Florida State University Law Review

Volume 25 | Issue 3 Article 3

1998

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LAW REVIEW

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VOLUME 25 SPRING 1998 NUMBER 3

Recommended citation: Jonathan P. Hersey & Anthony F. Ventura, *Challenging Challenge Inspections: A Fourth Amendment Analysis of the Chemical Weapons Convention*, 25 FLA. ST. U. L. REV. 569 (1998).

CHALLENGING CHALLENGE INSPECTIONS: A FOURTH AMENDMENT ANALYSIS OF THE CHEMICAL WEAPONS CONVENTION

JONATHAN P. HERSEY* AND ANTHONY F. VENTURA**

I. INTRODUCTION

> The problem in defense is how far you can go without destroying from within what you are trying to defend from without.[1]

The development, production, and potential deployment of chemical weapons have become the greatest threat of mass destruction in the post-Cold War world.[2] Recent United States intelligence reports estimate that there are upwards of twenty-five nations that either currently possess stockpiles of chemical weapons or are in the process of developing them.[3] Moreover, these sources specifically name China,[4] India,[5] Iran,[6] Iraq,[7] Libya,[8] North Korea,[9] Pakistan,[10] and

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1. PEGGY ANDERSON, GREAT QUOTES FROM GREAT LEADERS 131 (Celebrating Excellence Publ'g 1990) (quoting Dwight D. Eisenhower).

2. See Burrus M. Carnahan, Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Issues, 25 INT'L LAW. 167, 168 (1991). Carnahan bases this view on the widely publicized use of chemical weapons in the Iran-Iraq war. Carnahan also cites Iraq's threats to use chemical weapons against Israel and Libya's reported construction of a chemical weapons production facility as evidence of the increased risk posed by chemical weapons in the post-Cold War era. See id. at 168.

The technologies and nuclear matter necessary for the creation of a nuclear weapon are closely guarded by the nations who possess successful nuclear programs. However, the information and substances required for the development and production of a chemical weapon are readily available worldwide on the Internet. See Randal Ashley, Nunn and Lugar Tell the Hard Truth About Dangers We Face, ATLANTA J. & CONST., Nov. 5, 1995, at G6. Chemical weapons do not require advanced technology. Instead, chemical weapons can be made in private locations with chemicals that have common non-military purposes. See id.; infra notes 115-19 and accompanying text; see also Stuart Auerbach, 19 Nations Back U.S. Plan for Chemical Arms Curbs, WASH. POST, May 31, 1991, at A1.

3. The list of nations suspected or known to currently possess chemical weapons includes Angola, Bosnia, China, Croatia, Egypt, Ethiopia, France, India, Indonesia, Iran, Iraq, Israel, Japan, Libya, Myanmar, North Korea, Pakistan, Russia, Saudi Arabia, South Africa, South Korea, Syria, Taiwan, Thailand, the United States, and Vietnam.See Treaty Isn't Perfect, But It Does Mean a Safer World, USA TODAY, Feb. 11, 1997, at A10 [hereinafter Treaty Isn't Perfect].

4. See China Calls For Early Implementation of Weapons Convention, Xinhua News Agency, July 24, 1996, available in LEXIS, News Library, Curnws File.

5. See Treaty Isn't Perfect, supra note 3.

6. Iran signed the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, or the Chemical Weapons Convention (Treaty), in 1993, but failed to ratify it. As Dr. Gordon C. Oehler, Director of the Nonproliferation Center of the Central Intelligence Agency, noted:

Syria[11] as likely chemical weapons proliferators.[12] As far as U.S. intelligence reports are concerned, each of these countries poses a substantial threat for the dissemination or use of chemical weapons.

> [Iran] continues to upgrade and expand its chemical weapons production infrastructure and chemical munitions arsenal. Iran is spending large sums of money on long-term capital improvements to its chemical weapons program as part of this expansion, which tells us that Tehran fully intends to maintain a chemical weapons capability well into the foreseeable future.

Global Proliferation of Weapons of Mass Destriction, Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Affairs, 104th Cong. 217 (1996) (Statement of Dr. Gordon C. Oehler). Oehler further stated that:

> Tehran is continuing its drive . . . to acquire increasingly toxic nerve agents and soon should have a production capability for these agents. It also is developing a production capability for precursor chemicals it needs to support chemical agent production, and within several years may become virtually independent of imported raw materials.

Id.

7. Iraq used chemical weapons against Iranian soldiers during the Iran-Iraq War in the 1980s. See Carnahan, supra note 2, at 168. Saddam Hussein also used chemical weapons against Khurdish refugees amassed inside the Iraqi border. See id. U.S. intelligence sources learned that Hussein intended to conduct a chemical weapons attack on United States soldiers during the Gulf War. Captured Iraqi documents and newly declassified U.S. intelligence reports revealed that Hussein actually gave the order for chemical weapons to be used against Allied Forces once these troops crossed into Iraqi territory. The reports indicated that Iraq's chemical weapons were deployed and their commanders were given discretion to use the weapons. See Keith Timmerman, The Iraq Papers: Saddam's Weapons Revealed, NEW REPUB., Jan. 29, 1996, at 12; see also Arthur Spiegelman, Iraq Ordered Chemical Warfare in Gulf War, Reuters World Service, Jan. 17, 1996, available in LEXIS, News Library, Curnws File.

8. In 1985, U.S. satellites discovered a major construction project near Rabta, a remote desert town in Libya. The U.S. suspected that the Libyans intended to build the largest chemical weapons plant in the developing world. Such fears escalated when packs of wild dogs near the facility suddenly and mysteriously died. Concerns about the Rabta project resurfaced last year when Libya purchased from two German companies the technology to produce mass quantities of poison gas and the equipment needed to build a chemical weapons production facility deep inside a mountain fortress. See Libyan Report Denies Plans for Massive Chemical Weapons Plant, Deutsche Presse-Agentur, Feb. 26, 1996, available in LEXIS, News Library, Curnws File (based on statements made by the Director of the U.S. Central Intelligence Agency, John Deutch); William C. Rempel & Robin Wright, Dead Dogs, Surveillance, Vigilance, Luck Expose Libya Plant, L.A. TIMES, Jan. 22, 1989, at A1; see also THOMAS C. WIEGELE, THE CLANDESTINE BUILDING OF LIBYA'S CHEMICAL WEAPONS FACTORY 21, 32-33 (1992); Mary Williams Walsh, German Linked to Libyan Arms Deal, L.A. TIMES, Feb. 28, 1996, at A4.

9. See Karen Lowe, Threat of Future Chemical Weapons Attack Is Growing, Experts Say, Agence France Presse, Mar. 20, 1995, available in LEXIS, News Library, Arcnws File.

10. See id.

11. Syria purchased chemical weapons from the Soviet Union prior to 1991. See Knut Royce, Mideast Chemical Arms Deal: Russia Denies Soviet Official's Accusation, NEWSDAY, Nov. 2, 1995, at A17. Vil Mirzayanov, Counter-Intelligence Chief of Russia and the former Soviet Union's chemical warfare research department, told the Senate Permanent Subcommittee on Investigations that such weapons were shipped to the Mideast sometime prior to the breakup of the Soviet Union in 1991. See id.

12. See Race Is on for Chemical Weapons, CHI. TRIB., Feb 19, 1996, at A1 (quoting John Holum, director of the Arms Control and Disarmament Agency); see also Lowe, supra note 9 (citing U.S. intelligence sources that suspect, inter alia, China, North Korea, Pakistan, and India).

In addition, the possibility that terrorist organizations will acquire chemical weapons continues to increase.[13] The March 1995 intentional release of deadly Sarin gas in a Japanese subway well-illustrates this point.[14] The knowledge and substances necessary to construct an even more lethal device are easily accessible, thus heightening the fear that such a scenario could be played out in other parts of the world—including in the United States.[15]

Furthermore, the dissolution of the Soviet Union has created a fear that large quantities of chemical weapons will escape Russian control.[16] High-ranking Russian officials admit that prior to its collapse in 1991, leaders of the former Soviet Union sold chemical weapons to Middle East countries, including Syria.[17] The potential supply of these weapons has not dried up. As economic hardship continues to mount in the new Russian republics, a logical fear exists that some of this stockpile may fall into unauthorized hands.[18] Russian soldiers charged with the duty of guarding insufficiently secured stores of chemicals might be easily bribed by would-be terrorists.[19] The result could be the unhindered spread of mass quantities of chemical weapons to irresponsible leaders and radical terrorist organizations.[20]

On January 13, 1993, in an effort to defend against the growing threat of chemical weapons described above, an international com-

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13. The difficulty with preventing such an attack is that individual terrorist organizations, unlike nations, cannot be readily deterred from using chemical weapons. Additionally, the very nature of the radical views espoused by terrorist organizations makes it all the more likely that extremist groups will eventually decide to use chemical weapons once they obtain them. See Randal Ashley, Q & A on the News, ATLANTA J. & CONST., Mar. 28, 1996, at A14; see also Dick Hogan, Conference Is Warned of Chemical Weapons Risk, IRISH TIMES, Feb. 7, 1996, at Home News 2 (quoting Commandant Peter Daly of the Army Ordinance Corp). Daly concluded: "For the foreseeable future, the chemical weapon will continue, like the Sword of Damocles, to hang over the head of civilised society." Id.

14. Adequately distributed, one-third of an ounce of Sarin can produce up to 5000 casualties. See Ashley, supra note 2 (quoting James A. Genovese, U.S. Army Chemical & Biological Defense Command).

15. Senators Sam Nunn and Richard Lugar feared that thousands of Americans attending the Olympic games in the Georgiadome, like the Japanese commuters in the subway, could have been killed just as easily from a cult's Sarin gas attack. See id.; see also Lowe, supra note 9 (discussing the likelihood that the United States will become a target for chemical weapon attacks now that a loose network of terrorist organizations can easily acquire and assemble these devices).

16. Estimates of the size of the Russian stockpile of chemical agents range between 40,000 and 50,000 tons. See Choke Hold, ECONOMIST, Feb. 10, 1996, at 79; see also Lowe, supra note 9.

17. See Royce, supra note 11.

18. See Choke Hold, supra note 16, at 79.

19. See id. Inspectors visiting Russian chemical weapons storage sites observed unguarded doors, single padlocks, and a lack of alarms. Additionally, they noted the possibility that impoverished Russian soldiers might accept small amounts of cash in return for access to the stockpiles. See id.

20. See id.

munity of more than 120 nations signed the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, or the "Chemical Weapons Convention" (Treaty).[21] Since that time, forty additional countries have signed the Treaty.[22] On April 24, 1997, after a fervent political battle and heated legislative debate, the United States Senate ratified the Treaty, making the United States an original member of the Treaty.[23]

It is the contention of these authors that, in ratifying the Treaty and effectuating its verification requirements, the United States will jeopardize the protection of individual rights upon which our democracy was founded, and which the Treaty was designed to protect.

Part II of this Article interprets the text of both the Treaty and the domestic legislation that would implement the Treaty in the United States (Implementation Act),[24] in light of the individual constitutional rights guaranteed by the Fourth Amendment. Part II also discusses the scope of the Treaty's verification mechanisms, and specifically concentrates on the on-site and challenge inspections.

The Treaty's verification regime, unlike other arms control treaties, allows foreign inspectors to search private businesses and residences in the United States.[25] For this reason, Part III focuses on the applicability of Fourth Amendment legal analysis to the Treaty and its domestic Implementation Act.[26] Part III also considers each of the potential legal justifications upon which a court or magistrate might rely when deciding whether to grant a search warrant to government officials seeking to perform a challenge inspection search. Of course, before international authorities will be permitted to conduct a challenge inspection, they will be required to obtain a valid search warrant through domestic officials at the Department of Justice. Unfortunately, Department of Justice officials will likely be unable to sat-

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21. Jan. 13, 1993, S. TREATY DOC. NO. 103-21 (1993) [hereinafter TREATY]; see also David G. Gray, Note, "Then the Dogs Died": The Fourth Amendment and Verification of the Chemicals Weapons Convention, 94 COLUM. L. REV. 567, 568 (1994).

22. See Serguei Batsanov, CWC Is Not Industry's Foe; Involvement by Business Will Ensure Benefits, DEFENSE NEWS, Jan. 29-Feb. 4, 1996, at 20 (as of January 1996, 46 of the Treaty's 160 signatories had ratified the Treaty).

23. See Alison Mitchell, Senate Approves Pact on Chemical Weapons After Lott Opens Way, N.Y. TIMES, Apr. 25, 1997, at A1.

24. See The Chemical Weapons Convention Implementation Act of 1997, S. 610, 105th Cong. (1997) [hereinafter Implementation Act]. At the time of publication, there were several versions of proposed legislation to implement the Treaty. This Article discusses and cites to the first version of the Implementation Act, which was officially introduced in the Senate on April 17, 1997. See id.

25. See David A. Koplow, The Shadow and Substance of Law: How the United States Constitution Will Affect the Implementation of the Treaty, in SHADOWS AND SUBSTANCE: THE TREATY 155, 155 (Benoit Morel & Kyle Olson eds., 1993).

26. See Implementation Act, supra note 24.

isfy the necessary constitutional requirements of the Fourth Amendment before such warrants are issued.[27]

Part IV addresses the U.S. government's proposed solution for ensuring that it does not unintentionally abrogate its Treaty obligations by failing to fulfill its obligation to facilitate challenge inspections. Notably, the language of the domestic Implementation Act strips the judiciary of its power to issue injunctive relief to private citizens seeking to prevent unconstitutional challenge inspections. This provision is designed to ensure that a judge cannot impede the United States' verification requirements by issuing an injunction that enjoins officials from conducting inspections without the requisite level of probable cause or reasonable suspicion. This legislative safeguard, however, undermines the protections of judicial enforcement of the Fourth Amendment[28] and therefore violates the Constitution.

This Article concludes that the Treaty, while founded upon the noble goal of ridding the world of these hideous weapons of mass destruction, is constitutionally infirm. The challenge inspections upon which the Treaty's effectiveness is based are made impractical by the necessity of their procedural compliance within the strictures of the Fourth Amendment.

II. ANALYSIS OF THE TREATY AND DOMESTIC IMPLEMENTATION ACT

A. Foundations of the Treaty

Since January 13, 1993, 160 nations have signed the Treaty.[29] The Treaty became effective 180 days after the sixty-fifth nation achieved domestic ratification, on April 29, 1997.[30] By that date, seventy-six ratifying nations, including the United States, had become original State Party members.[31]

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27. See infra Part III.

28. The Fourth Amendment in its entirety states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

29. See Batsanov, supra note 22, at 20.

30. See TREATY, supra note 21, art. XXI, ¶ 1, at 323 (outlining the requirements under which the Treaty would become effective); Stanley Meisler, Senate OKs Pact to Ban Chemical Warfare, L.A. TIMES, Apr. 25, 1997, at A1.

31. See Meisler, supra note 30, at A8; see also Briefing by Arms Control and Disarmament Agency, Fed. News Serv., Sept. 4, 1996, available in LEXIS, News Library, Curnws File. Nations who ratify the Treaty after it becomes effective must wait 30 days before they can become a State Party member. See Defense Department Briefing, Fed. News Serv., Apr. 8, 1997 (Remarks by John Holum, Director of the Arms Control and Dis-

The United States became an original State Party member when the Senate voted to ratify the Treaty on April 24, 1997.[32] However, U.S. ratification did not come easily. Despite leading the international effort to sign the Treaty in 1993, the United States nearly missed the deadline to join the Treaty as an original State Party member. Initially, the U.S. ratification process stalled as a result of several tangentially related political disputes. Despite President Clinton's attempts to acquire Senate ratification in the fall of 1996, Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, refused to release the Treaty from his committee.[33] Helms rejected Clinton administration pleas to pass the Treaty to the Senate floor for a ratification vote until other Republican priorities, such as the reformation of several supposedly antiquated foreign policy agencies, were completed.[34]

President Clinton and Senator Helms resolved their dispute by agreeing to a compromise consolidation plan.[35] Helms allowed the Treaty to be considered and debated by the Committee, which eventually voted to recommend ratification. He then sent the Treaty to the Senate for a full vote.[36] However, ratification encountered a second delay on the Senate floor. The original Senate debate occurred in September 1996, in the midst of the presidential campaign between President Clinton and Senator Robert Dole.[37] Fearing it lacked the

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armament Agency (ACDA), available in LEXIS, News Library, Curnws File [hereinafter Defense Department Briefing].

32. See Mitchell, supra note 23.

33. See Jim Lobe, Arms Pact First Test of Clinton Internationalist Credo, Int'l Press Serv., Feb. 5, 1997, available in LEXIS, News Library, Curnws File.

34. See id. Specifically, Helms planned to consolidate the Agency for International Development (AID), the U.S. Information Service, and the ACDA into the State Department. See John Carlin, A Horse Would Do a Better Job, INDEPENDENT, Feb. 16, 1997, at World 11. President Clinton vowed to veto Helms' proposal. See Charles William Maynes, The Big Chill at State as Helms Battles the White House, L.A. TIMES, Oct. 1, 1995, at M2 (noting that this dispute "brought the entire foreign-policy process to a halt"). Helms reacted by refusing to permit any legislation, including the Treaty, to pass from his foreign affairs committee. See id.; Barbara Crossette, U.S. Politics Delays Treaty on Poison Gas, N.Y. TIMES, Aug. 20, 1995, at A9.

35. See Senate OKs Start II Treaty, UPI, Jan. 26, 1996, available in LEXIS, News Library, Wires File. Helms agreed to hold hearings on the Treaty by April 30, 1997, or to send the Treaty directly to the Senate floor for consideration. In return, President Clinton agreed to submit a State Department consolidation plan saving $1.7 billion over five years. By agreement, if the Administration fails to offer this plan, the three agencies targeted by Helms will be eliminated. See id.

36. See Letter of Transmittal from President Clinton to U.S. Senate (Nov. 23, 1993), in TREATY, supra note 21, III-VI; see also Pat Griffith, Chemical Arms Treaty Embattled, PITTSBURGH POST-GAZETTE, Apr. 13, 1997, at A8.

37. See Barry Kellman & Edward A. Tanzman, Chemical Treaty Deserve [sic] Ratification: No One's Constitutional Rights Are Going to be Violated by the Treaty, BULL. OF THE ATOMIC SCIENTISTS, Jan. 11, 1997, at 15.

number of needed votes to ensure ratification, the Clinton administration withdrew the Treaty from Senate consideration.[38]

After the election, President Clinton made ratification of the Treaty one of his most important foreign policy goals.[39] After another agreement with Senator Helms, the Treaty again passed from the Committee to the Senate floor, this time a week before the deadline to ratify the Treaty as an original member.[40] After several days of political maneuvering and the application of intense political pressure from the White House, the Treaty finally received the necessary two-thirds majority of votes.[41]

1. Textual Mandates of the Treaty

The purpose of the Treaty is not only to prevent the use of chemical weapons, but also to eliminate their production and stockpiling.[42] The Treaty attempts to achieve these goals through several means. First, the Treaty requires a State Party member to destroy existing stockpiles of chemical weapons within ten years after the Convention becomes effective.[43] Second, the Treaty has two different built-in verification mechanisms to guard against the prohibited use, stockpiling, or production of chemical weapons: routine inspections and challenge inspections.[44]

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38. See id.; Griffith, supra note 36; see also Tom Rhodes, Setback for Treaty, TIMES (London), Sept. 14, 1996, at 14.

39. See Capital Hill Hearing With Defense Department Personnel, Fed. News Serv., Mar. 5, 1997, available in LEXIS, Newslibrary, Curnws File (reporting a Capital Hill hearing with Defense Department personnel, namely John Holum, Director of the U.S. ACDA). Senator Richard Lugar (Repub., Ind.), a member of the Senate Foreign Relations Committee, introduced the Treaty in the Senate on January 21, 1997. See Lugar Introduces Resolution Calling for Ratification of CWC, Armed Forces Newswire Serv., Jan. 22, 1997, available in LEXIS, News Library, Curnws File.

40. This compromise not only involved President Clinton's concessions to some of Helms' demands, but also threats by Democrats to thwart all other Senate business unless the Treaty received immediate consideration. See Frank Gaffney Jr., Chemical Weapons Moment of Truth, WASH. TIMES, Apr. 15, 1997, at A16; see also Late Approval Granted for Chemical Accord, JANE'S DEFENCE WEEKLY, Apr. 23, 1997, at 8.

41. The turning point of the Senate vote came when President Clinton persuaded new Republican Senate Leader Trent Lott to support the Treaty. See Mitchell, supra note 23; see also Jerry Gray, Resolving Treaty Issue, Lott Seems to Cement Party Leadership, N.Y. TIMES, Apr. 25, 1997, at A6. Lott's support then brought along other Republican votes, which guaranteed Treaty ratification. See Mitchell, supra note 23.

42. See TREATY, supra note 21, Preamble, at 279.

43. See id. Annex on Implementation and Verification, Part IV(A), ¶ 17(a)-(c), at 365-66 (explaining the differences between the three categories of chemical weapons and the timeframe by which each category is to be destroyed).

44. See id. § D, at 370-76. This Article focuses on the constitutionality of challenge inspections only. Routine inspections primarily involve government-owned production and stockpiling facilities or privately owned businesses that are so closely tied to the government that they do not have the same expectations of privacy associated with those private businesses or residences covered by challenge inspections. See New York v. Burger, 482 U.S. 691, 700 (1987). As discussed below, the scope of challenge inspections permits

The Treaty divides actual and potential chemical weapons into three distinct schedules that list the toxic chemicals and their precursor chemical agents.[45] Schedule One is a list reserved for chemicals already converted to weapons status and which have a high potential for use in activities prohibited by the Treaty.[46] Schedule Two includes chemicals that possess such "lethal or incapacitating toxicity . . . that would enable [them] to be used as . . . chemical weapon[s],"[47] and are "not produced in large commercial quantities for purposes not prohibited under this Convention."[48] Schedule Three contains highly lethal toxins that may be produced in large commercial quantities for purposes not prohibited under the Treaty.[49]

For each facility containing a chemical covered under Schedules One, Two, or Three, the Treaty establishes a comprehensive routine verification regime. This routine regime includes such requirements as data monitoring and collection, self-reporting by businesses and state-operated facilities, and regular on-site inspections by an international enforcement directorate.[50]

More importantly, the Treaty also establishes a system of challenge inspections. The challenge inspections allow signatory State Parties to make immediate on-site inspections of any facility within the jurisdiction of another State Party member.[51] These challenge inspections are used to resolve disputes concerning questions of possible noncompliance.[52] To allow this verification system to function, the Treaty establishes a clear procedure to which State Parties must adhere.[53]

2. Procedure for Challenge Inspections

Any State Party member may request a challenge inspection of a facility inside the territory of another State Party member. The first step in initiating a challenge inspection is for a State Party member to submit a request for an inspection to the director-general and ex-

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Treaty inspectors to target almost any private facility or residence, even those without a direct connection to the production or stockpiling of chemical weapons. See infra Part III.C.2.

45. See TREATY, supra note 21, Annex on Chemicals, at 325-31.

46. See id. ¶ 1, at 326.

47. Id.

48. Id. ¶ 2(d), at 327.

49. See id. ¶ 3, at 327.

50. See id. Annex on Implementation and Verification, Part VI, § E, at 407-08 (listing the verification regime for Schedule One chemicals); id. Part VII, § B, at 412-15 (listing the verification regime for Schedule Two chemicals); id. Part VIII, § B, at 419-21 (listing the verification regime for Schedule Three chemicals).

51. See id. art. IX, ¶ 8, at 311. The Treaty permits treaty officials to inspect private businesses and residences throughout the United States. See infra Part III.C.2.

52. See TREATY, supra note 21, art. IX, ¶¶ 8-25, at 311-13.

53. See id. Annex on Implementation and Verification, at 332-444.

ecutive counsel of the Convention.[54] To prevent frivolous requests or unfounded challenge inspections, a State Party member's request must fall within the scope of Treaty guidelines by providing the director-general and executive counsel with all relevant information suggesting noncompliance.[55] Specifically, a State Party member's inspection request must contain at least the following information:

> (a) The State Party member to be inspected and, if applicable, the Host State;
> (b) The point of entry to be used;
> (c) The size and type of the inspection site;
> (d) The concern regarding possible non-compliance with this Convention including a specification of the relevant provisions of this Convention about which the concern has arisen, and of the nature and circumstances of the possible non-compliance as well as all appropriate information on the basis of which the concern has arisen; and
> (e) The name of the observer of the requesting State Party member.[56]

The director-general must acknowledge receipt of the request for a challenge inspection within one hour of submission of the above information.[57] The director-general must then notify the State Party member to be inspected, and supply that State Party member with the same information listed above, not less than twelve hours before the planned arrival of the inspection team at the point of entry.[58] Once the request for a challenge inspection is officially submitted, the Executive Counsel has only twelve hours to reject the request.[59] For the executive counsel to reject the request, three-quarters of the majority must vote against permitting the inspection.[60] If the three-quarters majority is not met, then the request for a challenge inspection is considered approved.

Within twenty-four hours of arrival at the point of entry, the international inspection team must be transported to the point of inspection by the Host State Party member.[61] Not later than twelve hours after arriving at the inspection site, the inspection team must begin collecting data at the perimeter and exit points of the facility.[62]

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54. See id. Part X, ¶ 4, at 428-29.
55. See id.
56. Id.
57. See id. ¶ 5, at 429.
58. See id. ¶ 6, at 429.
59. See id. art. IX, ¶ 17, at 312.
60. See id.
61. See id. Annex on Implementation and Verification, Part X, ¶ 15(b), at 431.
62. See id. ¶ 23, at 432.

Within 108 hours of arrival, the Host State Party member must provide the inspection team with internal access to the facility.[63]

An observer from the State Party member that requested the challenge inspection is permitted to be at the site and to make recommendations to the inspection team.[64] It must also be informed as to the conduct and findings of the inspection by the inspection team.[65] Finally, the challenge inspection shall not last longer than eighty-four hours, unless by agreement of the Host State Party member.[66]

The Host State Party member has one significant measure to limit the scope of the search of the challenge inspection. The language of the Treaty guarantees that the Host State Party member may take into account any domestic constitutional obligations. The Treaty states in relevant part:

> [T]he inspected State Party member shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures. The inspected State Party member has the right under managed access to take such measures as are necessary to protect national security. The provisions in this paragraph may not be invoked by the inspected State Party member to conceal evasion of its obligations not to engage in activities prohibited under this Convention.[67]

This provision is commonly referred to as the Treaty's "constitutional savings provision."[68] Supporters of the Treaty claim that the Host State Party member can theoretically use this provision to refuse access to a challenge inspection site if the inspection compromises national security or violates the Host State Party member's constitution.[69] However, such an interpretation of the constitutional savings provision is flawed for several reasons. First, it would be politically disastrous for a State Party member to invoke this provision. The Treaty intends for challenge inspections to serve

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63. See id. ¶ 39, at 435.

64. See id. art. IX, ¶ 12, at 311; id. Annex on Implementation and Verification, Part X, ¶¶ 53-56, at 437-38.

65. See id. Annex on Implementation and Verification, Part X, ¶ 55, at 437.

66. See id. ¶ 57, at 438.

67. Id. ¶ 41, at 435. The Treaty later discusses managed access in the following terms:

> The inspection team shall take into consideration suggested modifications of the inspection plan and proposals which may be made by the inspected State Party member, at whatever stage of the inspection including the pre-inspection briefing, to ensure that sensitive equipment, information or areas, not related to chemical weapons, are protected.

Id. ¶ 46, at 436.

68. Gray, supra note 21, at 595.

69. See id. at 545-46.

as an immediate and effective means of verifying another State Party member's compliance.[70] The purpose of a challenge inspection is to expose a violation of Treaty restrictions or to alleviate the reasonable fear of the State Party member requesting the inspection.[71] Designed to instill confidence in the Treaty's verification mechanism, challenge inspections provide a State Party member broad and intrusive discretion to investigate suspected violations. Such discretion is required because of the ease with which other State Party members can easily produce, transport, and hide chemical weapons.

If the Host State Party member invokes the constitutional savings provision to deny access, neither of these goals is achieved. It is doubtful that verbal assurances of compliance could alleviate the requesting State Party member's fears. Thus, the effectiveness of the verification mechanism rests upon quick and virtually unrestricted access to inspections of suspect facilities. Without challenge inspections, State Party members would have no confidence in the Treaty's verification regime. The State Party member requesting the inspection, and the international community, would assume that a Host State Party member refusing to allow inspections was attempting to hide a Treaty violation.[72]

Furthermore, the integrity and effectiveness of the Treaty's verification mechanisms demand that the entire Treaty be reciprocal. For example, assume the United States requested a challenge inspection of an Iranian facility, but Iran denied access to protect the rights of the facility's owner. The United States could reasonably assume that the Iranians were merely covering up a treaty violation.[73] However, if the verification mechanisms are to function effectively, the United States must be as open to challenge inspections as it expects other nations to be.[74] The United States should not invoke the constitutional savings provision to protect the rights of private businesses and citizens without expecting to create perceptions of noncompliance with Treaty prohibitions on chemical weapons production and stockpiling.[75]

The Treaty also states that before a Host State Party member may deny the inspectors access to an area, the member is obligated

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70. See id.

71. See id.

72. See David A. Koplow, Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States, 63 N.Y.U.L. REV. 229, 355-56 (1988) (stating that if a State Party member uses warrant requirements to justify denying access to a challenge inspection site, other State Party members will perceive a deliberate cover-up).

73. See Gray, supra note 21, at 578 (arguing that the reciprocal right to conduct challenge inspections in other countries prevents the United States from relying on the constitutional savings clause to avoid challenge inspections on its own soil).

74. See id.

75. See id. at 576, 578.

to use "alternative means to clarify" why a limited-access area is not related to Treaty compliance obligations and, therefore, not subject to search.[76] However, it is hard to imagine an alternative means of demonstrating compliance or non-relation when the Host State Party member denies a team of international inspectors full access to the facility. The only proof of compliance would be the Host State Party member's own verbal assurances. If these were sufficient, the other State Party member would not have requested a challenge inspection in the first place.[77]

Reciprocity and the efficacious functioning of the verification regime demand that each Host State Party member resolve its own constitutional requirements without denying access to the inspection team. Therefore, the Host State parties have an obligation to place verification over national security concerns and must make every reasonable effort to demonstrate good faith when denying inspection requests.[78]

B. Textual Mandates of the Implementation Act

Like most arms control treaties, the Treaty is not self-executing—it requires that each State Party member form its own National

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76. TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 42, at 435. Paragraph 42 states: "If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection." Id.

77. Some American supporters of the Treaty have suggested that the United States National Authority could use the constitutional savings provision when it cannot obtain a search warrant. See Gray, supra note 21, at 590-91. This is impossible for the reasons stated above. In addition, relying on the savings provision would force the United States to categorically deny any challenge inspection to a privately owned residence or non-chemical business. Such a denial would destroy the verification regime because the State Party member would presume a Treaty violation. Once confidence in the verification regime is lost, the Treaty becomes worthless.

78. By using a Treaty provision distinct from the constitutional savings provision, private and state-owned businesses may take reasonable measures to prevent the disclosure of confidential business information during the search. These include removing or covering sensitive equipment; restricting sample analysis to the presence or absence of chemicals listed in Schedules One, Two, or Three; and in exceptional cases, giving only individual inspectors access to certain areas of the inspection site. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 48, at 436. In such instances, the Host State Party member is responsible for demonstrating that the portions of the inspection site to which the inspection team is granted only limited access are not related to possible noncompliance with the Treaty. See id. ¶ 49, at 436.

However, this clause does not include a total denial of access to the inspectors. Instead, it is intended solely as a means to limit access to confidential business information where the owner or business has made a reasonable attempt to show that it is a business secret that is unrelated to any possible non-compliance with the Treaty. See Gray, supra note 21, at 595-96.

Authority to oversee compliance with Treaty mandates.[79] It is the responsibility of each National Authority to act as liaison between that State Party member's government and the Organization for the Prohibition of Chemical Weapons (OPCW).[80] Each State Party member must also design its National Authority to ensure the smooth application of the Treaty's verification mechanisms.[81] Thus, the Implementation Act was designed to fulfill the United States' obligation to create a National Authority to ensure adhesion to the Treaty's constructs.[82]

Title I of the Implementation Act establishes the United States National Authority.[83] Section 101 requires the President to create such a National Authority, but vests the President with the proper discretion to decide which arm of the executive branch will oversee the Treaty's verification.[84]

Title IV of the Implementation Act governs the National Authority's procedure for handling inspections to be conducted in the United States.[85] Subsection 401(h) mandates that the National Authority assist inspected facilities in interactions with the inspection team.[86] Section 402 gives the President the power to decide which federal department to appoint to handle compliance with certain inspections.[87]

Title IV also imposes criminal and civil penalties on those who impede or hinder the National Authority's ability to help conduct the inspections permitted by the Treaty's verification regime.[88] Section 403 makes it "unlawful for any person to fail or refuse to permit entry or inspection, or to disrupt, delay, or otherwise impede an inspection as required by this Act or the Treaty."[89] Section 404 details the criminal and civil penalties for violations of section 403.[90] For ex-

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79. See Koplow, supra note 72, at 288 n.363 ("A self-executing Treaty is one that requires no congressional action in order to become domestic law.") (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1986)).

Congress introduced the Implementation Act to authorize the establishment of a United States National Authority. The Implementation Act also authorizes the National Authority to enforce the Treaty requirements in the United States.

80. See TREATY, supra note 21, art. VII, ¶ 4, at 297. The Treaty states: "In order to fulfill its obligations under this Convention, each State Party member shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other State Parties." Id.

81. See id. art. VII, at 297; Implementation Act, supra note 24, § 401(h).

82. See Implementation Act, supra note 24, § 101(a).

83. See id. § 101.

84. See id.

85. See id. § 401.

86. See id. § 401(h).

87. See id. § 402.

88. See id. § 404.

89. Id. § 403.

90. See id. § 404.

ample, subsection 404(a) provides for civil fines of up to $50,000 for refusing to provide an inspection team access to conduct a challenge inspection.[91]

Furthermore, the Implementation Act recognizes the need for the National Authority to provide timely access for challenge inspections at almost any facility in the United States. This includes challenge inspections of facilities where private individuals or businesses might refuse access by invoking their Fourth Amendment rights.[92] The purpose of the Implementation Act is to provide the National Authority with the ability and the authority to ensure that a challenge inspection occurs within the mandates of the Treaty and the Constitution.

Section 406 dictates the legal procedural framework for challenge inspections.[93] Section 406(a)(1) requires the Lead Agency to seek the consent of the owner of the premises prior to the inspection.[94] Either before or after seeking such consent, the Lead Agency may seek a search warrant from an official authorized to issue search warrants.[95] The official will conduct the search warrant hearing ex parte unless the Lead Agency decides otherwise.[96] The Lead Agency shall provide the information supplied by the Technical Secretariat concerning the basis for the selection of the site and the type of inspection requested in seeking the warrant.[97] In the case of challenge inspections, the Lead Agency will also provide the official with any appropriate evidence or reasons given to the Technical Secretariat by the State Party member requesting the inspection, or any other relevant information.[98]

Section 406(a)(2) specifically states:

> The official authorized to issue search warrants shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the Lead Agency showing that—
> (A) the Treaty is in force for the United States;
> (B) the plant site, plant, or other facility or location sought to be inspected is subject to the specific type of inspection requested under the Treaty;

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91. See id. § 404(a). Normally, one might expect that a single $50,000 fine would be sufficient regardless of the duration of the refusal to permit the search. However, this section states that "each day such a violation of section 403 continues shall constitute a separate violation of section 403." Id. § 404(1)(c). The purpose of this latter provision is to place additional pressure on those who refuse access.

92. See U.S. CONST. amend. IV (guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

93. See Implementation Act, supra note 24, § 406.

94. See id. § 406(a)(1).

95. See id.

96. See id.

97. See id.; see also infra Part II.A.2 and accompanying text.

98. See Implementation Act, supra note 24, § 406(a)(1).

> (C) the procedures established under the Treaty and this Act for initiating an inspection have been complied with; and
> (D) the Lead Agency will ensure that the inspection is conducted in a reasonable manner and will not exceed the scope or duration set forth in or authorized by the Treaty or this Act.[99]

Section 406(a)(3) requires that the warrant specify the type of inspection and the location of the inspection, including any specific items or documents and the identity of the inspectors.[100] The Lead Agency may use a subpoena to require the attendance and testimony of witnesses or to compel the production of documents, papers, or reports.[101]

Finally, Section 406(c) demands that no court issue an injunction or other order that would limit the ability of the Treaty officials, the United States National Authority, or the Lead Agency to facilitate an inspection authorized by the Treaty.[102]

Private individuals may not challenge the validity of the search warrant prior to the inspection, despite the fact that the Lead Agency is not required to meet the standard of probable cause required for a search warrant under the Fourth Amendment.[103] The Implementation Act does not require that the Lead Agency provide any evidence to support the justification of the search beyond its descriptions about the time, place, and manner of the search.

1. Verification

The Treaty, like the array of international arms control treaties that precede it, can only be as effective as the verification mechanism established to enforce it.[104] When a country decreases the size of its chemical weapons stockpile and ceases production of these weapons, it necessarily relinquishes a strategic military advantage.[105] Each country that abides by the Treaty must have confidence

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99. Id. § 406(a)(2). While the Implementation Act requires "reasonable" searches, nothing in the language of this provision mandates that the search not exceed the time and manner restrictions required by the Treaty. Nothing in section 406(a)(2)(D) demands that the "reasonableness" of the search include evidence to support the probable cause requirement established by the Supreme Court in its totality of the circumstances test. See Illinois v. Gates, 462 U.S. 213 (1983) (establishing the totality of the circumstances test); see also U.S. CONST. amend. IV.

100. See Implementation Act, supra note 24, § 406(a)(3).

101. See id. § 406(b).

102. See id. § 406(c); see also infra Part III.

103. However, a court could still deny the Lead Agency's request for a warrant because it is facially deficient under the requirements of the Fourth Amendment. See U.S. CONST. amend. IV; see, e.g., United States v. Cardwell, 680 F.2d 75, 77 (9th Cir.1982) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)).

104. See Michael Krepon, Open Skies and Multilateral Verification, in VERIFICATION: THE KEY TO ARMS CONTROL IN THE 1990S 106 (John G. Tower et al. eds., 1992).

105. See Gray, supra note 21, at 571.

that the other signatory countries will also abide by the Treaty requirements. Even the perception of cheating or an attempt to hide a violation might be sufficient to upset the delicate balance of strategic military power that must exist before countries will agree to relinquish their own chemical weapons.[106] Treaty analysts recognize that:

> [i]f a perception of significant cheating grows, the incentive mounts for a Treaty adherent to abandon the Treaty framework (or to resort to secret cheating of its own) so as to counter the advantage potentially available to rivals. If the Treaty structure cannot allay fears of undetected cheating, the Treaty will collapse under the weight of its own lofty goals.[107]

In order to ensure compliance with arms-control Treaty requirements, the verification mechanisms of most arms control agreements serve three goals: deterrence, detection, and assurance.[108] A verification regime that cannot act as an effective deterrent to cheating, allow for detection of noncompliance, or provide assurance of commitment to its Treaty mandates, makes it all the more likely that distrust will foster incentives to cheat.[109] A flawed verification regime may be worse than no verification regime at all. Therefore, the fulfillment of these goals necessarily entails intrusive and ambitious on-site inspections.[110] The ability to conduct random and short-notice on-site inspections further strengthens the effectiveness of Treaty verification schemes by promoting a deterrence-through-fear mentality.[111] Thus, the Treaty has incorporated a system of on-site challenge inspections designed to meet the verification needs of signatory countries.

2. The Importance of Challenge Inspections for Verification

The Treaty places few procedural constraints on the scope and location of a challenge inspection.[112] Thus, Treaty signatories may demand a challenge inspection of any public or private facility in the

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106. Any deviation from the Treaty is a violation of international law. See, e.g., Patricia B. McFate, Where Do We Go From Here? Verifying Future Arms-Control Agreements, WASH. Q., Autumn 1992, at 75, 77.

107. Gray, supra note 21, at 571 (citing Benoit Morel, Verifiability & Enforceability of the Treaty, in SHADOWS AND SUBSTANCE: THE TREATY 217-27 (Benoit Morel & Kyle Olson eds., 1993)).

108. See generally WILLIAM F. ROWELL, ARMS CONTROL VERIFICATION: A GUIDE TO POLICY ISSUES FOR THE 1980S (1986).

109. See Gray, supra note 21, at 571-72.

110. See Defense Department Briefing, supra note 31 (noting that even if verification is a difficult task, on-site inspections offer signatory nations a strong mechanism by which to calm their fears of noncompliance).

111. See Koplow, supra note 72, at 280-82.

112. See TREATY, supra note 21, art. IX, ¶ 8, at 311.

United States, even private homes and businesses.[113] Additionally, the Treaty does not limit the amount of challenge inspections any one country may request or endure.[114]

The logic behind the Treaty's liberal constraints on the amount and scope of challenge inspections is derived from the fact that many chemical weapons can be cheaply and easily produced[115] and stored[116] in relatively small and disguised facilities. Also, the equipment needed to produce these weapons is the same "garden-variety equipment" used by most commercial chemical manufacturers.[117] Therefore, a complete arsenal of chemical weapons, including the production equipment, could be hidden in a small building, warehouse, or residence.[118] The ease of production and the ability to conceal chemical weapons makes their existence incredibly difficult to verify.[119]

Especially troublesome is the dual-use nature of most of the chemicals[120] used in the production of chemical weapons.[121] Many of the chemicals used in the building of these weapons retain valuable commercial purposes. Thiodiglycol, for example, is a common chemical used in the production of fountain and felt-tip pens.[122] However,

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113. See Barry Kellman et al., Disarmament and Disclosure: How Arms Control Verification Can Proceed Without Threatening Confidential Business Information, 36 HARV. INT'L L.J. 71, 92 (1995) [hereinafter Kellman et al.]; see also Carnahan, supra note 2, at 180.

114. See Kathleen C. Bailey, Problems With the Treaty, in SHADOWS AND SUBSTANCE: THE TREATY 17, 28-29 (Benoit Morel & Kyle Olson eds., 1993) (estimating that 120 challenge inspections will be performed each year).

115. The ability to manufacture chemical weapons by making the "basic compounds in a kitchen sink, or a high school lab" is frightening. Robin Wright, Chemical Arms: Old and Deadly Source Returns, L.A. TIMES, Oct. 9, 1988, at A1. Mustard gas, for example, can be synthesized by mixing two chemicals in a vat. See Gray, supra note 21, at 574 (citing Chemical Warfare: Ban the World's Machineguns: Can't Be Done? As Easy As Trying To Get An Effective Global Ban on Chemical Weapons, ECONOMIST, June 4, 1988, at 19).

116. See Koplow, supra note 72, at 285-86 (stating that modern chemical weapons may easily fit inside a suitcase or similarly sized container); see also Bailey, supra note 114, at 17.

117. Auerbach, supra note 2.

118. See Bailey, supra note 114, at 17-24 (explaining that a chemical weapons laboratory could fit within a structure as small as 1600 square feet).

119. See Auerbach, supra note 2; see also Bailey, supra note 114, at 18-20 (stating that the best way to detect a violation is to test the residual traces of chemical ingredients). Such testing justifies the inclusion of intrusive challenge inspections without the right to refuse access.

120. See Bailey, supra note 114, at 24. Such dual-use chemicals are among those found in Schedule Two, but are dominant in the list of Schedule Three chemicals. See TREATY, supra note 21, Annex on Chemicals, Part B, Schedules Two, Three, at 330-31.

121. See Edward A. Tanzman, Constitutionality of Warrantless On-Site Arms Control Inspections in the United States, 13 YALE J. INT'L L. 21, 23 (1988) (citing George Bush for a governmental acknowledgement that chemical weapons and commercial chemicals are structurally similar, but have different uses).

122. See id.

this same chemical is also the precursor chemical agent to the lethal compound known as mustard gas.[123]

For these reasons, the Treaty grants each signatory nation the right to conduct intrusive challenge inspections to ensure compliance with the Treaty, including inspections of private commercial and residential facilities.

C. Challenges to the Legality of Challenge Inspections

Private individuals or businesses may file legal claims contesting the constitutionality of the Treaty's challenge inspections.[124] These potential plaintiffs must prove that the Treaty's denial of injunctive relief is unconstitutional and that the warrantless searches violate the Fourth Amendment.[125]

To receive an injunction, a plaintiff would first need to test the constitutionality of the Implementation Act's prohibition against judicial relief. If this section of the Implementation Act is found unconstitutional, a court would have the authority to issue a temporary restraining order or an injunction while considering the validity of the related search warrant.

Second, a plaintiff must prove that the search warrant obtained by the Lead Agency is invalid because it does not rise to the level of

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123. See Batsanov, supra note 22, at 20. Additional examples of such dual-use chemicals include: (1) trimethyl-phosphate (used to develop insecticides but is a precursor to nerve agents); (2) laundry detergent, (which may be easily converted into a chemical weapon, see Richard Saltus, Chemical Weapons Ban Would Be Hard To Verify, Specialists Say, BOSTON GLOBE, Jan. 17, 1989, at A8); (3) hydrogen cyanide (a by-product of acrylic manufacturing, see The Poison Gas Menace, WASH. POST, Jan. 10, 1993, at C6); and (4) some of the chemicals used to produce hand cream and fertilizer. Telephone Interview with Jeff Nagler, Spokesperson, Chemical Weapons & Biological Weapons Arms Institute (Jan. 17, 1996).

124. To correctly rule on these challenges, a court would have to balance two competing interests:

> If the U.S. Congress were to pass legislation designed to contravene Constitutional rights, court challenges would surely ensue. One of the main questions which probably would weigh in the judges' minds would be that of benefit to the public versus individual rights. That is, would inspections which could result in verifying a chemical weapons ban not outweigh the costs of abridging the Bill of Rights? In this context, it will become clear that inspection of facilities will not result in sure verification and that cheating will be extremely hard to detect. The question will then be whether the poor benefit of low-confidence verification is worth what it will cost in terms of freedom and the U.S. Constitution.

Bailey, supra note 114, at 33; see also id. at 18 (stating that there is no credible basis for attempts at deriving an actual number of times that verifications may succeed, but estimating verification will be successful less than 10% of the time).

125. This hearing is distinct from the Lead Agency's ex parte hearing application for a search warrant where a judicial official could deny the warrant because, on its face, the warrant application lacks sufficient evidence of requisite Fourth Amendment probable cause. See supra note 28.

probable cause required by the Fourth Amendment.[126] For example, a plaintiff could argue that the inspection may demand production of private documents or confidential business information that is unrelated to chemicals listed in the Treaty. If a court concludes that the Lead Agency does not have probable cause to authorize the search, the court may deny the challenge inspection by issuing an injunction. Moreover, companies hoping to protect critical and confidential business information may request an injunction to prevent the National Authority and international observers from conducting the challenge inspection.[127]

A commentator has noted that the threat of loss of confidential business information is inevitable given the structure of the verification regime.[128] The U.S. businesses targeted for a challenge inspection may refuse the search and seek injunctive relief from a federal district court.[129] A district court judge will be faced with a Hobbesian choice of either allowing an intrusive and wide-ranging search to take place on private property, or issuing a temporary restraining order until a determination of the constitutionality of the search can be made.[130] A judicial determination could implicate the constitutionality of the entire Implementation Act if the court decides that the information the Treaty officials must provide to the Lead Agency does not meet the probable-cause threshold required for a warrant. The information provided by the Treaty director-general to the National Authority will not, in all likelihood, include specific evidentiary support. Any inspection based upon the minimal

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126. See Implementation Act, supra note 24, § 305(b)(4).

127. See Carnahan, supra note 2, at 180 (concluding that it is inevitable that some property owner will refuse consent to a search); see also Kathleen C. Bailey, Chemical Weapons: Say No to This Troubled Treaty, WASH. POST, Dec. 12, 1995, at A17 (noting that companies feeling disadvantaged by the Treaty are virtually certain to claim that the Treaty violates their rights against illegal search and seizure). A company's confidential business information might be stolen in two significant ways. First, foreign inspectors, both the challenging State Party's observer and the neutral Treaty inspectors, might gather trade information and business secrets during the inspection. See Kellman et al., supra note 113, at 75-76. Second, the business's own government may mistakenly release confidential information or trade secrets and wrongly disseminate them to unauthorized persons or agencies. See id.

128. "[I]t is inevitable that inspection rights associated with future arms control treaties will enable inspectors, in pursuit of verification-related information, to collect significant amounts of information having no colorable connection to the Treaty." Koplow, supra note 72, at 286.

129. See Kellman et al., supra note 113, at 75-76;

> It is even possible that the company could be tempted to seek judicial injunctive relief from a forthcoming inspection or reporting requirement by claiming that its constitutional property rights could be violated by arms control operations. If a United States court were to enjoin arms control verification activities, however, the United States might be perceived as having violated its obligation to comply with the Treaty.

Id.

130. See Tanzman, supra note 121, at 67.

allegations required by the Treaty would therefore be insufficient to justify the issuance of a search warrant.

In a more likely scenario, the court will probably choose to limit its decision to the facts of the immediate request for a search warrant. Yet, the denial of access to even one facility could result in a perceived violation of the Treaty.[131] Even so, the United States may be perceived as having violated the Treaty without such judicial refusals to issue certain warrants. A court that issues a temporary restraining order while deciding whether the prohibition on injunctive relief is constitutional could inadvertently cause a Treaty violation if the time for the court's decision exceeded the timetables guaranteed by the Treaty.[132] John Holum, Director of the Arms Control and Disarmament Agency (ACDA), recognized that such litigation delays could force the United States to unintentionally abrogate its Treaty obligations.[133] A court's initial denial may cause a State Party member requesting an inspection to proclaim that the United States was acting to hide a Treaty violation.

The drafters of the Implementation Act foresaw the possibility of such a scenario, and concluded that some form of legislative preemption was needed to prevent its occurrence.[134] The government's proposed solution to this dilemma can be found in subsection 406(c) of the Implementation Act. Subsection 406(c) prohibits any court from issuing an injunction or other such order that might place the United States in the position of having to violate the Treaty's verification imperatives.[135]

III. THE APPLICATION OF FOURTH AMENDMENT ANALYSIS TO THE TREATY AND IMPLEMENTATION ACT

A. Constitutional Supremacy

An international treaty cannot authorize the United States government to act in ways contrary to the restraints and limitations imposed by the Constitution. In Reid v. Covert,[136] the Supreme Court held that "[i]t would be manifestly contrary to the objectives [of the Founding Fathers] . . . let alone alien to our entire constitutional history and tradition—to construe the Fourth Amendment as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."[137]

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131. See Koplow, supra note 72, at 355-56.
132. See Implementation Act, supra note 24, §§ 401(d), 402(a).
133. See Defense Department Briefing, supra note 31.
134. See id.
135. See Implementation Act, supra note 24, § 406(c).
136. 354 U.S. 1 (1957).
137. Id. at 17.

The supremacy of the Constitution in relation to international treaties is regarded as settled in the Restatement (Third) of the Foreign Relation Law of the United States: "No provision of an international agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States."[138] Therefore, when the Constitution and a treaty conflict, the treaty obligations agreed to by the United States government are subservient to the protections afforded to individuals under the Constitution.

The Treaty is no exception to the above hierarchy of law. The protections guaranteed by the Fourth Amendment are fundamental and cannot be bargained away by the government, even under the guise of protecting national security through an international agreement.[139] This constitutional rule remains true, even in the face of a treaty as important as this Treaty.

Traditionally, however, courts have been unwilling to invalidate international treaties on the grounds that they violate the Constitution.[140] Because treaties are negotiated and signed by the President and ratified by Congress, courts will usually either afford the Treaty a presumption of validity,[141] or rely upon the political question doctrine to avoid a judgment on the merits.[142] While the judiciary has shown consistent deference to treaties involving national security and other political questions, courts may still choose to exercise their adjudicatory authority when treaties infringe upon individual rights.[143] As one commentator noted, cases involving foreign policy issues juxtaposed with individual rights are: "not a domain where courts should fear to tread, looking about for unaccustomed dangers.

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138. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) (1986).

139. See Koplow, supra note 72, at 357.

140. See David A. Koplow, Back to the Future and Up to the Sky: Legal Implications of "Open Skies" Inspection for Arms Control, 79 CAL. L. REV. 421, 456 n.81 (1991) (citing DENNIS S. ARONOWITZ, LEGAL ASPECTS OF ARMS CONTROL VERIFICATION IN THE UNITED STATES 19-20 (1965)).

141. See id.

142. Based on the desire to avoid violations of separation of powers, courts will often avoid reaching the merits of a case based on what has become known as the political question doctrine.

> The "political question doctrine" posits that some constitutional issues are not justiciable, because the issue is committed to the political branches of government (Congress and the President). Recall the suggestion in Marbury that, where the President or another executive branch official had "legal discretion," the judiciary would not grant relief. The modern way of putting this is to say that the issue is political and not legal, or that there are "no judicially cognizable standards" by which a court could resolve a dispute involving one or both of the coordinate branches of government.

DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1028 (1993).

143. See, e.g., Baker v. Carr, 369 U.S. 186 (1962).

Indeed, this is the very essence of the judicial function in our constitutional system."[144] The Supreme Court has never supposed that judicial deference is absolutely necessary in every action involving foreign policy. In Baker v. Carr,[145] for instance, the Court stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[146] This is especially true when a plaintiff alleges that a treaty or a statute implicating foreign policy infringes upon constitutionally guaranteed individual rights.

In this manner, the Supreme Court has distinguished cases involving disputes between co-equal branches of government and cases involving individual rights where the judiciary finds itself as the sole form of relief.[147] Actions involving potential abuses of individual rights receive more deference from the courts because these challenges strike at the very heart of the judicial function.[148] With this distinction in mind, the Supreme Court has never invoked the political question doctrine to avoid determination on the merits of a claim where the promotion of foreign policy has come into conflict with the protection of individual liberties.[149]

B. General Fourth Amendment Analysis

1. Challenge Inspections as Searches

In the context of the Fourth Amendment, the Supreme Court defines a "search" as having been conducted when a government official's actions intrude upon an individual's objective and reasonable

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144. Gray, supra note 21, at 620 n.330 (citing LEWIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990)).

145. 369 U.S. 186 (1962).

146. Id. at 211 (discussing the justiciability of an action brought by voters in Tennessee to challenge the apportionment of votes for the state's General Assembly).

147. See Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) (discussing claims of violations of individual rights without non-judicial remedies, as distinguished from political questions).

148. See David S. Eggert, Note, Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches, 1983 DUKE L.J. 611, 632 (1983) (noting that Fourth Amendment rights are especially deserving of protection).

The law should be wary of exemptions that appeal to overwhelming interests and thus carry too great a presumption of validity: "[P]rinciples of law, once bent, do not snap back easily." Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting).

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

149. See Lewis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 485 n.6 (1972); see also Gray, supra note 21, at 620 n.330.

expectation of privacy.[150] Most businesses and residences maintain a reasonable expectation of privacy because they are not pervasively regulated by the United States government—especially those industries that do not perform defense contracting work.[151] Nor do these individuals or businesses possess a close nexus to the obligations and mandates imposed on the United States and its citizens by the Treaty.[152] These businesses or residences are simply caught under the broad reach of the Treaty's verification mechanism. Therefore, commentators seem to universally agree that challenge inspections conducted in the United States would constitute a search deserving of constitutional protection.[153] The Implementation Act even concedes that such an intrusion would be a "search" under the Fourth Amendment because it requires the United States Lead Agency to obtain a search warrant.[154]

2. Constitutional Warrant Requirement

In Katz v. United States,[155] the Supreme Court interpreted the Warrant Requirement Clause as the primary clause of the Fourth Amendment.[156] The Supreme Court held that warrantless searches are per se unreasonable, except in carefully delineated exceptions.[157] More recently, however, it appears that the Supreme Court is turning back to the view that the reasonableness clause, the first portion of the Fourth Amendment, should take precedence over the warrant

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150. See generally Katz v. United States, 389 U.S. 347, 359 (1967) (holding that an individual had an objective and subjective reasonable expectation of privacy while talking in a closed telephone booth); see also Silas J. Wasserstrom, The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment, 27 AM. CRIM. L. REV. 119, 123 (1989) (discussing Katz and its progeny).

151. See See v. City of Seattle, 387 U.S. 541, 543 (1967):

> The businessman, like an 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 a violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id.; see also Carnahan, supra note 2, at 180 (citing Dow Chemical v. United States, 476 U.S. 227, 236 (1986) (stating that even a highly regulated chemical industry has a reasonable, legitimate, and objective expectation of privacy that society must observe)).

152. See Carnahan, supra note 2, at 180.

153. See Gray, supra note 21, at 622 nn.340-44 (citing additional commentators who concluded that challenge inspections are searches within the meaning of the Fourth Amendment). These commentators include DENNIS S. ARONOWITZ, LEGAL ASPECTS OF ARMS CONTROL VERIFICATION IN THE UNITED STATES 104-09 (1965); Henkin, supra note 149, at 59; Koplow, supra note 72, at 351; and Tanzman, supra note 121, at 61.

154. See Implementation Act, supra note 24, § 406 (a)(1).

155. 389 U.S. 347 (1967).

156. See id. at 354-55 (applying the reasonable expectation of privacy test to the necessity for warrant requirement).

157. See id. at 357; see also Johnson v. United States, 333 U.S. 10, 14 (1948) (arguing that warrantless searches will render the Fourth amendment meaningless).

clause.[158] Yet, the justices are not reverting to the supremacy of the reasonableness interpretation by directly overruling warrant requirement standards; instead, the Supreme Court has been expanding the exceptions to the traditional warrant requirement standards.[159]

In Illinois v. Gates,[160] the Supreme Court abandoned a rigid two-pronged test for determining whether an informant's tip established probable cause for the issuance of a warrant.[161] In its place, the Court adopted a "totality of the circumstances" approach, and found that probable cause for a warrant to search a defendant's home and automobile was established by an anonymous letter indicating that the defendants were involved in interstate drug trafficking.[162] The Gates test considered both the veracity and reliability of the factual account giving rise to the request for judicial permission to conduct a search.[163] Probable cause exists when facts and circumstances sufficiently cause a prudent person to believe that the evidence to be seized is at the place to be searched.[164] This test for probable cause adopts a "totality of the circumstances" approach which balances interrelated factors including the informant's "reliability" or "veracity" and "basis of knowledge."[165] The "reliability" or "veracity" factor examines the informant's reputation for accuracy.[166] The "basis of knowledge" factor examines how the informant gathered the information, either through first hand knowledge or by offering sufficiently specific details of the criminal activity.[167] While the Gates test does not require that both factors be met, the interrelated consid-

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158. See Wasserstrom, supra note 150, at 124 (stating that the Supreme Court has used the Katz expectation of privacy analysis to exempt additional official investigations from Fourth Amendment restraints).

159. See id. at 121 (noting that beginning with the Burger Court, the Supreme Court began boring away at the warrant requirement by expanding and exploiting exceptions to the expectation of privacy test).

160. 462 U.S. 213 (1983).

161. See id. at 230.

162. See id. at 230–38.

163. See id. at 238. In Gates, the Supreme Court abandoned the former Aguilar/ Spinelli two-pronged test, in which each prong required separate analysis. The Court replaced this test by applying a reasonableness test focusing on the totality of the circumstances. The Gates Court stated:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238; see also Spinelli v. United States, 393 U.S. 410, 413 (1969); Aguilar v. Texas, 378 U.S. 108, 114-15 (1964).

164. See Gates, 462 U.S. at 238.

165. Id. at 233.

166. See id.

167. See id. at 234.

erations help the court determine whether probable cause exists under the "totality of the circumstances."[168]

Additionally, courts apply a particularity requirement to requests for a criminal warrant.[169] The potential evidence must be sufficiently described so as to limit the discretion an officer may exercise in executing the warrant.[170]

In the instance of challenge inspections of private businesses or residences, the U.S. National Authority probably could not obtain a valid criminal search warrant under the current standards. First, the Lead Agency, through the U.S. National Authority and the Department of Justice, will operate only with information supplied by the director general. In turn, the director general will likely possess minimal details provided by the State Party member requesting the challenge inspection.[171] The procedure for a challenge inspection by Treaty officials does not carry an evidentiary burden; mere written allegations based upon conjecture suffice.[172] For a judge issuing a warrant in the United States, however, this information will fall well-short of the burdens necessary to prove probable cause before a criminal warrant may be issued.[173]

The information provided by the State Party member requesting a challenge inspection that is handed over to the United States National Authority will probably fail to meet the Gates standard.[174] The requesting State Party member need only allege possible noncompliance with the Treaty in order to demand a challenge inspection.[175] The requesting State Party member is not required to produce any evidence that the target facility may have chemical weapons or any of their prohibited components. Therefore, no means exist to deter-

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168. See id. at 233.

169. See U.S. CONST. amend. IV; Marron v. United States, 275 U.S. 192, 196 (1927); United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982).

170. See Marron, 275 U.S. at 196 (ruling that the items to be seized must be described in the warrant with such particularity that it leaves little to the discretion of the officer executing the warrant).

171. See TREATY, supra note 21, art. IX, ¶¶ 14-15, at 312; see also id. Annex on Implementation and Verification, Part X, ¶¶ 4-6, at 428-29 (requiring the requesting State Party member to submit the following information: (a) the Host State Party member to be inspected; (b) the point of entry; (c) the size and type of inspection site; (d) the concern of non-compliance, the provisions of the Treaty believed to have been violated, and the nature, circumstances, and information giving rise to the concern for possible noncompliance).

172. See id. art. IX, ¶¶ 14-15, at 312; see also id. Annex on Implementation and Verification, Part X, ¶¶ 4-6, at 428-29.

173. See Illinois v. Gates, 462 U.S. 213, 238 (1983).

174. See id.

175. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 4, at 428-29. Subparagraph (d) does not require the requesting State Party member to provide any proof or evidence to support its allegation. See id. at 429. The Treaty merely requires a description of the nature of the actions giving rise to the Treaty violation. See id. ¶ 4(d), at 429.

mine the truthfulness of the information upon which the Lead Agency relies in order to obtain the warrant. The lack of evidence required by the Treaty falls far short of the level of proof required by the veracity and reliability considerations of the Fourth Amendment.[176]

Furthermore, the Lead Agency will probably be incapable of providing evidence to support the reliability of the informant. When factoring the reliability of the informant into the "totality of the circumstances" equation, courts examine the reputation of the informant, not the reputation of the government official seeking the warrant.[177] However, the Treaty does not require the requesting State Party member to produce any evidence or information about how it gathered the information giving rise to its suspicions. Under the Treaty's mandates, the requesting State Party member is under no obligation to divulge the identity of its informant, or even how it obtained information leading to the request for a challenge inspection.[178] The apparent assumption is that such information resulted from espionage and other intelligence-gathering sources. Thus, a court probably would not have evidence of probable cause concerning the reliability of the information or how it was obtained.

The information used by the National Authority to obtain a valid search warrant will probably also fail the particularity requirement, which mandates that government officials identify the specific portions of the facility and the items expected to be found.[179] Yet, the only burden imposed on the requesting State Party member by the Treaty is to name the country and target facility against which the challenge inspection will be conducted.[180] The requesting State Party member need not list the specific parts of the facility to be searched or what evidence it expects to uncover during the inspection.

Without this latitude, the objectives of the verification regime (deterrence, detection, and assurance) are undermined. Without a solid verification mechanism, the effective implementation of the Treaty becomes impossible. However, the purpose of the Fourth Amendment has been narrowly interpreted so as to prevent government officials from having such discretion in the scope of their searches. Therefore, the minimum requirements to demand a chal-

176. The Constitution requires probable cause for the issuance of a warrant. See U. S. CONST. amend. IV.

177. See Gates, 462 U.S. at 238.

178. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 4, at 428-29.

179. See Marron v. United States, 275 U.S. 192, 196 (1927).

180. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 4, at 428-29.

lenge inspection are insufficient to meet the probable cause requirements for a search warrant.

The Lead Agency will likely have insufficient evidence and information to obtain a search warrant because on its face, the warrant application lacks proof of its veracity, reliability, and particularity. Based upon the information provided to the court, the judge must either deny the warrant application or ignore the requirements of the Fourth Amendment.

In instances where a private owner refuses consent, the delay may cause the United States to be in procedural violation of the Treaty's verification regime. The Treaty requires the Host State Party member's National Authority to ensure that the challenge inspections are conducted in accordance with the timetables of the Treaty, and to prevent denials of access. Should the National Authority's failure to obtain a warrant delay or impede access to a suspected facility, the United States may be perceived as attempting to cover up suspected production or storage of chemical weapons.[181] Therefore, the Lead Agency must look for alternative means to authorize the Implementation Act's search warrant requirement for challenge inspections of private, non-chemical facilities inside the United States.

C. Administrative Searches

The Supreme Court stated in Katz that warrantless searches are per se unconstitutional unless they fall within clearly defined exceptions.[182] Since Katz, more conservative Supreme Court decisions have sought to weaken warrant requirements by not only extending the size and scope of its recognized exceptions, but also by creating additional exceptions.[183] As will be shown, however, most of these ex-

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181. The only solution to this dilemma is for the Lead Agency to have evidence from the requesting State Party member to support its allegations. However, it is unlikely that a member who already suspects a substantive violation of the Treaty will provide additional information. See id. ¶ 4, at 428-29.

182. See Katz v. United States, 389 U.S. 347, 357 (1967).

183. See Wasserstrom, supra note 150, at 121-24.

184. The Supreme Court has recognized some exceptions to the criminal warrant requirements. Thus, courts will likely grant an emergency exception when circumstances compel the police to act immediately because of the risk of the destruction of evidence or the escape of the suspect, and when it would be impractical for the officers to obtain a warrant. See Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (citing Payton v. New York, 445 U.S. 573, 583 (1980) (allowing warrantless home arrests of felony suspects and giving lower courts discretion to apply proper bounds to this exception)).

Courts may also grant a warrant when there is a "hot pursuit." See Welsh, 466 U.S. at 753. Hot pursuit requires that there be "immediate or continuous pursuit of the [the subject] from the scene of the crime." Id. (appearing to limit the hot pursuit exception to serious crimes and excluding misdemeanors).

There is also an exception that allows officers to search a felony arrest suspect and the area immediately surrounding the subject of an arrest, but the exception limits the scope

ceptions are inapplicable to challenge inspections.[184] Instead, the United States National Authority might seek an administrative warrant to conduct the challenge inspection search. The rationale behind administrative warrants is that they are part of a "regulatory scheme" that is "civil rather than criminal in nature."[185] Thus, they do not violate the Constitution because they are "limited in scope" and may not be exercised in unreasonable circumstances.[186] A typical example of an administrative warrant includes the type of broad-based warrant granted to public health and safety officials, such as fire marshals, for the enforcement of municipal safety regulations.[187]

The drafters of the Implementation Act were aware of the probable impracticability of obtaining a criminal search warrant for a challenge inspection; thus, they authorized the United States National Authority to acquire an administrative warrant.[188] Instead of meeting criminal probable cause standards, administrative warrants require the court to apply only a reasonableness balancing test.[189]

The Implementation Act specifically provides for issuance of search warrants by government officials or courts so that challenge inspections will comply with Fourth Amendment requirements.[190] The warrants may be granted "on the basis of 'administrative probable cause,' i.e., the standards for issuing warrants for administra-

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of the search to the space within the suspect's grasp. See Chimel v. California, 395 U.S. 752, 763 (1969); see also Maryland v. Buie, 494 U.S. 325, 334-35 (1990) (allowing protective sweeps of houses where an arrest has been made); United States v. Robinson, 414 U.S. 218, 225 (1973) (citing Agnello v. United States, 269 U.S. 20, 30 (1925) (stating that the doctrine justifying the search incident to arrest applies to the time period occurring contemporaneously with the arrest)).

The warrantless search of a vehicle is permissible if an officer has probable cause to expect to find evidence of a crime. See Carroll v. United States, 267 U.S. 132, 158-59 (1925). This exception permits the warrantless examination of impounded vehicles and the personal effects found inside to account for the owner's property. See Colorado v. Bertine, 479 U.S. 367, 371-72 (1987); see also Illinois v. Lafayette, 462 U.S. 640, 646 (1983) (applying inventory searches to a suspect's person). An additional exception permits a police officer to stop and frisk a suspect if the officer has a reasonable, articulable suspicion that a crime is afoot, and it would be impractical to obtain a warrant. See Terry v. Ohio, 392 U.S. 1, 30 (1968). Police may search a premise or vehicle if the owner gives voluntary consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

In addition, an officer may make a warrantless seizure of incriminating evidence that is in open view while the officer conducts a lawful search, entry, or arrest. See Horton v. California, 496 U.S. 128, 133 (1990).

185. Camara v. Municipal Ct., 387 U.S. 523, 528 (1967).

186. Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978)).

187. See Camara, 387 U.S. at 530.

188. See Implementation Act, supra note 24, § 406(a); see also supra note 154; supra Part II.B.

189. See Camara, 387 U.S. at 538-39; supra Part II.C.

190. See Implementation Act, supra note 24, § 305.

tive inspections rather than the standards used for criminal searches."[191]

1. The Camara Standard for Administrative Search Warrants

In 1967, the Supreme Court created an exception to the criminal search warrant requirement in instances when the search is conducted to enforce municipal health or safety codes.[192] In Camara v. Municipal Court,[193] eight of the nine justices held that warrantless administrative searches of individuals' homes based on suspicion of noncompliance with municipal codes violated the Fourth Amendment.[194] The justices found that such administrative searches significantly intruded upon interests protected by the Fourth Amendment, and would subject citizens to unreasonable intrusions by government health or safety inspectors in the field.[195] However, the Court also stated that broad administrative searches in the public interest were valid and, thus, it was appropriate to grant them in accordance with a reasonableness standard rather than requiring probable cause.[196] The Court based its decision on the finding that administrative searches differ from criminal searches because they seek to deter and correct violations of health and safety regulations, not to seize

191. Letter from John D. Holum, Director, ACDA, to George J. Mitchell, Senate Majority Leader (May 27, 1994) (on file with authors); see also Implementation Act, supra note 24, § 406(a).

192. See Camara, 387 U.S. at 540. Normally, one might expect that a government official wishing to enforce a health or safety code would first seek an individual's consent to search before resorting to the courts for a search warrant. However, in the case of the challenge inspection searches permitted by the Treaty, it seems unlikely that National Authority officials will waste precious time seeking a business's consent. Most businesses are likely to refuse such consent anyway, and will likely petition the courts to prevent the search.

193. 387 U.S. 523 (1967).

194. See id. at 540. In Camara, San Francisco housing inspectors conducted routine housing code inspections in an apartment building. See id. at 526. Informed by an apartment manager that Camara was using the ground floor leasehold as a personal residence in violation of occupancy permits, the inspector "confronted appellant and demanded that he permit an inspection of the premises." Id. Camara refused on three separate occasions to allow inspections without search warrants. See id. at 526-27. Camara was charged with refusing to permit a lawful inspection pursuant to the relevant San Francisco Municipal Code and was arrested. See id.

195. See id. at 532.

196. The rationale for the Camara Court's distinction between administrative and criminal searches is based upon the Court's recognition that enforcement of basic health and safety regulations sometimes demands routine and broad-sweeping searches. For instance, housing inspectors must have the ability to quickly gain access to several city blocks or to an entire residential neighborhood. Housing inspectors need timely access to the facilities in question to prevent landlords from possibly stalling the inspectors at the door while making efforts to correct violations. Otherwise, stalling tactics destroy the deterrence effect of housing code enforcement. See id. at 534–39.

evidence of a crime.[197] The Court also noted that emergency situations involving the public's health or safety further justified the issuance of administrative warrants.[198]

The Court applied a reasonableness test, which is a balancing of government's need to search against the invasion the search entails.[199] The Court noted:

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.[200]

Initially, government must prove there is a legitimate governmental purpose that serves the public interest underlying the search.[201] However, the focus is not on whether the public interest justifies the search, but whether it justifies the disregard of probable cause.[202] The question turns on whether "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[203] Further, the regulatory scheme used by the government to serve this purpose must be a logical, particular, and comprehensive plan that provides a check against random, arbitrary, or selective inspections.[204] These Fourth Amendment constraints serve to prevent

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197. See id. at 535-36. The rationale behind administrative warrants is that they are part of a "regulatory scheme" that is "civil rather than criminal in nature;" thus, they do not violate the Constitution because they are "limited in scope" and not available in unreasonable circumstances. Id. at 528.

198. See id. at 539.

199. See id. at 536-37. The Supreme Court later clarified its opinion as to why the traditional probable cause test is not applied to administrative warrant requests: "The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." Colorado v. Bertine, 479 U.S. 367, 371 (1987).

200. Camara, 387 U.S. at 539.

201. For instance, the Camara Court found that "the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property." Id. at 535. The governmental purpose in enforcing municipal housing codes in Camara was derived from the state police powers to promote health and safety. This is evidenced by two factors of the balancing test used by the Camara Court: (1) that "such [administrative] programs have a long history of judicial and public acceptance," and (2) that the "public interest" be free from dangerous conditions. Id. at 537.

202. See id. at 534-35.

203. Id. at 533 ("It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.").

204. See ROBERT M. BLOOM & MARK S. BRODIN, CONSTITUTIONAL CRIMINAL PROCEDURE 86 (1992) ("The justification envisioned in Camara is designed simply to insure evenhandedness and to avoid arbitrary or selected enforcement. . . . The constraints placed upon administrative searches operate, therefore, not to insure prior knowledge of probable wrongdoing, but to limit discretion and prevent arbitrary treatment of individ-

governmental "fishing expeditions" into private buildings or residences.

For the individual, the balancing test focuses upon the individual's expectation of privacy as best determined by the character of the place to be searched,[205] the individual's right to be free from unwarranted governmental intrusion, as measured by the probable fruitfulness of the government's search,[206] and the level of intrusiveness permitted by the warrant.[207] Therefore, the final decision should be determined by weighing government's need to search against the potential violation of the individual's rights.

2. The Inapplicability of Administrative Search Warrants to Challenge Inspections

Given the Supreme Court's balancing test for administrative search warrants, certain commentators suggest that the judiciary will be receptive to requests by the National Authority or other government officials to issue administrative search warrants to conduct challenge inspections in the United States.[208] However, courts and government officials should refuse to grant administrative search warrants to facilitate challenge inspections for numerous reasons.

First, courts and government officials should refuse to grant administrative search warrants for challenge inspections because of the individual's right to privacy. Individuals and most businesses possess a high expectation of privacy in the residence or facility in which they operate.[209] The typical home or business in the United States has no relation whatsoever to the restrictions imposed on the United States government and its industries by the Treaty. Yet, the Treaty's broad-based verification regime permits an international team of inspectors to search every home or facility.[210]

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als."); see also Koplow, supra note 72, at 351 (noting that the issuance of administrative search warrants requires an orderly and comprehensive inspection plan of all similarly situated properties).

205. See Camara, 387 U.S. at 538 (stating that the court should consider the nature of the building and the surrounding area).

206. See id. at 539 (weighing a valid public interest against the constitutional right to be free from unreasonable searches and seizures).

207. See id. at 537. The Camara Court envisioned that administrative searches would be minimal intrusions when it stated that "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." Id.

208. See Gray, supra note 21, at 633 n.408.

209. See See v. City of Seattle, 387 U.S. 541, 546 (1967) (holding that administrative entry into non-public portions of a commercial property may only be done with a warrant).

210. See supra notes 112-13 and accompanying text.

Second, despite the deterrence effect that the potential challenge inspections may create,[211] the likelihood that they will actually uncover evidence of noncompliance seems remote.[212] Even assuming that the requesting State Party member relies in good faith upon evidence it has collected through intelligence gathering, it is improbable that a challenge inspection could discover instances of noncompliance, given the ease with which chemical weapons are transported and hidden.[213] Based upon the information given to the United States National Authority, the lead agency will likely lack sufficient evidence, when scrutinized by Fourth Amendment standards, to support a claim that discovering the alleged chemical weapons is probable. Considering the small likelihood that the challenge inspection search will produce evidence of noncompliance, a neutral and detached magistrate should reject the initial application for any form of warrant.

Third, the scope of the challenge inspections authorized by the Treaty is extremely broad. Inspectors are permitted to search all areas of the facility, limited only by the Host State Party member's proof that the areas restricted from the search are not related to Treaty compliance.[214] The inspection may include taking chemical samples, company records, documents, and computer files for analysis. The level of intrusion permitted by the challenge inspections far surpasses the level of intrusion envisioned by the Camara Court when it outlined administrative search requirements based on a relatively minimal invasion of privacy.[215]

Finally, the request for an administrative search warrant to conduct a challenge inspection will not likely include a logical, particular, and comprehensive plan. On the contrary, government officials will likely seek an administrative search warrant to allow them to conduct a selective inspection of a single facility.[216] Further, the scope of the search is unlimited. The requesting State Party member is permitted to investigate, examine, and test anything in or around

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211. See supra notes 112-23 and accompanying text for a discussion of how the Treaty's verification regime creates a deterrent effect against noncompliance; see also Koplow, supra note 72, at 356 (concluding that such intrusive verification measures have "too many potential targets and too few inspectors," and thus the likelihood of detection remains small).

212. See Koplow, supra note 72, at 356.

213. However, under the Treaty, Requesting State Parties are not compelled to produce their reasons for requesting a challenge inspection. It is highly doubtful that these State Parties would divulge espionage secrets when not required to do so.

214. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, § C, at 434-38.

215. See Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

216. Because a challenge inspection is directed at a single facility, any request for an administrative warrant will most likely not be based on such a comprehensive or broad-based plan.

the facility, as long as the established time restrictions are met.[217] The Camara Court recognized that this type of search does not meet the standards for granting an administrative search warrant under the reasonableness balancing test.[218]

D. The Pervasively Regulated Industry Exception to the Administrative Search Warrant Requirement

The Supreme Court carved an exception to the Camara ruling by permitting warrantless administrative searches if the business to be inspected is a pervasively regulated industry (PRI).[219] The PRI exception has evolved from a doctrine of implied consent[220] to a doctrine that focuses on the subjective expectation of privacy claimed by the property owner.[221] Under this exception, characterization of the target business's commercial practice becomes crucial.[222] If the PRI exception applies, an entire class of warrantless searches are authorized and an official may demand unimpeded entry to the facility.[223] That right of entry may also authorize the use of force to gain access to the facility in fulfillment of the official's mission.[224]

1. Explanation of the Pervasively Regulated Industry Search Warrant Exception

In Donovan v. Dewey,[225] the Supreme Court created a two-pronged test to determine whether a warrantless administrative search would be constitutionally permissible. The first prong deals with the objective government interest in conducting a search. The second

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217. This does not include the Host State Party member's ability to limit the investigation because of constitutional or national security concerns. However, as stated above, such limits could not be effectively used.

218. See Camara, 387 U.S. at 537.

219. See, e.g., Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (holding that no warrant is required to inspect a liquor industry business based upon a long-standing congressional regulation).

220. See United States v. Biswell, 406 U.S. 311, 316-17 (1972) (ruling that a property owner who chooses to conduct business in a pervasively regulated industry impliedly consented to routine warrantless administrative searches).

221. See Donovan v. Dewey, 452 U.S. 594, 601, 603-05 (1981) (shifting by implication the PRI exception from a doctrine of implied consent to one that applies a test based on two considerations: the pervasiveness of government regulation and the individual's subjective expectation of privacy); New York v. Burger, 482 U.S. 691, 711 (1987) (reformulating the Donovan test to clarify procedural safeguards necessary for the protection of the individual's subjective expectation of privacy including consideration of time, place, and scope of inspection).

222. See Burger, 482 U.S. at 702-03.

223. See id.

224. See Koplow, supra note 72, at 310.

225. 452 U.S. 594 (1981). In Donovan, the Secretary of Labor brought suit seeking to enjoin a company from refusing to permit warrantless searches of its mining facilities pursuant to the Federal Mine Health and Safety Act of 1977. See id. at 596.

prong uses the owner's subjective expectation of privacy to determine if the regulation is sufficiently comprehensive to justify a warrantless search. When "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme,"[226] and "federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes, a warrantless search is constitutionally permissible."[227]

The Donovan Court also demanded a procedural safeguard of the individual's privacy interest—that the pervasive government regulation must provide a constitutionally adequate substitute for a warrant.[228] In determining whether a constitutionally adequate substitute exists, the court must utilize two criteria based upon a review of the textual mandates of the government regulation. First, does the regulation sufficiently limit the discretion of the inspectors?[229] Second, is the inspection scheme sufficiently comprehensive and predictable so that the property owner could be on notice of the likelihood of inspection?[230] In answer to the second question, the Donovan Court considered four factors: the regularity of searches; the frequency of searches; the duration of the scheme; and the ubiquity of the inspections.[231] The Court rejected the legality of random, infrequent, or unpredictable warrantless searches, especially when an inspection is so infrequent as to cause the owner to doubt whether his facility will ever be searched.[232]

Finally, the Donovan decision seemed to suggest that Congress may be limited when formulating its regulations to meet the PRI exception. The Court refused to permit Congress to cross industry lines with its regulatory scheme.[233] Instead, the Court found government regulation must narrowly target a single industry.[234] This restriction

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226. Id. at 600.
227. Id.
228. See id. at 603.
229. See id. at 600.
230. See id.
231. See id. at 599, 605-06.
232. "[W]arrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property from time to time [will] be inspected by government officials." Id. at 599; see also Gray, supra note 21, at 618; Tanzman, supra note 121, at 48.
233. See Gray, supra note 21, at 618.
234. See id. This Article does not address the constitutionality of the Implementation Act's regulation of the chemical industry. The chemical industry is already heavily regulated and since the production of chemical weapons is generally illegal, industries producing chemical weapons do so under the guidance and license of the United States government. These specific industries are already subject to mandatory inspections under the

increases the likelihood that a rational property owner will be aware of the measures designed to regulate that owner's particular business.

In New York v. Burger,[235] the Supreme Court reformulated the considerations proposed in Donovan.[236] The initial threshold question applied by the justices in Burger was whether the industry in question was closely regulated.[237] The Burger Court replaced the Donovan two-pronged test with its own three-pronged variation. The first prong requires that the regulatory scheme be justified by a substantial governmental interest.[238] The second prong demands that warrantless searches be necessary to further the regulatory scheme.[239] The third prong requires the inspection program to provide a constitutionally adequate substitute for a warrant.[240]

In applying the Burger test for deciding whether an industry is pervasively regulated, the dominant theme in recent case law has focused on the property owner's subjective expectation of privacy.[241] Courts use numerous factors espoused by the Burger justices to reach a conclusion on whether or not an industry is pervasively regulated. In addition to applying three of the four Donovan factors,[242] the Burger test also added consideration of any licensing or reporting requirements, the existence of fines or safety standards to enforce the regulations, the tradition of governmental regulation of this industry, and the inescapability of governmental control.[243]

The Burger Court's concentration on the target property owner's subjective expectation of privacy is the logical focus of the PRI exception. By definition, an owner who is unaware of significant governmental regulation of his or her industry cannot have the lessened expectation of privacy necessary to justify a warrantless adminis-

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Treaty and do not raise constitutional issues because they include governmental involvement in the production and storage of chemical weapons.

235. 482 U.S. 691 (1987).

236. See id. at 707. In Burger, the regulation authorized warrantless searches of automobile junkyards and permitted police to examine the owner's record books, as well as the vehicles themselves. See id. at 711-12.

237. See id. at 701-02.

238. See id. at 702.

239. See id.

240. See id. at 703. In Burger, the search was limited to inspections of vehicle dismantling industries during normal business hours. The scope of the search was also limited to the owner's records and the vehicles themselves. The statute included a requirement that the operator be informed that the business was subject to inspection, that the standards of potential inspections be identified, and that the time, place, and scope of the inspection be identified. See id. at 711.

241. See, e.g., Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654 (1995) (O'Connor, J., dissenting); see also Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

242. The three factors mentioned by the Court were regularity, intensity, and frequency of searches. See supra note 231 and accompanying text.

243. See Burger, 482 U.S. at 703.

trative search. Conversely, an owner who is aware of significant governmental regulation should expect to be subject to frequent and routine searches. Thus, when courts demand that an industry be found pervasively regulated before applying the three-pronged Burger test, they ask whether the regulation is so pervasive that the owner could not escape awareness of the regulation's existence.

2. The Application of the Pervasively Regulated Industry Search Warrant Exception to the Treaty Challenge Inspections

If the United States National Authority cannot obtain an administrative warrant under Camara,[244] the Department of Justice may attempt to justify a warrantless search as a PRI exception to prevent incidental abrogation of the Treaty. Since the PRI exception allows warrantless administrative searches without judicial scrutiny prior to the search, the National Authority will only need to fulfill the requirements of the Burger test to validate their search. However, the National Authority probably cannot meet the Burger standards for conducting a warrantless challenge inspection search.[245]

Challenge inspections of private commercial businesses would probably fail the Burger test for several reasons. First, private businesses that do not have a direct or close connection to the Treaty, but which are still subject to the scope of possible challenge inspections, maintain a high expectation of privacy.[246] For instance, pen factories, pesticide producers, and fertilizer manufacturers use chemicals that the Treaty specifically lists and attempts to control, yet these industries, not being pervasively regulated, have no reason to expect a search for evidence of chemical weapons production.[247] These industries lack a clear nexus to the obligations imposed on the United States government by the Treaty, and therefore lack the requisite notice to constitute a lessened expectation of privacy, which is needed for unwarranted intrusions. This lack of notice is demonstrated by the fact that many of the "other" chemicals that fall outside the bounds of the Treaty's three schedules are not even mentioned by the Treaty, yet are still within the scope of verification.[248]

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244. See supra Part III.C.1 (explaining Camara and applying it to the Treaty challenge inspections).

245. Other authors have concluded that challenge inspections fail to pass constitutional muster under the current PRI exception. See Gray, supra note 21, at 632-33; Tanzman, supra note 121, at 48-54.

246. See supra Part II.B.1 (discussing the high expectation of privacy associated with most businesses subject to a challenge inspection).

247. See Tanzman, supra note 121, at 53 (stating that "[s]urely such enterprises could not be on notice that being uninvolved in the chemical weapons industry makes them fair game for warrantless searches to assure U.S. compliance with a chemical weapons treaty").

248. See Gray, supra note 21, at 619.

The result is that the National Authority cannot prove that a vast majority of the businesses subject to challenge inspections possess a lessened expectation of privacy.

Second, the challenge inspection of private, non-related industries would be too irregular and infrequent for a company owner to reasonably expect the business to be searched.[249] The United States has thousands of companies potentially subject to challenge inspections, but in all likelihood only a few will ever actually be searched by Treaty inspectors. This is contrary to the Burger Court's requirement that all of the businesses under the scope of the regulation be routinely searched, and that the only randomness involved be the order in which the searches are conducted.[250]

Further, industries selected for inspection can be arbitrarily chosen by a foreign State Party member.[251] While the Treaty requires the State Party member requesting the challenge inspection to offer some level of suspicion of noncompliance with Treaty mandates, the foreign State Party member bears no official evidentiary burden in the request.[252] Consequently, almost any business in the United States could be selected for challenge inspection without proper justification. A requesting State Party member may be more interested in obtaining a Host State Party member's confidential business or trade secrets than ensuring Treaty compliance.[253] Challenge inspections are the type of random, limitless, and arbitrary administrative searches the Supreme Court opposed in Donovan.[254]

Third, the Treaty procedure does not provide an adequate constitutional substitute for a warrant. Non-related private businesses are not required to be notified that their use of certain chemicals makes them vulnerable to possible inspection by foreign officials. Unlike the

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> In practice, however, the subjective focus of close regulation is problematic. . . . [T]he subjective focus might give short shrift to an objective factor—such as a truly compelling governmental interest—that might support warrantless inspections of industries that are not so closely regulated. Consequently, the close regulation standard may set a threshold that is too high for the Treaty's verification regime to meet.

Id.

249. See Tanzman, supra note 121, at 53.

250. Such warrantless searches, without probable cause and judicial scrutiny, have been compared to the searches conducted by British soldiers before the founding of the Constitution. "Ad hoc on-site inspections resemble the general warrants that the King of England relied upon to search the businesses of colonists before the Revolutionary War. It was the reaction to such warrants that gave rise to the Fourth Amendment." Id. at 54 n.199.

251. See supra Part II.A.2.

252. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶¶ 4-6, at 428-29.

253. See Pat Griffith, supra note 36 (describing the fears of Treaty opponents that teams of international inspectors will burst into U.S. firms without notification in an attempt to capture trade secrets).

254. See Donovan v. Dewey, 452 U.S. 594, 599 (1981).

requirements of Burger, the challenge inspections are not limited to normal business hours; they may proceed continuously for almost four days.[255] Also, the Treaty and Implementation Act do not procedurally limit the scope of the inspection, as did the statute in question in Burger. In contrast to a comprehensive and detailed inspection regime, the Treaty uses broad and unconfined language to describe the bounds of this highly intrusive verification process. The Treaty places full discretion in the hands of the domestic officials and international inspectors conducting the search.

Finally, the scope of the Treaty's challenge inspections is not limited to a specific or single industry, but instead crosses industry lines. Because the verification mechanism is designed to prevent the unauthorized manufacturing and stockpiling of chemical weapons, it permits searches of all industries that produce or use the chemical agents related to possible weapons. For instance, the exception would have to include the pen factories and detergent manufacturers previously mentioned because they also use Schedule Two, Schedule Three, and other proscribed chemicals.[256] This contradicts the logical underpinning of the current PRI exception. In Donovan, the regulation narrowly targeted a single, specific industry.[257] The Court justified its opinion on the basis that the regulation was limited in nature and the property owners were subjectively aware of the regulations permitting the governmental intrusion.[258] Further, while the Supreme Court may have granted Congress the power to regulate more industries under its expansion of the PRI exception, the Court required that such regulations take place on an industry-by-industry basis.[259] If the PRI exception were upheld to justify such intensive warrantless administrative searches across industry lines, the exception would swallow the Camara rule. No business would be left with a reasonable expectation of privacy from unwarranted governmental inspection.

E. The Special Needs Exception to the Administrative Search Warrant Requirement

In recent years, the Supreme Court has carved a second exception to the Camara administrative warrant requirement. A warrantless administrative search may be justified if the reason for the lack of a

255. See TREATY, supra note 21, Part X, §§ B-C, at 428-39.
256. See supra text accompanying notes 120-23.
257. See Donovan, 452 U.S. at 597.
258. See id. at 599-600.
259. See Gray, supra note 21, at 613, 618 (analyzing relevant case law limiting the application of the PRI exception).

warrant is declared a "special need."[260] A special need arises when the government attempts to protect a substantial governmental interest that extends beyond the needs of normal law enforcement.[261] Examples of court-declared special needs include a high school principal's right to search a student's purse[262] and an employer's right to require employee blood and urine drug testing.[263]

The Supreme Court created the special needs exception to the administrative warrant requirement in New Jersey v. T.L.O.[264] The Court upheld a public school principal's right to search a student's purse after the student was caught violating the school's no smoking rule.[265] The Court found that a special need justified the warrantless search because of the difficulty in maintaining discipline in public schools and the significant social impacts created by increasing levels of violence and drug use.[266] The Court applied a reasonableness test that considered all of the circumstances and balanced the governmental interest and nature of the search against the intrusion of the individual's privacy right.[267]

According to the T.L.O. Court, for a warrantless administrative search to be justified as a special need, it must meet three criteria.[268] First, the government must prove that a strong governmental interest exists beyond the need of normal law enforcement procedures.[269] Second, the necessity of the search must make both the warrant and probable cause requirements impractical.[270] Third, the regulatory scheme must protect the target from arbitrary or unjustified invasions.[271] In applying these protections, courts require proof of reasonable and articulable grounds to suspect that the search will uncover evidence of misconduct.[272]

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260. See New Jersey v. T.L.O., 469 U.S. 325, 333 (1985); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).

261. See Von Raab, 489 U.S. at 665-66; Skinner v. Railway Lab. Exec. Ass'n, 489 U.S. 602, 619-20 (1989); T.L.O., 469 U.S. at 351-52 (Blackmun, J., concurring); see also Wasserstrom, supra note 150, at 127-29 (explaining the rationale behind the special needs exception).

262. See T.L.O., 469 U.S. at 353.

263. See Von Raab, 489 U.S. at 679; Skinner, 489 U.S. at 633-34.

264. 469 U.S. 325 (1985).

265. See id. at 347-48.

266. See id. at 339-40.

267. See id. at 341. The Court will, at times, ease both the warrant and probable cause restrictions of the Fourth Amendment when it is impractical for an official to obtain a warrant or to establish probable cause. See id.

268. See id. at 340-43; see also Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-60 (1995).

269. See T.L.O., 469 U.S. at 339-40.

270. See id. at 340.

271. See id. at 342-43.

272. See O'Connor v. Ortega, 480 U.S. 709, 726 (1987) (relying upon the holding of T.L.O.).

More recently, the Supreme Court handed down two decisions to help clarify the special needs exception. In Skinner v. Railway Labor Executives' Association,[273] the Court reaffirmed its holding that once the government proves that a special need is involved, courts should balance the governmental and privacy interests to assess the practicality of the warrant requirement.[274] In applying the balancing test, the Skinner Court concluded that the safety of the railways and their history of accidents outweighed the minimal privacy intrusion of a blood and urine testing program that was limited in scope, gave no discretion to the field officials, and was known by all employees.[275]

In National Treasury Employees Union v. Von Raab ,[276] the Court upheld a similar drug testing program, finding that the government interest in deterring drug use by individuals eligible for sensitive positions in the customs service outweighed the employees' privacy interests against mandatory urine tests.[277] In short, the Court held that in special cases an administrative search of a person is permissible without individualized suspicion.

Thus, Skinner and Van Raab evidence the Supreme Court's expansion of the special needs exception to permit warrantless searches based merely on a reasonable suspicion rather than on probable cause. In so doing, the Court seemingly blurred the line between what is, and what is not, a "special need." The Court's rulings leave undecided the scope of the special needs exception, which appears to be defined by the particular factual circumstances in any given case, rather than by a more precise legal standard or per se rule.

National Authority officials might attempt to justify warrantless challenge inspections as a special needs exception to the administrative warrant requirement. The National Authority will likely argue that upholding the Treaty is a special need because controlling the proliferation and potential use of chemical weapons is a strong governmental interest. Since the challenge inspections will most likely be coordinated by the Department of Justice and conducted by foreign inspectors, the search will probably be beyond the scope of normal law enforcement. Also, the administrative warrant requirement is impractical given the structure of the verification regime.[278] Finally, the reasonableness of the balancing test would favor upholding the Treaty requirements over an individual's business or resi-

273. 489 U.S. 602 (1989).
274. See id. at 619.
275. See id. at 622.
276. 489 U.S. 656 (1989).
277. See id. at 679.
278. See supra Part III.C.

dential privacy interests when considering the potential effects that might result from a breakdown of the Treaty.

However, several counter-arguments prevent the special needs exception from authorizing challenge inspections without a warrant or pre-judicial scrutiny. First, the special needs exception only allows searches of people or their personal possessions.[279] Courts have never allowed the special needs exception to subject homes or businesses to warrantless administrative searches. This would be an incredible expansion of the current doctrine given the level of intrusion allowed by challenge inspections and the fact that their scope could reach inside nearly every facility in the United States. Furthermore, any extension of the current doctrine would require litigation and an express judicial change, at which point the Treaty might have already been violated by the delay of the inspection.[280]

Second, the practicality standard to justify the lessening of the traditional administrative warrant cannot be satisfied. The Treaty mandates that the Host State Party member has between twenty-four and 108 hours to provide the inspectors with the required access to the chosen facility.[281] Thus, the Department of Justice would have up to four-and-one-half days to apply for an administrative warrant from a federal judge. Therefore, the warrant process is not impractical to meet the needs of the Treaty.[282] Additionally, the Implementation Act requires that the National Authority try to obtain an administrative warrant.[283] Thus, to argue a special needs exception exists, the Department of Justice will have to be denied an administrative warrant from a federal magistrate, and then contend that the search involves a special need.

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279. See, e.g., Skinner, 489 U.S. at 619-20; Von Raab, 489 U.S. at 666-67; New Jersey v. T.L.O., 469 U.S. 325, 347-48 (1985).

280. This conclusion does not assume the potential unconstitutionality of the Implementation Act's ban on the lower courts' ability to issue injunctive relief. At best, the ban is still subject to constitutional scrutiny to the extent that a federal court will need to consider the legitimacy of section 406 of the Implementation Act. See infra Part IV.

281. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, § B, at 428-34.

282. The problem for the Department of Justice is that it is unlikely that a judge will issue an administrative warrant for a challenge inspection given the intrusive nature of the search. See infra Part III.C. The only reason the warrant requirement may be "impractical" is because the Department of Justice officials will likely lack sufficient information to meet the minimum standards required by the Fourth Amendment. See Gray, supra note 21, at 604-05 (explaining that the importance of the Treaty may not justify ignoring the impracticality standard of the special needs exception).

For the Treaty to be valid, it must not only be important, but it must also be legitimate under the Constitution. Gray writes, "[T]he 'special needs' test perhaps passes too quickly by the claim of impracticality; the correspondence between practicality and constitutionality may be tenuous. Arguably, the need must be more than substantial; it must also be legitimate." Id. at 605 n.233.

283. See Implementation Act, supra note 24, § 406.

Further, the Treaty and Implementation Act do not protect the target facility from arbitrary inspections. Challenge inspections are easy for a State Party member to request, and are unlikely to be rejected by the Technical-Secretariat.[284] The Treaty only requires that the requesting State Party member provide nominal information. However, this level of information is insufficient to justify a search under the Fourth Amendment. The regulatory scheme does not adequately prevent arbitrary selection of facilities for challenge inspections, and thus cannot meet the protections demanded by the special needs exception.

Finally, the application of the factors used in the Skinner balancing test leads to the conclusion that the warrantless challenge inspection search is unreasonable. When the Skinner Court upheld the blood and urine testing of railroad employees, it stated that the individual's privacy interests were lessened because the regulation limited the discretion of the officials, was narrow in scope, and was known to all of the employees.[285] Conversely, challenge inspections may be authorized against any facility at any time. The verification regime also allows the inspectors a nearly unlimited amount of discretion.[286] Private individuals and businesses deserve protection of the strong privacy interest.

F. A Possible Reformulation of the Pervasively Regulated Industry Exception

One commentator, David G. Gray, has suggested that the unconstitutionality of challenge inspections may be avoided by a reformulation of the PRI exception to include a "special needs" reasonableness balancing test to allow warrantless administrative searches.[287] The proposed reformulated "PRI-special needs hybrid exception" (Hybrid Exception) would utilize a four part test to determine if a particular search requires an administrative warrant. The first two parts of the test involve threshold questions. First, is there a special need involved? A special need must exist to justify the lack of a warrant.[288] Second, does the individual or business enjoy a decreased ex-

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284. See supra text accompanying notes 54-60.

285. See Skinner v. Railway Lab. Exec. Ass'n, 489 U.S. 602, 622 (1989).

286. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, § C, at 434-38.

287. See Gray, supra note 21, at 650-55 (explaining how his proposed reformulated pervasively regulated exception would alleviate the constitutional problems that arise from challenge inspections).

288. Gray argued that this special need analysis should be identical to the special need analysis described in Part III.E. See id. at 645. Gray also indicated that the special needs Hybrid Exception search may cross industry lines because it would be unwise to hinder Congress in its efforts to address social problems. See id.

pectation of privacy?[289] The third and fourth parts of the Hybrid Exception involve more substantive concerns. The third part uses the special needs balancing test to weigh the governmental interest against the privacy intrusion.[290] The fourth part demands that a constitutionally adequate substitute be required in the regulation to protect the individual.[291]

Gray argues that the proposed Hybrid Exception test should allow warrantless administrative searches of non-Treaty-related private businesses.[292] Upholding Treaty obligations would qualify as a special need because of the substantial governmental interest in preventing the use and proliferation of chemical weapons. Gray contends that these non-related private businesses enjoy a limited privacy interest because of the dangers the Treaty attempts to alleviate.[293] Because intrusive verification is needed to enforce the Treaty, Gray justifies reducing the privacy expectation of the individual property owners.[294] Finally, Gray argues that the inspection process was not arbitrary because the slight burden of suspicion and the rationality of resource management dictate that constraints and safeguards exist.[295]

However, several obstacles prevent Gray's Hybrid Exception from solving the constitutional problems raised by the challenge inspections of private, unrelated businesses. First, the creation of a Hybrid Exception would require an affirmative act of Fourth Amendment interpretation by a court. However, no such mechanism was offered

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289. Gray does not propose whether this expectation of privacy should be subjective or objective. See id. However, the individual's subjective expectation of privacy is at the center of the Supreme Court's decisions in both Donovan and Burger. See Donovan v. Dewey 452 U.S. 594 (1981); New York v. Burger 482 U.S. 691 (1987). If Gray suggests modifying the expectation of privacy standard to an objective view, he neither explains how this will effect the previous PRI cases, nor justifies why an objective expectation of privacy is a better standard.

290. See supra Part III.E (discussing the special needs exception).

291. See Gray, supra note 21, at 650. The constitutionally adequate substitute is identical to the third procedural prong of the Burger test. See id. For a discussion of the third prong of the Burger test, see Part II.D.1. The constitutionally adequate substitute relies on the logic of the Donovan decision and applies two criteria: (1) whether the regulation sufficiently limits the discretion of the inspector, and (2) whether the inspection scheme is sufficiently comprehensive and predictable so that the property owner is constructively notified of the inspection. See Gray, supra note 21, at 650.

292. Gray assumes that a challenge inspection of a home would be extreme and require a warrant. However, he argues that any facility capable of producing a significant quantity of chemical weapons would be larger than a home and subject to the Hybrid Exception. See Gray, supra note 21, at 653-54.

293. Gray argues that there are three ways a business may have a reduced expectation of privacy: (1) a history or tradition of regulation, (2) an inherent or immediate threat to health or safety, or (3) consent. See id. at 645-48.

294. Gray's full argument follows: "A limited privacy interest inheres in non-residential property under the best of circumstances; the danger countered by the Treaty reduces the legitimate privacy expectations still further." Id. at 655.

295. See id.

to implement these new standards.[296] Once a Treaty challenge inspection reaches the litigation stage in a district court, the United States may have already delayed the inspection team and violated its obligations under the Treaty.[297]

Second, a challenge inspection of a private, unrelated business would fail the Hybrid Exception. Nothing in the theory explains why the targeted business has a decreased expectation of privacy to meet the second part of the exception. Since there is no history or tradition of government regulation of such broad scope across so many industries, the focus of the test must be on the inherent threat to safety.[298] Again, Gray gives no analysis as to why the importance of the Treaty's protection reduces the privacy expectation of these unrelated private businesses. As previously mentioned, these industries have not been warned or put on notice that they are subject to searches by teams of international inspectors.[299] Therefore, the existence of the Treaty regulations themselves fails to provide constructive notice of the potential for a warrantless search.

Moreover, Gray's rationale suggests that these individuals deserve a lessened expectation of privacy because of the important societal benefits derived from the Treaty.[300] This logic, however, is circular. It allows the legislative intent behind the Treaty regulations to dictate the warrant requirement for challenge inspections in open disregard of constitutionally protected Fourth Amendment rights. Application of the Hybrid Exception would make the Fourth Amendment nothing more than a hollow guarantee of the individual right to be free from unreasonable searches and seizures.

Gray does not offer a constitutionally adequate substitute to protect the individual from arbitrary inspections. The fact that the National Authority informs a business or homeowner that their property will be intensely searched for the next five days does not meet the advance notice requirement set forth in Donovan or Burger.[301]

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296. See id.

297. The Implementation Act attempts to prevent this delay by banning judicial remedies before the search occurs. See Implementation Act, supra note 24, § 406(c).

298. See supra Part III.D.2.

299. See supra Part III.D.2.

300. "While it seems likely that the inspections are too infrequent to diminish greatly the subjective privacy expectations of the owners of the target plants, the very danger that this Treaty combats extends so far as to reshape the objective expectation of privacy accorded the owners by society." Gray, supra note 21, at 651-52.

However, this argument concedes that there is no decrease in the subjective expectation of privacy, and Gray never proposes an absolute shift to allow objective privacy viewpoints to govern the test. Furthermore, a mechanism or justification for shifting the current Supreme Court reliance on the subjective expectation of privacy is not explained in Gray's article.

301. See New York v. Burger, 482 U.S. 691, 711 (1987); Donovan v. Dewey, 452 U.S. 594, 601-03 (1981).

The Treaty also does not limit the scope or intensity of the search, but instead leaves such decisions to the discretion of the inspectors or to the objections of the Host State Party member.

Gray concedes that the Treaty verification regime cannot tolerate blind spots larger than a home.[302] However, it is doubtful that the Hybrid Exception can alleviate the constitutional concerns raised by the challenge inspection of a private, non-related business. Gray gives no justifiable explanation as to how two distinctly established and applied juridical doctrines may be extended and merged without initial considerations by the courts. Also lacking is how the Hybrid Exception can be reformulated before a violation of the Treaty occurs. Finally, the Treaty fails to meet the requirements of its application to the Hybrid Exception because there is neither a decreased expectation of privacy, nor a constitutionally adequate substitute to protect the privacy interests of the targeted owner.

G. National Security Exception

Government officials might rely on a national security exception to justify a warrantless search for challenge inspections. Generally, courts are deferential to cases involving issues of national security.[303] This is especially true when both elected branches are acting in concert.[304] However, such case law does not necessarily mean that courts concede all matters concerning national security to the government. On the contrary, courts continue to apply constitutional safeguards to issues of national security, especially when individual rights are at stake.[305] The Constitution demands that legislative and executive actions undertaken in the name of national security still be bound by Fourth Amendment protections.[306]

More significantly, the Supreme Court has never announced a national security exception to the warrant requirement.[307] In Katz, the Court expressly reserved its judgment on the issue of whether a warrant should be required before government could be permitted to conduct electronic surveillance for national security purposes.[308] The

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302. See Gray, supra note 21, at 652.
303. See Koplow, supra note 72, at 325.
304. See id.
305. See id. at 326.
306. See id. at 461 n.213.

> The Constitution . . . was written so as to strike a balance between the protection of political freedom and protection of national security interests. To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy. It is unthinkable that we should now be required to sacrifice those freedoms in order to defend them.

Id. (quoting United States v. Smith, 321 F. Supp. 424, 430 (C.D. Cal. 1971)).
307. See Gray, supra note 21, at 634.
308. See Katz v. United States, 389 U.S. 347, 358 n.23 (1967).

Supreme Court left this question open by rejecting the chance to rule on the constitutionality of warrantless surveillance of domestic organizations by denying writs of certiorari to lower court cases.

The closest the Supreme Court has come to ruling on a national security exception was in 1976 when it denied a writ of certiorari to review the decision of a federal court of appeals decision in Zweibon v. Mitchell.[309] The Court of Appeals for the District of Columbia had held that the government needed a Camara-style warrant before they could electronically wiretap a domestic organization, even though the wiretaps were authorized by the President.[310] The Zweibon ruling required the government to seek an administrative warrant because the warrant requirement did not frustrate the governmental purposes behind the search.[311]

Even though the Supreme Court has not definitively ruled on the legitimacy of a national security exception, several lower courts have addressed the issue. Currently, the circuit courts are split as to the permissibility of warrantless searches based on national security concerns. For example, in United States v. United States District Court,[312] the Supreme Court considered a Sixth Circuit Court of Appeals decision against allowing national security interests to trump civil liberties.[313] The Sixth Circuit had held that the government is required to obtain a warrant to conduct surveillance deemed necessary to protect the country from domestic organizations' attempts to subvert the existing structure of government.[314] The Supreme Court affirmed the appellate court's opinion, deciding that the government's national security interest was insufficient to justify the subversion of constitutionally guaranteed individual rights.[315]

Conversely, other circuit courts have held warrantless searches justified by national security concerns. For example, in United States v. Brown,[316] the Fifth Circuit held that the President may authorize warrantless wiretaps to gather foreign intelligence.[317] Additionally, in United States v. Butenko,[318] the Third Circuit applied a reasonableness standard to searches based on national security, and de-

309. 516 F.2d 594 (D.C. Cir. 1974).

310. See id. at 614 (relying on Camara to require a warrant prior to the installation of the wiretap).

311. See id. at 669.

312. 407 U.S. 297 (1972).

313. See id.

314. See United States v. United States Dist. Ct., 444 F. 2d 651, 667 (6th Cir. 1971), aff'd, 407 U.S. 297 (1972).

315. See United States v. United States Dist. Ct., 407 U.S. 297, 323-24 (1972); see also Eggert, supra note 148, at 632-33 (discussing the scope of warrant requirement for noncriminal searches).

316. 484 F.2d 418 (5th Cir. 1973).

317. See id. at 426.

318. 494 F.2d 593 (3rd Cir.).

termined that not all of these searches require prior judicial approval.[319]

Even the circuit court opinions that seem to allow a warrantless national security search have a limited scope. The warrantless search appears to be limited to electronic intelligence gathering against foreign groups.[320] Furthermore, the searches cannot be conducted against non-foreign powers or non-foreign agents, and probably require presidential authorization.[321]

Government officials may assert that Fourth Amendment jurisprudence has developed, or should develop, a national security exception permitting them additional latitude to implement and enforce international treaty obligations. This argument suggests that the importance of preserving international agreements, especially multinational arms control treaties, justifies a national security exception to the traditional warrant requirement.

However, several distinctions exist between the currently recognized but limited form of the national security exception and its possible application to the Treaty. First, the Treaty permits inspections of private businesses and homes which are only tangentially related to Treaty objectives.[322] This is in sharp contrast to the circuit court opinions that limit the scope of the national security exception to surveillance of foreign organizations or their agents.[323]

Second, the government has never used the national security exception to justify a physical search of any facility. Instead, the exception has been limited to justify electronic intelligence gathering.[324] Given the current state of the extremely narrow national security exception, no government official could reasonably rely on it as an acceptable means to avoid obtaining a warrant before conducting a challenge inspection. Rather, the expansion of the national security exception would likely entail litigation of the issues in front of a neutral and detached magistrate—and would therefore run the risk of delaying the international inspectorate's access to the facility.

The extension of a national security exception to justify warrantless administrative searches would undermine the foundation of the Constitution. Overlooking constitutional requirements simply be-

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319. See id. at 608; see also United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980) (holding that courts do not need to require a warrant every time the executive branch conducts foreign surveillance of foreign powers); see also United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977) (holding that foreign security wire taps are a recognized exception to the general warrant requirement).

320. See Koplow, supra note 140, at 460 (synthesizing the holdings of Truong Dinh Hung, Buck, Butenko, and Brown); see also Eggert, supra note 148, at 627-28.

321. See Eggert, supra note 148, at 627-28.

322. See supra Part II.A. (discussing the scope of challenge inspections).

323. See cases cited supra notes 315, 319.

324. See cases cited supra notes 315, 319.

cause the government has a strong interest at stake is wrong, especially when the value of our individually protected constitutional rights conflict with an important governmental concern. It is in times of conflict when the constitutional dedication to the protection of individual rights should prevail over the creation of broad-based and unbounded exceptions to those safeguards. As one court so elegantly noted: "The Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times."[325]

Developing a national security exception would also destroy the traditional notion of separation of powers established by the Constitution. A national security exception would remove judicial oversight when it is most desperately needed—at times when individual rights are at stake. The constitutional warrant requirement exists to help contain the power of the government to order such searches by requiring a detached and neutral magistrate to review and, if needed, protect the rights of the individuals being searched. It is the courts' ultimate duty to act as a bulwark against such encroachments, and that obligation should not be abandoned simply because the executive and legislature have found a "national security" need.[326] The Supreme Court warned against allowing such encroachments into individual rights when it wrote:

> It may be that . . .[this search and seizure] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[327]

Finally, government could create a national security exception to justify any governmental intrusion. To justify a warrantless search, the executive need only claim a national security interest and the courts' precedent would allow the search to take place. Courts should never open such a Pandora's box; once open, it will be nearly impossible to shut.

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325. Gray, supra note 21, at 637 n.425 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1200-01 (D.C. Cir. 1979)).

326. See id. at 637.

327. Boyd v. United States, 116 U.S. 616, 635 (1886).

IV. THE UNCONSTITUTIONALITY OF THE IMPLEMENTATION ACT'S PROHIBITION OF INJUNCTIVE RELIEF

Subsection 406(C) of the Implementation Act prohibits courts from issuing injunctions relating to warrants or other orders limiting the ability of the Technical Secretariat to conduct inspections, or the U.S. Government to facilitate them.[328] By this mandate, Congress intended to enact a procedural jurisdictional bar against a court's ability to issue injunctive relief.[329] Yet, the Implementation Act does not provide an explicit alternative remedy of redress for a plaintiff who is harmed by an unconstitutional challenge inspection.

The purpose behind the legislative ban on injunctive relief is fairly obvious. If plaintiffs are permitted the opportunity to enjoin challenge inspections, such suits could delay, or even completely prevent, government officials' and foreign inspectors' access to the challenge site. The issuance of an injunction, or the delay associated with such an appeal, could cause the United States to inadvertently abrogate its Treaty verification obligations.

If the Implementation Act is left intact, private individuals and businesses will be unable to seek judicial relief to protect both their privacy interests and confidential business information from challenge searches. Because the Implementation Act strips the courts of their ability to provide an appropriate remedy and also fails to provide a substitute remedy, the Implementation Act fails to withstand constitutional scrutiny.[330]

In addition, any plaintiff knowing a challenge inspection is imminent and seeking injunctive relief before it occurs could pose the adjudicating court with a Hobbesian choice. Before dismissing the plaintiff's prayer for injunctive relief, the court would inevitably be required to consider the constitutionality of the Implementation Act's ban on the plaintiff's right to request this remedy. If the court determines that Congress's jurisdictional prohibition against injunctive relief is valid, the court will be forced to dismiss the suit and the plaintiff will be left without a prospective remedy. On the other hand, if the court determines that Congress's removal of injunctive jurisdiction is improper, it will be forced to strike down the Implementation Act as unconstitutional.

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328. See Implementation Act, supra note 24, § 406(c); see also supra text accompanying notes 131-35 (noting the Implementation Act's recognition that if such injunctions were allowed, the United States might inadvertently violate its Treaty obligations).

329. See Implementation Act, supra note 24, § 406(c).

330. See infra Part IV.B. (discussing injunctions as the only appropriate remedy for the protection of constitutional rights threatened by the Implementation Act).

A. The Lack of Precedent Justifying a Ban on Injunctive Relief

The text of the Implementation Act cites what the drafters and several commentators consider to be long-standing legal precedent in support of Congress's power to prevent the courts from issuing injunctive relief.[331] However, a closer analysis of this precedent leads to the conclusion that in cases where injunctive relief is the only appropriate remedy by which the courts can fulfill their responsibility to protect individual constitutional rights, Congress may not strip the courts of this power.

1. The Norris-LaGuardia Act

The Implementation Act explicitly relies on the Norris-LaGuardia Act,[332] an anti-injunction law, as an example of domestic legislation through which Congress constitutionally limited the availability of injunctive relief.[333] Early in the twentieth century, the Supreme Court struck down state laws forbidding remedies that enforced "yellow dog contracts"—contracts in which employees agree not to join labor unions.[334] The Norris-LaGuardia Act provided that no federal court has jurisdiction to issue an injunction to enforce yellow dog contracts[335] and was enacted because the conservative Court had struck down state legislation prohibiting these contracts and allowing labor strikes.[336]

In Lauf v. E.G. Shinner & Co.,[337] the Court addressed the constitutionality of the Norris-LaGuardia Act's limitations on the courts' ability to grant injunctions for labor disputes.[338] The Court upheld this section of the Norris-LaGuardia Act and stated, "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[339]

In order for supporters of the Implementation Act to rely on the Norris-LaGuardia Act, Lauf must stand for the proposition that

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331. See Implementation Act, supra note 24, § 406(c) (discussing the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1994); Yakus v. United States, 321 U.S. 414 (1944); and Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948)).

332. 29 U.S.C. §§ 101-15 (1994).

333. See Implementation Act, supra note 24, § 406(c).

334. See, e.g., Truax v. Corrigan, 257 U.S. 312, 330 (1921) (suggesting that it would be a violation of due process for a state not to grant injunctive relief to protect a property owner if the state provides no other alternative protection); Coppage v. Kansas, 236 U.S. 1, 18 (1915); Adair v. United States, 208 U.S. 161, 171 (1908).

335. See 29 U.S.C. §§ 101, 103, 107 (1994).

336. See William E. Forbath, The Shaping of the American Labor Movement, 102 HARV. L. REV. 1111, 1193 n.376 (1989); see also Paula L. McDonald, Note, Judicial Interpretation of Collective Bargaining Agreement: The Danger Inherent in the Determination of Arbitrabililty, 1983 DUKE L.J. 848, 850-51 (1983).

337. 303 U.S. 323 (1938).

338. See id. at 329.

339. Id. at 330.

Congress may strip the courts of jurisdiction to grant injunctive relief regardless of the fact that injunctive relief is the only available remedy to prevent the violation of a constitutional right. But while the language of Lauf may seem to suggest that Congress has such power, there are numerous reasons to believe that this legislative authority lacks a constitutional foundation.

First, a careful reading of Lauf demonstrates that the Supreme Court skirted the issue of whether Congress's power to control the jurisdiction of inferior courts may supersede the protection of constitutional rights.[340] Section 107 of the Norris-LaGuardia Act actually permits lower courts to grant injunctive relief if certain strict standards are met.[341] Among these standards is the requirement that the plaintiff prove that, absent this special form of court intervention, a substantial and irreparable injury will result.[342] The Norris-LaGuardia Act leaves intact other state and federal remedies besides injunctions and does not mandate a complete ban of injunctive relief.[343] Thus, the validity of the Norris-LaGuardia Act's limitation on injunctive relief rests upon Congress's decision to provide other remedies unless injunctive relief is constitutionally required.

Congress may limit the judiciary's authority to issue injunctions in two ways. Congress may either withdraw the courts' jurisdiction to grant injunctions, or Congress may heighten the standards an individual is required to meet in order to receive an injunction. Both congressional acts would limit an individual's ability to avoid a substantive constitutional rights violation through the protective cloak of an injunction. However, the Constitution limits Congress's authority to restrict an individual's substantive constitutional protections.[344] Congress may not impede or deny an individual injunctive relief when such relief is required to protect a constitutional right. In this sense, the withdrawal of a court's jurisdiction to issue an injunction enforcing labor contracts is identical to a legislative heightening of the standard of proof required before a court could issue an injunction. Both forms of congressional action, if designed with the intent of preventing a plaintiff from obtaining prospective

340. See Gordon G. Young, A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts, 54 MD. L. REV. 132, 170 (1995).

341. See 29 U.S.C. § 107(a)-(e) (1994).

342. Section 107 permits a court to issue an injunction if: (1) unlawful acts have been threatened, will be or have been committed and will continue; (2) substantial and irreparable injury will result; (3) greater injury will result to complainant by denial of relief than to defendants by granting [relief]; (4) there is no adequate remedy at law; and (5) the public officers charged with protecting complainant are unwilling or unable to do so. See id.

343. See id.

344. See U.S. CONST. amend. XIV.

relief, permit preventable violations of individual constitutional rights. Procedural limitations exist to protect a court's jurisdiction when congressional limitations impact an individual's substantive rights. These procedural limitations are subject to constitutional scrutiny. "Lauf contains no holding permitting jurisdictional powers to trump constitutional claims. . . ."[345]

Second, there is good reason to believe that by the time the Lauf court considered the Norris-LaGuardia Act, the justices no longer felt bound by their previous Lochner-era decisions.[346] With Lochner and its progeny decisions, the Court chose to protect businesses' rights, including the right to remain unconstrained by certain types of governmental regulation and to receive an injunction to effectuate this right.[347] These were the same rights asserted by the plaintiffs in Lauf.[348] However, by 1938 the Court had already begun to repudiate its protection of substantive economic rights.[349] The Lauf justices, in determining the constitutionality of the Norris-LaGuardia Act, may not have considered the plaintiffs' rights deserving of constitutional protection through the issuance of an injunction. Instead, the justices believed that the plaintiffs' economic rights could be remedied through alternative federal and state means.[350]

Finally, the Norris-LaGuardia Act created a poor standard upon which to base a determination of when a substantive right deserves protection by the issuance of an injunction. The Norris-LaGuardia Act requires a plaintiff to prove "That as to each item of relief granted greater injury will be inflicted upon [the] complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."[351]

This balancing test shifts the burden of proof to the plaintiff to demonstrate that enforcement of yellow dog contracts outweighs the benefit of avoiding labor strikes and an industry-wide impediment to industrial production. However, if such a standard were applied to the Implementation Act, it would force private individuals and businesspersons to prove that their privacy or interests outweigh the potential benefit of maintaining the Treaty. Given the design of the balancing test in this instance, it would seem impossible for any plaintiff to receive an injunction to protect his or her rights against

345. Young, supra note 340, at 170.

346. See id. at 176.

347. See Lochner v. New York, 198 U.S. 45, 53 (1905) (striking down a New York law limiting the hours that bakers could work to 10 hours a day and 60 hours a week).

348. See Lauf v. E.G. Shinner & Co., 303 U.S. 323, 326 (1938).

349. See Young, supra note 340, at 176-78.

350. Unlike the alleged substantive economic rights in Lochner and Lauf, plaintiffs contesting a Treaty challenge inspection seek protection of a well-established Fourth Amendment right. See supra Part III.B.

351. 29 U.S.C. § 107(c) (1994).

an illegal search. While the Lauf Court held the Norris-LaGuardia Act constitutional in part because it allowed the issuance of injunctions under limited circumstances,[352] application of this same balancing test to the Implementation Act would appear to have the same effect as a complete ban on injunctive relief. On the face of the statute, plaintiffs would be at a tremendous disadvantage in attempting to prove that their individual privacy interests outweigh the benefits of the Treaty.

2. Yakus v. United States

In 1942, Congress enacted the Emergency Price Control Act.[353] As part of the Act, Congress denied both federal and state courts jurisdiction to consider the constitutionality of price regulations, and prevented the courts from enjoining enforcement of the Act's regulations.[354] Attacks on the validity of the Act were limited to a newly created Emergency Court of Appeals whose decision could only be reviewed by the Supreme Court.[355]

In Yakus v. United States,[356] the Court considered a district court's ruling under the Emergency Price Control Act. The district court had refused to consider Yakus's claim that the Emergency Price Control Act was unconstitutional and had convicted him of violations of price control regulations covered by the Act.[357] The Supreme Court affirmed the conviction and held that Yakus should have challenged the validity of the Act in the newly created Emergency Court of Appeals.[358] In so doing, the Supreme Court emphasized Congress's ability to deny the district court's jurisdiction to consider Yakus's defense so long as Congress provided Yakus with an adequate forum in which to make his appeal.[359]

Despite its practical result in affirming Yakus's conviction, the Court's decision stands for the proposition that Congress cannot limit a lower court's jurisdiction to enter pleas for the protection of a constitutional right without the provision of an adequate remedial substitute. The implementing legislation provides no alternative and adequate substitute forum where potential plaintiffs may seek protection of their Fourth Amendment rights before an allegedly unconstitutional search commences.

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352. See Lauf, 303 U.S. at 330.
353. Pub. L. No. 77-421, 56 Stat. 23 (1942), repealed by Act of July 25, 1946, ch. 671, 60 Stat. 664.
354. See id. § 204(d), 56 Stat. at 32-33.
355. See id.
356. 321 U.S. 414 (1944).
357. See id. at 418.
358. See id.
359. See id. at 429.

3. Battaglia v. General Motors Corp.

The Fair Labor Standards Act of 1938[360] mandated overtime pay for employees working over forty hours per week. The Portal-to-Portal Act of 1947[361] defined the "work week" of miners so as not to include the time these laborers spent traveling underground to and from the mineface, as well as other preparation time involved in their work.[362] The Portal-to-Portal Act also limited federal court jurisdiction against hearing any suit for overtime pay arising from this legislative definition of a miner's work week.[363]

The Second Circuit Court of Appeals upheld the Portal-to-Portal Act in Battaglia v. General Motors Corp .[364] However, the Second Circuit also held that Congress's power to regulate jurisdiction of the inferior federal courts is subject to compliance with the requirements of the Fifth Amendment.[365] The Court ruled that Congress's power to withdraw lower court jurisdiction to consider certain cases is subject to the same constitutional limitations on Congress's substantive power to eliminate employer liability for accrued overtime pay.[366] In other words, Battaglia indirectly stands for the principle that Congress's authority to limit federal court jurisdiction is bound by the requirement that an alternative appropriate remedy be supplied to protect the jeopardized constitutional right.[367]

Application of the Battaglia holding to the Implementation Act once again demonstrates that Congress lacks the authority to withdraw injunctive relief when its failure to provide an appropriate substitute remedy threatens the violation of a well-established Fourth Amendment right.

B. Injunctions Are the Only Appropriate Remedy

The precedent of cases mentioned above dictates Congress's obligation to provide an adequate remedy for the protection of constitutional rights. To do otherwise subverts the judiciary's obligation to prevent incipient violations of these rights. These cases also suggest that Congress's ability to prohibit injunctive relief, like its ability to control jurisdictional issues, is limited by its effect on substantive

360. 29 U.S.C. § 207 (1994).

361. See id. §§ 254-56; see also Battaglia v. General Motors Corp., 169 F.2d 254, 255-56 (2d Cir. 1948).

362. See 29 U.S.C. § 254(a) (1994).

363. See id. § 252(d).

364. 169 F.2d 254 (2d Cir. 1948).

365. See id. at 272.

366. See id. at 272-73.

367. See id. at 273 ("Should Congress undertake to withdraw from the courts jurisdiction to consider and determine pure questions of ownership or title to property unaffected by constitutional provisions, a more serious question would be presented, but we are not confronted here with such a case.").

rights—limitations imposed by the Constitution. There can be only one reasonable conclusion drawn from the judicial precedent described above: Congress cannot withdraw jurisdiction to issue any constitutionally required remedy.

Naturally, this conclusion seems to beg the question: When is a remedy constitutionally required such that congressional withdrawal of lower court jurisdiction to grant that remedy should be struck down as unconstitutional? In answering this query, the courts should consider two factors: whether the remedy to be prohibited is an appropriate mechanism by which to redress the plaintiff's injuries and whether appropriate alternative remedies exist.[368]

1. Injunctive Relief Is an Appropriate Remedy

Historically, injunctions have been considered adequate and appropriate remedies in cases involving litigation of constitutional violations.[369] This is especially true when an award of monetary damages is unsuitable to redress the individual's loss from the constitutional violation.[370] Injunctions have also been used by courts as an appropriate remedy to prevent governmental disclosure of confidential business information and trade secrets.[371] There can be no doubt that injunctions are an appropriate remedy by which to protect individuals from foreseen, yet avoidable, constitutional violations.

In the case of challenge inspections, injunctive relief is an appropriate remedy. The Treaty's verification regime obligates the director-general to inform the Host State Party member of the impending search and the facility to be inspected.[372] It is logical to assume that the United States National Authority will inform the private individual or business targeted for challenge inspection. The National Authority will either ask the property owner for consent to search, or at a minimum, inform the property owner to prepare the facility for the forthcoming inspection. This notice would provide the property owner with time, albeit limited, to seek judicial intervention to pre-

368. See generally Lawrence Gene Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 85 (1981).

369. See Tanzman, supra note 121, at 39 n.117 (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)).

370. See id. (citing Daniel L. Rotenberg, Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process, 14 HAST. CONST. L. Q. 77, 85 (1986)); infra Part IV.B.2.

371. See id. (citing Megapulse, Inc. v. Lewis, 672 F.2d 959, 970 (D.C. Cir. 1982); Dow Chemical Co. v. United States, 476 U.S. 227, 231 (1986)).

372. See TREATY, supra note 21, Annex on Implementation and Verification, Part X, ¶ 11, at 430 (requiring at least 12 hours of notice before the planned arrival of the inspection team at the point of entry).

vent the inspection. If necessary, an injunction would be an appropriate measure by which to protect the constitutional interest of the property owner before those interests could be trampled.

2. No Appropriate Alternative Remedies Exist

The Implementation Act, while withdrawing lower court jurisdiction to issue injunctive relief to prevent verification searches, offers no explicit alternative remedy.[373] Thus, the only option to redress a plaintiff's allegations of violations of protected privacy interests or the release of confidential business information would be a post facto suit for monetary damages. However, a suit for monetary damages would not only be infeasible, but would also be unlikely to fully compensate the plaintiff for the harms suffered.

A property owner is not likely to prevail in a suit for monetary damages against a foreign State Party member because, unless the foreign State Party member consents to be sued in a United States court, that State Party member enjoys sovereign immunity.[374] The property owner would be forced to bring suit in the foreign jurisdiction, and the suit would be governed by foreign law.[375] The likelihood of a domestic plaintiff prevailing against a foreign State Party in a

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373. See Implementation Act, supra note 24, § 406(c).

374. See Kellman et al., supra note 113, at 109 n.222 (citing Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994)).

The Foreign Sovereign Immunities Act controls here. See 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 (1994). Section 1604 states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." Id. § 1604. Section 1605 provides various exceptions to the general rule of immunity. See id. § 1605. One exception is if a foreign state "has waived its immunity either explicitly or by implication." Id. § 1605(a)(1). However, a section 1605 waiver is strictly construed, and there must be strong evidence that the foreign state intended to waive its immunity. See Rodriguez v. Transnave, 8 F.3d 284, 287 (5th Cir. 1993). A foreign state impliedly waives its immunity when it agrees to arbitration in another country, agrees that a contract is controlled by the laws of another country, or files a responsive pleading without raising immunity as a defense. None apply in this situation. See id. A property owner suing for damages resulting from a Treaty inspection could not rely on a section 1605(a)(1) waiver to obtain jurisdiction over the offending foreign state. See id.

The only other relevant exception to the general immunity of a foreign state is provided by section 1605(a)(5). A foreign state is not immune from jurisdiction in a United States court when money damages are sought for "damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5) (1994). The damage must have occurred as a result of a tortious act or omission of either the foreign state or an offical or employee of that state within the scope of that person's office or employment. See id. However, tortious acts and omissions committed within the tortfeasor's discretionary function as an official or employee are immune from jurisdiction. See id. § 1605(a)(5)(A). Any foreign state inspector performs pursuant to the terms of the Treaty and, therefore, performs a discretionary function. Thus, the inspector is immune from jurisdiction. See Johnson v. Fankell, 117 S.Ct. 1800, 1803 (1997) (recognizing the discretion exception for qualified immunity for state officials); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (noting that discretionary actions receive immunity if not violative of clearly established statutes or constitutional rights).

375. See Kellman et al., supra note 113, at 109.

foreign, or domestic, court is remote; thus, such suits are inappropriate remedies.

Nor could a plaintiff successfully bring suit against Treaty officials in the OPCW, which includes members of the inspection team. The Treaty provides complete immunity for all OPCW personnel for acts conducted in their official capacity.[376] This immunity also includes protection from criminal and civil suits as enjoyed by international diplomats under Article 31 of the Vienna Convention on Diplomatic Relations.[377]

The Treaty language authorizes the director-general to waive any member of the inspection team's immunity "in those cases when the director-general is of the opinion that immunity would impede the course of justice and . . . can be waived without prejudice to the implementation of the provisions of this Convention. Waiver must always be express."[378]

It seems unlikely that the director-general would waive a Treaty official's immunity unless a Host State Party member can demonstrate that the official intentionally abused his or her privileges and immunities. Even if immunity were waived by the director-general, it would be nearly impossible to hail a Treaty official from a foreign nation into a United States court without creating an international incident. As such, monetary damages actions against Treaty officials are an inappropriate remedy to correct a violation of a United States citizen's constitutional rights.[379]

Further, while the Federal Tort Claims Act (FTCA)[380] permits private parties to sue the federal government for the negligent acts of its employees,[381] there are several exceptions that may prevent a private plaintiff from recovery against this entity.[382] First, an intentional negligence exception exempts the federal government from liability if an employee's intentional torts were committed in good faith.[383] As a result, private property owners would only be able to maintain an action against the United States government if the government officials who facilitated the inspection acted maliciously or

376. See TREATY, supra note 21, art. VIII, ¶ 48-51, at 308; id. Annex on Implementation and Verification, Part II, § B, at 345-47.

377. See id. Annex on Implementation and Verification, Part II, ¶ 11(e), at 346; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, ¶¶ 1-3, 23 U.S.T. 3227, 3240-41, 500 U.N.T.S. 95, 112.

378. TREATY, supra note 21, Annex on Implementation and Verification, Part II, ¶ 14, at 347.

379. See Kellman et al., supra note 113, at 109.

380. 28 U.S.C. §§ 1346(b), 2671-2680 (1994).

381. See id.

382. See id. § 2680.

383. See Kellman et al., supra note 113, at 111.

in bad faith.[384] Second, the government may avoid liability for alleged torts committed by federal officials in the performance of a discretionary function.[385] Therefore, with at least two broad-ranging exceptions by which the United States government may claim sovereign immunity from tort actions, property owners are unlikely to recover for the loss of confidential business information and violations of privacy interests.

Finally, private plaintiffs have little chance of successfully bringing suit against United States officials in their individual capacity under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics.[386] Normally, a Bivens action permits a person to seek monetary damages against a federal official for alleged violations of constitutional rights.[387] In the case of challenge inspections, a plaintiff might allege both a violation of the Fourth Amendment based on the illegality of the search, and a violation of the Fifth Amendment based on the unauthorized and uncompensated release of guarded trade secrets.[388] Yet, reliance on a potential plaintiff's ability to bring a Bivens suit to redress the constitutional violations perpetrated by National Authority officials falls short of providing an adequate and appropriate remedy.[389] It is unlikely that an award against a gov-

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384. See id. at 112 n.239 (citing Norton v. United States, 581 F.2d 390, 397 (4th Cir. 1978).

385. See 28 U.S.C. § 2680(a) (1994). For a discussion of the discretionary function exemption, see Kellman et al., supra note 113, at 111 nn.235-36. Additionally, the FTCA permits federal immunity from claims alleging governmental interference with contract rights. See 28 U.S.C. § 2680(h) (1994). Such an exception might bar recovery for the release of confidential business information. See Kellman et al., supra note 113, at 112.

386. 403 U.S. 388, 397 (1971) (holding that a warrantless search of Biven's apartment was a violation of the Fourth Amendment). The Court, however, did not consider the immunity question.

387. See id. at 397.

388. See Kellman et al., supra note 113, at 114 n.249 (citing Seguin v. Eide, 720 F.2d 1046, 1048 (9th Cir. 1983) (noting that although no case has explicitly awarded damages under a Bivens action for a violation of the Takings Clause of the Fifth Amendment, Seguin recognized the potential for such a suit)).

389. Gualtieri and Tanzman proposed the creation of a government-administered collective insurance fund so that individual plaintiffs will not have to resort to Bivens actions or suits against the United States or foreign governments. Under such a proposal, individuals and businesses potentially effected by verification inspections would pay into this fund "based on such factors as their market share, the risk of loss posed to each firm, and the likelihood of a claim being made by that firm." Id. at 114 nn.252-53.

Such a proposal, even if mandated by Congress, fails to provide an appropriate remedy to redress constitutional violations. The government-administered collective insurance fund effectively forces individuals to pay into a fund that would later be used to compensate their own damages. Forcing individuals to pay their own compensatation is hardly an appropriate remedy to justify banning injunctive relief. Acceptance of the proposed collective insurance fund would set a precedent whereby the government can violate an individual's constitutional rights without the fear of injunctive proscription. Instead, individuals will foot the bill to compensate themselves for violations of their own rights. This could have been prevented if the courts were not stripped of their power to issue injunctive relief. Also, in the case of challenge inspections, the proposal for a collective insurance

ernment official in his or her personal capacity could fairly remunerate a plaintiff for the loss of confidential trade information or business secrets. Even if courts were to recognize such an action, the government official may still claim qualified immunity as a defense to avoid liability to a Bivens suit.[390]

Even if one of the aforementioned suits against foreign or domestic governments or their employees could succeed, wise policy demands that the government not be permitted to buy itself out of constitutional violations. Allowing the government to pay for its constitutional violations instead of allowing the individual to prevent the constitutional tort in the first place makes a mockery of affirmative constitutional safeguards.

> The fourth amendment does not grant the government the discretion to decide whether the benefits of infringing the public's right to be protected from unreasonable searches and seizures are worth some expenditure of the public's funds; the language of the amendment is an affirmative command. It is therefore doubtful that the substitution of a claim against the government . . . would provide equally effective vindication of the constitutional interests thus protected, and it is therefore doubtful that such a substitution would be constitutionally valid.[391]

3. The Unconstitutionality of Congress's Ban of the Only Appropriate Judicial Remedy

If Congress strips lower court jurisdiction to fashion the sole appropriate remedy, the practical effect of such legislation is to deny the plaintiff a forum in which to have his or her claims properly adjudicated. As Lawrence G. Sager noted: "Hobbling the judiciary by denying it all reasonably effective remedies is as fatal to a litigant's effort to vindicate constitutional rights as is flatly denying the litigant a judicial forum. Indeed, for many constitutional claims the availability of anticipatory relief is essential."[392]

To do otherwise would legitimize Congress's power to jurisdictionally exclude the prevention and protection of constitutional rights in individual cases. By eliminating jurisdiction, Congress would prohibit judicial scrutiny of legislative regulations that adversely impact constitutionally safeguarded liberties.

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fund does not assume that any business or residence may be subject to an inspection. This means that every private individual or business would be forced to buy insurance because injunctive relief is unavailable.

390. See id. at 114 n.252 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6 (1994)).

391. Walter E. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 HARV. L. REV. 1532, 1563 (1972).

392. Sager, supra note 368, at 85.

In the case of challenge inspections, Congress's attempt to strip lower court jurisdiction to issue injunctions is nothing more than a means to elevate the importance of the Treaty above the protection of Fourth Amendment rights. This "means to an end" rationale for jurisdictional withdrawal was explicitly rejected by the Supreme Court over 100 years ago.[393] The holdings of such landmark cases as Marbury v. Madison[394] and United States v. Klein[395] helped forge the role of the judicial branch in the American political system—to protect the rights and liberties of United States citizens through the careful review of legislative acts. It would undermine the function of the court system if Congress could prohibit judicial remedies for the constitutional violations for which the courts were created.[396] Alexander Hamilton aptly summarized this concern in the Federalist Papers when he wrote:

> Limitations on legislative authority can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.[397]

V. CONCLUSION

The Treaty is the result of years of international negotiations to prevent the potential use and proliferation of chemical weapons. The Treaty calls for a ban on the development, production, and stockpiling of chemical weapons which is enforced through an intensive verification regime. Given the threat chemical weapons pose to international security and the damage their use can have in a domestic setting, such a global agreement seems appropriate.

However, the intrusiveness of the verification mechanism by which the international community seeks to enforce the Treaty raises clear constitutional problems. The availability of challenge inspections by the verification regime allows other Treaty signatories to request inspections of any private business or home in the United States without meeting a minimal evidentiary burden or warrant requirement. The Implementation Act facilitates these challenge in-

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393. See United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1872) (standing for the proposition that when an impermissible substantive end is achieved by prescribing a substantive rule under the guise of a jurisdictional regulation, Congress's attempt to withdraw jurisdiction may an unconstitutional means to an end).

394. 5 U.S. (1 Cranch) 137 (1803).

395. 80 U.S. (13 Wall.) 128 (1872).

396. See Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 YALE L.J. 498, 506 (1974).

397. Id. (quoting THE FEDERALIST NO. 78, Alexander Hamilton, at 466 (New Am. Lib. ed. 1961)).

spections by establishing a National Authority with the capability to obtain administrative warrants to authorize these searches.

Objections to the Treaty arise because, like all international agreements, it is subject to the constitutional limitations imposed on all statutory regulations in the United States. Specifically, the scope of the Treaty's challenge inspections should be bound by the Fourth Amendment's protection against unreasonable searches and seizures. Unfortunately, there is little hope that a judicially recognized exception exists to exempt challenge inspections from traditional warrant and probable cause requirements.

The Implementation Act's attempt to prevent private businesses or property owners from indirectly causing the United States to abrogate its treaty obligations is unconstitutional. In effect, the Implementation Act's jurisdictional prohibition against injunctive relief destroys the only appropriate remedy available to safeguard an individual's Fourth Amendment rights.

While well-intentioned, the practical effect of the Treaty and the domestic Implementation Act in the United States will be to subjugate paramount individual constitutional rights to the hope of acquiring some level of security from the ever-present threat from the proliferation of chemical weapons.