has been a violation, it will usually be necessary to follow-up this suspicion with direct ground inspection in a suspected area, and perhaps with interrogation of suspected and other individuals.

For constitutional examination, one may set apart first, inquiry and investigation into activities of the United States Government and its officials. These may well be the particular concern of international inspection. But, because it is the Government that is affected, not any private citizen, the Constitution throws up no obstacles. If governments should some day arrive at such agreement as we are assuming, the right of international inspectors to come to government offices and inspect documents which now are generally classified, to enter military and other federal establishments and examine equipment and papers, will raise numerous practical difficulties. Indeed, it may be difficult to imagine the climate in which such practices would be acceptable; it would in fact require major adjustments to shed habits and attitudes based on the need for secrecy. So far as the law is concerned, however, direct inspection of this sort would create no problem which could not be disposed of by legislation and executive order. We repeat: nothing in the Constitution requires the United States to maintain secrecy against anybody, including foreign governments and international bodies. The constitutional separateness and independence of the President permits him to maintain the privacy of the Executive Branch vis-à-vis Congress, but the Constitution does not require the secrecy of executive departments if the President agrees to "bargain it away" by treaty. The privacy of congressional premises and documents can also be abolished if Congress agrees. Secrecy concerning governmental installations whose inspection will be necessary and significant — the depots and arsenals, atomic energy plants, perhaps power and related facilities like those of the Tennessee Valley Authority and other authorities—would raise even fewer political difficulties and no legal ones. The Constitution does not stand in the way.

Similarly, the United States can require federal officials or former officials to testify about their official activities, or to produce official documents. International inspectors then can probably be authorized by treaty to interrogate civilian or military officials of the United States, or to require them to produce official documents. But, the officer would still have his privilege against self-incrimination, both as to testimony sought and to

private papers; we shall discuss below the effect and significance of this privilege.

It is the inspection of private establishments and installations, the interrogation of private persons, that raises the significant constitutional issues. Effective international scrutiny of arms control compliance must take into account also activities in installations and establishments not belonging to the government, of individuals who are private citizens rather than government officials. While, as we have suggested, strictly private violations would be unlikely and would be less significant, it would be important to assure that private persons and corporations were not acting in collusion with the government to circumvent the control agreement. And private persons might have information of violations by government officials which international inspectors should be able to obtain. Direct investigation of private activities, then, is a key feature of arms inspection.

A preliminary and special situation is created by the fact that the inspectors, we assume, would be foreign personnel, probably serving an international body. Some problems, we have suggested, could be eliminated if the direct policing, the inspections, and the interrogations, could be left to United States officials. International or foreign officials might learn enough to satisfy themselves from general forms of investigation not involving the exercise of authority over private places and persons. Or they might be present to observe while national officials inspect or interrogate—a plan of cooperative inspection like that contemplated for the EURATOM power program to assure the United States that the nuclear materials it supplies are not being diverted to military use. Documents, records, books, and papers might be obtained for international officials by officers of the United States, through established procedures. If the international officials were not content with the action of national officials, and their complaints went unheeded, they might assume that something was being hidden and act accordingly.

The use of established national channels would avoid problems, political as well as legal, in the United States; as we said, however, it might not be feasible internationally. Negotiations have been in terms of direct inspection and interrogation by foreign officials or by representatives of an international body. This is what the United States apparently contemplates for assuring Soviet compliance; it is what the United States, then, would have to accept in turn.

In general, we conclude, that the functions which are anticipated in this discussion may, consistent with the Constitution, be performed in the United States by foreign personnel who are not in fact United States officials, not paid or controlled by the Executive Branch pursuant to Congressional authority, not under oath to support the Constitution of the United

States. While some issues of proper "delegation" of power are suggested, they do not appear to be constitutionally serious in regard to functions of interrogation and inspection. And there are some, if limited, precedents in other contexts in which Congress authorized international or foreign personnel—for example, international commissions, allied military forces conducting courts martial of their troops—to compel the attendance of witnesses, to administer oaths, to subpoena documents, either on their own authority or by appeal to United States courts. There is also precedent in past legislation for enforcing such subpoena power for international or foreign bodies through the United States courts, who may hold in contempt those who fail to heed the subpoenas, or convict for perjury those who give false witnesses. As to inspection also, while there appears to be no precedent for foreign inspectors, there is some precedent in systems of federal regulation for inspection by persons in the United States who are not strictly federal officials.

Interrogation of Private Persons

The international inspectorate might wish to interrogate not only officials of government, but also persons in key industries, or other possible witnesses. Mill owners and scientists, doctors and mine foremen might all have information concerning arms or armament materials, or activities related to arms, in which the inspectors might have proper interest under the control agreement. The authority of the United States to require private persons to give testimony in an appropriate inquiry is not subject to doubt. And, we conclude, Congress, pursuant to treaty, could provide that the inspecting body, even if international in character, may issue or obtain subpoenas for testimony and documents, administer oaths, and require American citizens and residents to testify or produce papers before it.

Here, again, we run into the privilege against self-incrimination. It would apply, we believe, to interrogations by international inspectors; and it is a privilege available, the Supreme Court has said, even to the innocent who may wish to avoid possible prosecution for a crime. This privilege, as to some private persons and particularly as to government officials, may be a serious obstacle to the work of international interrogation. The obstacle can, however, be removed by an "immunity statute." Congress can compel the incriminating testimony if it gives the witness immunity from prosecution for the crime revealed. In the case of arms control, the inspectors will not be seriously interested in having the witness convicted of crime. What they seek is information on behalf of other nations and the international community; this they can get if the testimony is compelled pursuant to an immunity statute.

It need hardly be said that international inspectors could not use physi-

cal force to coerce testimony. A recalcitrant witness could be held in contempt and imprisoned. But no one, under the Constitution, could physically compel him to talk. The inspectors and the rest of the world might deduce what they wished from his continued silence, or try to find out from other sources what he is hiding.

Physical Investigation

The heart of the inspection issue is raised by the problems of direct inspection, *i.e.*, physical entry by inspectors into private installations in search of evidence of violations. Government installations apart, the important objects of international inspection would be the factories, the depots, the laboratories in private hands. Some of these may be subject to inspection because they are openly carrying on activities which are regulated or limited by the arms control agreement. There may be others clandestinely doing what they are not supposed to be doing at all. If the control agreement has merely imposed "ceilings," inspectors might wish to inspect factories and depots where arms and other materials are admittedly manufactured or stored to assure that the ceilings are not being exceeded. If to avoid such "ceilings" and other regulations a private concern does clandestinely what it could do openly only within limits; or if there are absolute prohibitions on activities or on the possession of materials, the inspectors may wish to investigate any installation or other place where they suspect a violation.

A major part of our problem may be separated and examined, and conclusions reached with confidence based on an abundance of precedent. In so far as the control plan imposes limitation and regulation, rather than complete prohibition, on private activity, it would mean that by treaty and legislation the United States has regulated the manufacture of armaments and related activities in the same manner as, under other powers, Congress has regulated the transportation of firearms, the manufacture and handling of narcotics, alcohol and food and drug products, the development of atomic energy. On the basis of the precedents from such Congressional regulation, some of which have passed the courts, all of which have the sanction of long-standing usage, we may conclude that there would be little difficulty in providing for inspection of the arms industry subjected to regulation by treaty. As far as the Constitution is concerned, the United States could agree, and Congress could require, that reports be made and books be kept by those engaged in arms and related industries; that these reports be made available for international inspection at all times; that international inspectors be permitted to come at any time, without warrant, to any industrial establishment within the framework of the arms control regulation scheme, including mines, factories, and depots, to inspect such reports and records, as well as to check operations and inventory. The inspectors might make

spot-checks, or inspectors might be stationed permanently in a factory or other installation. Congress could make it a crime punishable in the courts of the United States to falsify the records or reports to be kept, or to interfere with inspection. And the inspectors could be authorized to use force to carry out inspection were it resisted.

The "regulated" arms industry, then, raises no special difficulty. The troublesome issues are those of the "button factory." In the course of disarmament negotiations in the United Nations, the Soviet representative once asked rhetorically whether the contemplated inspectors should have the right to enter and inspect a button factory. The reply to this question was, of course, that they should be able to enter a factory representing itself as a button factory to make certain that it was. Here we have no avowed armaments enterprises and related businesses subject to limitation or regulation by treaty, which, we have seen, may be carefully circumscribed and scrutinized. Where an activity is prohibited, there is of course no permitted industry to regulate; there is no registration of such activities with the authorities; there is no consent to inspection which might be implied from such registration. And even activities which are permitted within limits or under supervision may be carried on clandestinely instead to avoid such regulation. To the extent, then, that activities are prohibited, rather than merely regulated—and even under regulation as regards those not registered and accepting regulation—all industrial installations are "button factories." Can there be inspection of factories ostensibly doing a permitted thing to assure that they are not doing something prohibited?

The issues are difficult. We may seek possible analogies, as, for example, municipal health and fire inspectors, but the constitutionality of these inspections without warrant has also not been settled.³ And arms inspectors might be deemed to be more like police officials than like these municipal inspectors. Analogy and precedent apart, one can suggest arguments based on the broad powers of Congress or the treaty-makers, under which far-reaching regulation and inspection may be permissible. We may recall that during the Second World War, Congress did in effect turn virtually all commercial enterprise into "regulated industry"; under the Emergency Price Control Act, the ordinary business entries of every small businessman became "required records" subject to inspection. If that could be done to implement price control legislated in the national defense, could not commercial activity be subjected to inspection pursuant to arms control agreed

³ Since this article was prepared the Supreme Court of the United States decided *Frank v. Maryland*, 359 U.S. 360 (1959). In that case the Supreme Court upheld the conviction, and fine of \$20.00, of a home owner who refused permission to a health inspector to inspect his basement for sources of rat infestation. That case of course, involved a limited invocation of state power rather than an exercise of federal authority.

to in the national defense? Indeed, price regulation and inspection were continuous, burdensome, intrusive into every establishment; by comparison, the possibility of arms inspection for any factory would be minimal.

These and other agreements can be made. But they are arguments, not answers. Still, one should add that the "reasonableness" of such inspection would surely be enhanced by limitations and qualifications upon it: for example, if such inspection were permitted only in certain defined installations, perhaps based on size, or location, so that the possibility of their being a "cover" is not absurd; if it were feasible to require some warning; perhaps if United States or local officials were also present. And the entire arrangement would seem still more "reasonable" if congressional implementation of arms control included provisions to protect or compensate American industry for damage due to abuse of the inspection.

The Dwelling

What about the dwelling house? One has occasionally heard that to assure that no violations of arms control are going on, international inspectors must be able to go anywhere at any time to look at any thing. As a suggestion that governments should not be able to cut off areas from scrutiny, the proposal of course has sense. In its broadest form, however, it would seem to imply also the right of inspectors to descend upon any private dwelling in the land at any time of day or night without a warrant and rummage for evidence of possible arms control violations. If this is what the suggestion means, it makes little sense. Serious violations in a day of hydrogen bombs and intercontinental missiles will hardly be taking place in private dwellings. If some forms of biological and chemical warfare might be prepared or secreted in small areas, perhaps even a private house, their detection could hardly be effected simply by giving a blanket right to inspect all dwellings without a warrant. If there were a basis for suspicion, a warrant could be obtained, directly by international officials, or through national officers, and refusal of national officers to cooperate would no doubt be some indication that something was being hidden.

It may be that large estates could lodge industrial or military operations, and a government eager to conceal something might concentrate it in some such location. But this suggests a small and special situation, for which—if requiring a warrant is not feasible—special remedies might be necessary. It hardly requires that all private dwellings in the land be rendered open to inspection without warrant.

Since the suggestion has been deemed implied in proposals actually under consideration, we should mention the constitutional difficulties which such arrangements would entail. For the most part, they are those discussed in relation to the "button factory." In regard to a dwelling house, the arms

inspector looks even more like the police inspector trying to enforce a criminal law than like the health inspector seeking immediately to protect the health and welfare of the occupant and his neighbors. The arms inspector then would generally need a warrant based on "probable cause" as required by the fourth amendment. To justify his inspection without such warrant would require a finding that his search, in all the circumstances, would not be "unreasonable." The argument for such a finding may seek some support in a broad treaty power; in the necessities of national defense as reflected in an arms control agreement; in the need to agree in principle to the inspection of an occasional dwelling in order to make it possible for similar inspection in other countries, thereby to achieve greater security for the United States; in the inability to rely on warrants from national courts; in the extreme unlikelihood that a particular dwelling, or any dwelling, would in fact be inspected; and in the fact that it is only an extraordinary power in a special group for a very limited purpose most unlikely to materialize, not a general warrant in the hands of police.

The arguments are difficult to weigh. If no feasible way were found for meeting the special problem of the large estate, the "dwelling" here or in other countries might appear to be a loophole of significance weakening security against violation. A constitutional amendment, then, might be necessary here to circumvent the problem. Certainly the American people should have explained to them the implications of such a proposal, and an opportunity given to them to indicate their willingness to make the sacrifice involved.

Something should be said also of private structures other than dwellings or business establishments, and of private lands, in which inspection might be desired. Inspection in such places might be particularly pertinent if, for example, agreement were reached in the current efforts to halt nuclear tests. Suppose that after an agreement making nuclear tests illegal, a seismic device at a monitoring station records a suspicious tremor leading international inspectors to suspect that there may have been an illegal nuclear explosion within, say, a radius of 20 miles of Phoenix, Arizona. Inspectors then, may wish to comb the area, including fields belonging to private persons, and perhaps barns, or other structures on these lands.

Again, the problem would disappear if it were feasible to get a warrant for such inspection. But, in addition to political and practical objectives to requiring a warrant, it is questionable whether the seismic warning would, of itself, satisfy the constitutional requirement of "probable cause" to support a warrant for search of every private place within a large area. (Surely it is open to serious doubt that these facts would support a warrant to search every private *house* in the area.) Without a warrant, inspection of fields presents no problem since, it has been held, the open field enjoys no con-

stitutional protection against search and seizure. The barn, on the other hand, while far below the dwelling in constitutional concern may rank somewhere by the button factory and be subject to the considerations we have discussed. Again, some safeguards, warnings, the presence of the owner, of United States officials, perhaps some kind of warrant even if it does not meet constitutional standards, might help to mitigate any "unreasonableness" in the search for purposes of the fourth amendment.

A control agreement might also provide for the inspection of private hospitals, of private or institutional laboratories. These raise fewer difficulties than the dwelling house; the validity of such provisions can be asserted, though with hesitation in differing degrees.

Other Considerations

These are major forms of "verification" which have been suggested. There are others, generally of an auxiliary character, which may evoke constitutional objection. Can international inspectors be permitted to tap wires in aid of inspection or interrogation? Today the answer is not difficult: wire tapping is a "dirty business," but it is not, the Supreme Court has held, "search or seizure" under the fourth amendment, and there is no reason, in general, why it cannot be permitted by treaty or act of Congress.

There may also be a proposal to require the registration of scientists; all persons with a given level of scientific training or achievement would be required to report their whereabouts and their "whatabouts" at regular intervals. Here we are without clear precedent or authority. Some areas of the problem may be carved out for answer with greater certainty. The United States, for example, could agree to report on the activities of all the scientists which it employs. Similarly, industries otherwise subject to regulation by Congress could probably be required to report on personnel engaged by them in research. By analogy to elements already in the Atomic Energy Law, the United States might also require all persons who make scientific discoveries related to arms or arms control to report and make them available to the United States, although if these discoveries were to be used it might have to pay for them as a "taking" of property for public use. But persons engaged in scientific activity which had been rendered illegal could not be compelled to report that fact in view of the privilege against self-incrimination, unless they were granted immunity from prosecution.

The core of the question—whether it is possible to require individual citizens, merely because of their past education, activities, and skills to inform the United States, or through the United States an international body, where they are and what they are doing—is subject to argument; the precedents are few, and perhaps distinguishable. On balance, one might

guess that a provision for such registration, in a treaty, or in legislation implementing a treaty, would probably be upheld. Whether this is a desirable provision is another matter.

The constitutional issues we have considered may suggest also consequent questions of a constitutional character. For example, one may examine the possibility of an immunity statute under the fourth amendment like that suggested under the fifth amendment; a statute which would make it lawful to seize evidence without warrant but give the "victim" immunity from prosecution for any crimes which the evidence reveals. But, we conclude, the fourth amendment is not merely a protection against conviction by evidence unlawfully seized; it is also an affirmative guarantee of privacy.

And one should examine the difficulties which a citizen would encounter in asserting his constitutional rights in the courts in view of the probable immunity to suit of the inspectors, and of a disposition of the courts not to consider what they may deem "political questions" left to the other branches of the government.

Conclusion

In today's world, there will be no arms control without inspection. And, despite past failures, if nations are prepared to seek security in mutual disarmament rather than in competitive armament, it should not be impossible to obtain agreement on "workable systems of inspection." It has been suggested, indeed, that if an agreement to disarm is in the interest of both the United States and the Soviet Union, it is also in the interest of both that the agreement continue in effect, and inspection should be acceptable, even desired, to assure that the other side will not suspect or fear violation and terminate the agreement.

Any agreed arms inspection would apply in the United States as well. As to any proposal or plan for arms inspection the citizen will be entitled to ask whether it affords assurance that no other nation is violating the agreed controls. He will be entitled to ask too what such inspection as applied in the United States would mean to him, what is its cost in impact on his rights and traditions. And he will have to decide whether he is willing to pay that price. But the citizen is entitled also to ask his government whether that cost is necessary, whether some particular form of inspection is essential elsewhere and must therefore be accepted here.

This suggests the need to concentrate care and ingenuity in examining and developing methods of detection; to focus on what it is one needs to know, and on alternative methods for learning what one needs to know. Feasibility of any inspection proposal, and selection between alternatives, must include due attention to the possible effect on the rights of citizens and on institutions of this nation and of other nations. Where it appears that a

proposal could not be assimilated or accepted here, surely it could not be lightly or sincerely urged on other nations; and rejection by them need not necessarily be evidence of a refusal to disarm or to permit effective corroboration of compliance with disarmament.

For the United States, it may be said, in sum, that the probable elements of an arms control inspection plan lie largely within the framework of the United States Constitution. If direct inspection by international officials is called for, one may conclude that, even on a conservative view of the flexibility of the constitutional pattern, such inspection, for the most part, would not do it violence. The essentials of the inspection system—the reports from government and industry, interrogations of officials and citizens, inspection of governmental installations, of private industrial establishments related to armaments, perhaps even of any industrial establishments suspected—will not turn the litmus paper of the Constitution. It is the eccentric, perhaps, the extreme suggestion—the improbable incursion into the home without a warrant—which raises serious warning signals, and this may prove to be only an imaginary dragon. It does not appear necessary to effective investigation of arms control; it would raise major constitutional questions if applied in the United States; it should not lightly materialize in negotiations, in demands by or of other nations.

If its constitutional implications need not reach far or wide, international inspection for arms control will nevertheless contain new elements. The novel aspects in law, as in our traditions, will be the presence of international officials observing operations of the United States Government and its citizens. This may be a grating, even a wrenching concept, which opponents of arms control may exploit. The “foreign” character of the inspectorate and of international control may create some problems like those which earlier in our history resulted from federal operations in areas of the country where “federal” meant “foreign.” But the nation, and the States, survived these tests. In peripheral respects, the United States, with other nations, may have to accept minor international intrusion for the sake of peace and its own security. Yet the degree of intrusion may prove rather less than we may be asked to imagine. In its impact on the citizen, arms control and inspection should not prove more intrusive, more jarring to traditional behavior and liberties, than control of narcotics, or liquor, or firearms, or filled milk. Few Americans would, in all probability, hear of international arms inspectors; fewer still would have contact with them. And few of these might ever be subjected to adversary, antagonistic requirements, to hostile interrogation, to subpoenas, or to unwelcome nonroutine inspection. The citizen is already accustomed to federal, state, county and city officials; another small, special group, under federal auspices, should not disturb him. The contacts with international inspectors may be fewer

than those with the inspectors to which he is accustomed; they need not be more startling or onerous.

Perhaps the most striking aspect of thorough arms inspection in support of thorough arms control would be the projected effect on secrecy and security. There is an air of unreality, redolent of Utopia, in a discussion which assumes freedom of access, even to foreigners, to United States installations and offices, which may even entail the virtual abolition of security classifications and with them security checks, and investigations, and prosecutions for espionage or related crime. And, indeed, if arms control comes, it may still take years to replace habits of secrecy and withholding with easy and free habits of openness and cooperation. It will take legislation to educate the public and education to make legislation possible. It will take bold leadership, enjoying popular confidence, to bring it about and make it work. But, again, it is useful to stress that secrecy is not a constitutional principle; to recall times not beyond the memory of living men when "security" was not a living concept, when there was not a single prosecution for espionage in any form in many years, when classifications were few and relaxed. To remind of this is not to dream idly of better, old days before total war, warm or cold, but rather to recall that openness and freedom have at least as good a claim in the American tradition as secrecy and fear.