No. 12-158

# In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
JOHN P. CARLIN
*Acting Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
JOSEPH R. PALMORE
*Assistant to the Solicitor General*
VIRGINIA M. VANDER JAGT
ADITYA BAMZAI
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

The Chemical Weapons Convention Implementation Act of 1998 (Act), Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856, makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). It defines "chemical weapon" as a "toxic chemical" that can "cause death, temporary incapacitation or permanent harm," "except where intended" for, among other things, a "peaceful purpose." 18 U.S.C. 229F(1)(A), (7)(A) and (8)(A). The questions presented are:

1. Whether the use of a toxic chemical to harm another individual is use for a "peaceful purpose" and thus exempt from the Act's prohibition.

2. Whether Congress had the power under the Constitution to prohibit petitioner's conduct by means of the Act.

## TABLE OF CONTENTS

Page

Constitutional, treaty, and statutory provisions involved......... 1
Statement........................................................................... 1
Summary of argument ................................................... 8
Argument:
Petitioner was validly convicted of using chemical weapons under 18 U.S.C. 229 ............................... 10
I. Petitioner's conduct was proscribed by the act ............ 11
A. Section 229 broadly prohibits knowing use of a chemical weapon............................................... 12
B. Petitioner's use of toxic chemicals to harm Haynes was not for a "peaceful purpose" ............... 13
1. Petitioner's interpretation of the statute is foreclosed by its plain text .................................... 13
2. Petitioner's interpretation is incompatible with the history and context of the Convention ........................................................ 15
3. Section 229 cannot be interpreted to include a terrorism element.................................. 16
II. The Act's application to petitioner is constitutional..... 17
A. The prohibition on petitioner's use of toxic chemicals is within Congress's Commerce Power. 18
1. Section 229 is part of a comprehensive scheme of commodity regulation and thus within the Commerce Power......................... 18
2. The Commerce Power basis for Section 229 is properly before the Court.................................. 25
B. The Act's application to petitioner is independently authorized by Congress's power to enact laws necessary and proper to carry into execution the Treaty Power ..................................... 26
1. The Treaty Power is exclusively federal............. 27
2. It has long been settled that the Treaty Power extends to matters ordinarily within the jurisdiction of the States ................................. 29

Table of Contents—Continued: Page

3. There is no basis for overruling *Holland* 47
Conclusion ........ 55
Appendix:
Constitutional provisions ........ 1a
Treaty provisions ........ 3a
Statutory provisions ........ 76a

**TABLE OF AUTHORITIES**

Cases:

*Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768 (1992) ........ 47
*American Bank & Trust Co.* v. *Dallas Cnty.*, 463 U.S. 855 (1983) ........ 15
*Asakura* v. *City of Seattle*, 265 U.S. 332 (1924) ........ 43
*Baker* v. *Portland*, 2 F. Cas. 472 (C.C. Or. 1879) (No. 777) ........ 37
*Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641 (1890) ........ 25
*Chirac* v. *Lessee of Chirac*, 15 U.S. (2 Wheat.) 259 (1817) ........ 34
*Craig* v. *Radford*, 16 U.S. (3 Wheat.) 594 (1818) ........ 34
*Elkison* v. *Deliesseline*, 8 F. Cas. 493 (C.C.S.C. 1823) (No. 4,366) ........ 35
*Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) ........ 34
*Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) ........ 29
*Geofroy* v. *Riggs*, 133 U.S. 258 (1890) ........ 45, 46, 52
*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ........ 54
*Golan* v. *Holder*, 132 S. Ct. 873 (2012) ........ 52
*Gonzales* v. *Raich*, 545 U.S. 1 (2005) ........ *passim*

Cases—Continued: Page

*Hall St. Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576 (2008) ........ 14
*Hauenstein* v. *Lynham*, 100 U.S. 483 (1880) ........ 54
*Heath* v. *Alabama*, 474 U.S. 82 (1985) ........ 41
*Heller* v. *Doe*, 509 U.S. 312 (1993) ........ 25
*Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) ........ 46
*Hines* v. *Davidowitz*, 312 U.S. 52 (1941) ........ 54
*Holden* v. *Joy*, 84 U.S. (17 Wall.) 211 (1872) ........ 46
*Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454 (1806) ........ 35
*Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ........ 51
*Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) ........ 28
*Mayor of New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836) ........ 45
*Medellin* v. *Texas*, 552 U.S. 491 (2008) ........ 29
*Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) ........ 43
*Missouri* v. *Holland*, 252 U.S. 416 (1920) ........ *pasism*
*Neely* v. *Henkel*, 180 U.S. 109 (1901) ........ 44
*New York* v. *United States*, 505 U.S. 144 (1992) ........ 42
*Northern Sec. Co.* v. *United States*, 193 U.S. 197 (1904) ........ 24
*Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) ........ 34
*Parrott*, *In re*, 1 F. 481 (C.C. Cal. 1880) ........ 37
*Pasquantino* v. *United States*, 544 U.S. 349 (2005) ........ 52
*Perez* v. *United States*, 402 U.S. 146 (1971) ........ 23
*Railway Labor Execs. Ass'n* v. *Gibbons*, 455 U.S. 457 (1982) ........ 53
*Reid* v. *Covert*, 354 U.S. 1 (1957) ........ 28, 46, 52, 53

Cases—Continued: Page

*Santovincenzo* v. *Egan*, 284 U.S. 30 (1931)..........................43
*Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) ...................32
*United States* v. *Butler*, 297 U.S. 1 (1936) ...........................53
*United States* v. *Comstock*, 130 S. Ct. 1949 (2010)........41, 42
*United States* v. *Curtiss-Wright Exp. Corp*. 28, 41, 55
299 U.S. 304 (1936) ..................................................28, 41, 55
*United States* v. *IBM Corp.*, 517 U.S. 843 (1996)................47
*United States* v. *Kebodeaux*, 133 S. Ct. 2496 (2013)...........40
*United States* v. *Lara*, 541 U.S. 193 (2004).............28, 29, 43
*United States* v. *Lopez,* 514 U.S. 549 (1995) ..................23, 53
*United States* v. *Morrison*, 529 U.S. 598 (2000).................24
*United States* v. *Pink*, 315 U.S. 203 (1942) ..........................54
*United States Postal Serv.* v. *Council of Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) ..................24
*Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796)..........................35
*Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) ..........................................................................43
*Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) ...........25

Constitution, treaties, statutes and regulations:

U.S. Const.:
Art. I ......................................................................6, 53, 54
§ 8 ..........................................................................................28
Cl. 3 (Commerce Clause).............11, 18, 20, 50, 1a
Cl. 4 (Bankruptcy Clause)...................................53
Cl. 8 (Copyright Clause)................................52, 53
Cl. 18 (Necessary and Proper Clause) ......*passim*
§ 10:
Cl. 1..................................................................28, 1a

Constitution, treaties, statutes and regulations—Continued: Page

Cl. 3 ....28, 1a
Art. II ....28, 53
§ 2 ....39
Cl. 2 (Treaty Clause) ....27, 29, 2a
Art. VI ....39
Cl. 2 (Supremacy Clause) ....28, 29, 34, 2a
Amend. I ....52
Amend. X ....6, 28, 38, 39, 53, 3a
Amend. XVII ....32
Additional Articles to the Treaty of the 18th of June, 1858, U.S.-China, July 4, 1868, 16 Stat. 740:
art. V ....36
art. VI ....36
Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 ....38
art. VIII ....38
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) ....1, 3a
preamble ....2, 9, 19, 3a
art. I:
para. 1 ....2, 9, 15, 51, 5a
para. 1(a) ....3, 12, 5a
art. II:
para. 1(a) ....3, 6a
para. 2 ....3, 12, 7a
para. 9 ....3, 10a

Treaties, statutes and regulations—Continued: Page

art. VI:
para. 2 ....19, 27a
art. VII....19, 29a
para.1(a)....2, 16, 51, 30a
art. XI ....19, 64a
Verification Annex:
pt. VI ....19
pt. VII, para. 31 ....3
Convention Regarding Navigation, Fishing, and Trading, art. 5, U.S.-Russia, Apr. 17, 1824, 8 Stat. 304 ....41
International Convention with Respect to the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 ....41
Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 ....33
art. 9 ....33
Treaty on Commerce and Navigation, art. I, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848 ....37
Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 (18 U.S.C. 229 *et seq.*)....3, 20, 76a
18 U.S.C. 229....8, 27, 101a
18 U.S.C. 229(a) ....10, 12, 101a
18 U.S.C. 229(a)(1) ....1, 3, 6, 8, 12, 101a
18 U.S.C. 229C....15, 107a
18 U.S.C. 229F ....12, 108a
18 U.S.C. 229F(1)(A)....8, 12, 108a
18 U.S.C. 229F(7)(A)....8, 13, 14, 21, 110a
18 U.S.C. 229F8(A) ....8, 12, 110a
Clean Water Act, 33 U.S.C. 1251 *et seq.* ....5

Statutes and regulations—Continued: Page

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* ..........5
Controlled Substances Act, 21 U.S.C. 801 *et seq.* ..........20
Migratory Bird Treaty Act, ch. 128, 40 Stat. 755..........38
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* ..........5
Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.* ..........22
15 U.S.C. 2605(a)..........22
18 U.S.C. 32..........17
18 U.S.C. 81..........17
18 U.S.C. 175..........17
18 U.S.C. 175(a)..........22
18 U.S.C. 831(a)..........23
18 U.S.C. 842(n)(1)..........23
18 U.S.C. 1366..........17
18 U.S.C. 1708..........1, 6
18 U.S.C. 2332a..........17
18 U.S.C. 2332c (Supp. II 1996)..........17
18 U.S.C. 2339..........17
18 U.S.C. 2339(a)..........17
18 U.S.C. 2339A..........17
18 U.S.C. 2339A(a)..........17
22 U.S.C. ch. 75..........22, 78a
22 U.S.C. 6721 *et seq.* ..........20, 113a
42 U.S.C. 2284..........17
49 U.S.C. 46502..........17
1822 S.C. Acts 12..........35

Regulations: Page

15 C.F.R.:

Pts. 710-721 .....20, 22

29 C.F.R. 1910.1026 .....5

40 C.F.R.:

Section 302.4 .....5

Section 401.15 .....5

Miscellaneous:

Christopher Andrew & Vasili Mitrokhin, *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* (1999) .....14

J. Aroesty et al., *Rand Publ'n Series No. R-3745-ACQ, Domestic Implementation of a Chemical Weapons Treaty* (1989) .....22

*Article-by-Article Analysis of the Convention*, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) .....15

*(Authentic) Treaty of Amity, Commerce, and Navigation, Between His Brittanick Majesty, and the United States of America. By Their President, With the Advice and Consent of Their Senate With an Addition of Two Important Motions* (1795), *reprinted in* 18 *The Papers of Alexander Hamilton* (Harold C. Syrett ed. 1973) .....33

Charles Henry Butler, *The Treaty Making Power of the United States* (1902):

Vol. 1 .....44

Vol. 2 .....44

143 Cong. Rec. 6,426-6,427 (1997) .....2

Congressional Research Service, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements* (2013) .....42

Miscellaneous—Continued: Page

*Convention on the Elimination of All Forms of Discrimination Against Women*, S. Exec. Rep. No. 9, 107th Cong., 2d Sess. (2002) ........... 48

Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* (1913) ........... 44

*Council of Europe Convention on Cybercrime*, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. (2003) ........... 48

Samuel B. Crandall, *Treaties: Their Making and Enforcement* (2d ed. 1916) ........... 30, 31

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) ........... 33, 34, 35, 36, 37, 43

Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013) ........... 32, 48

Louis Henkin, *Foreign Affairs and the Constitution* (1972) ........... 48

Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785), *in* 2 *The Diplomatic Correspondence of the United States of America* (1837) ........... 31

Letter from George Washington to Hamilton (July 3, 1795), *reprinted in* 18 *Hamilton Papers* ........... 33

Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (1986) ........... 30

1 NDRC, Office of Scientific Research & Dev., *Summary Technical Report of Division 9: Chemical Warfare Agents, and Related Chemical Problems* (1946) ........... 4

Miscellaneous—Continued: Page

1 Op. Att'y Gen. 659 (1824) .................. 35
2 Op. Att'y Gen. 426 (1831) .................. 36
8 Op. Att'y Gen. 411 (1857) .................. 36, 55
22 Op. Att'y Gen. 214 (1898) .................. 36
33 Op. Att'y Gen. 560 (1923) .................. 36
11 Op. O.L.C. 104 (1987) .................. 36
Organisation for the Prohibition of Chem. Weapons, *OPCW: The Legal Texts* (2d ed. 2009) .................. 12
*Philonimus*:
*No. 6*, Charleston Mercury, Sept. 11, 1823 .................. 36
*No. 7*, Charleston Mercury, Sept. 13, 1823 .................. 36
*Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Great Britain* (July 9-11, 1795), *reprinted in* 18 *Hamilton Papers* .................. 34
Restatement (Third) of the Foreign Relations of the United States (1987) .................. 50
Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273 (1907) .................. 37, 38, 54
S. Exec. Rep. No. 33, 104th Cong., 2d Sess. (1996) .................. 2, 15, 16, 17, 20, 22
S. Res. No. 75, 105th Cong., 1st Sess. (1997) .................. 2
George Sutherland, *Constitutional Power and World Affairs* (1919) .................. 28, 44, 46
William H. Taft, *The United States and Peace* (1914) .................. 44, 54

Miscellaneous—Continued: Page

*The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1888):

Vol. 2 .......... 31, 32

Vol. 3 .......... 31, 32

*The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers* .......... 34

*The Federalist* (Gary Wills ed., 1982):

*No. 22* (Alexander Hamilton) .......... 31

*No. 42* (James Madison) .......... 32

*No. 62* (James Madison) .......... 32

*No. 64* (John Jay) .......... 32, 50

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1966) .......... 30, 31

*Treaties and Executive Agreements: Hearings on S.J. Res. 1, Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties and Other International Agreements Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955) .......... 43

Henry St. George Tucker, *Limitations on the Treaty-Making Power Under the Constitution of the United States* (1915) .......... 44

*United Nations Convention Against Corruption*, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. (2006) .......... 47

U.S. Envtl. Prot. Agency, *Chemical Manufacturing*, http://www.epa.gov/sectors/sectorinfo/sectorprofiles/chemical.html (last updated Jan. 12, 2011) .......... 21

# In the Supreme Court of the United States

No. 12-158

CAROL ANNE BOND, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES**

**CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED**

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-145a.

**STATEMENT**

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised release. Pet. App. 51-52. The court of appeals affirmed her conviction, *id.* at 48-72, and this Court vacated and remanded, 131 S. Ct. 2355-2368. On remand, the court of appeals again affirmed. Pet. App. 1-47.

1. In 1997, the Senate gave its advice and consent to ratification of the Convention on the Prohibition of the

Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the Convention or CWC), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, at 278-451, 103d Cong., 1st Sess. (1993) (App., *infra*, 3a-75a); see S. Res. No. 75, 105th Cong., 1st Sess. (1997); 143 Cong. Rec. 6,426-6,427 (1997) (voting 74-26), and the Convention entered into force for the United States on April 29, 1997. The Convention was intended to fill the gaps left by an earlier chemical weapons convention, the 1925 Geneva Protocol, which prohibited use of chemical weapons only during warfare. S. Exec. Rep. No. 33, 104th Cong., 2d Sess. 2 (1996) (Senate Report).

In particular, the Convention sought "to exclude completely the possibility of the use of chemical weapons." App., *infra*, 4a (preamble). At the same time, the Convention recognized beneficial uses of even toxic chemicals, and included provisions "to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties." *Ibid.*

The Convention provides that States Parties "never under any circumstances" may "use chemical weapons" or "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." App., *infra*, 5a (art. I, para. 1). The Convention also obligates each State Party to enact domestic penal legislation that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Id.* at 29a-

30a (art. VII, para. 1(a)). In addition, the Convention regulates international trade in chemicals by, among other things, prohibiting States Parties from exporting certain scheduled toxic chemicals to non-States Parties. Verification Annex, pt. VII, para. 31.

The Convention defines chemical weapons as, among other things, "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes." App., *infra*, 6a (art. II, para. 1(a)). "Toxic Chemical," in turn, means "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals" and "includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." *Id.* at 7a (art. II, para. 2). The "Purposes Not Prohibited Under this Convention" include "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." *Id.* at 10a (art. II, para. 9).

To implement the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (Act), Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 (App., *infra*, 76a-145a). The criminal provisions of the Act mirror in all material respects the prohibitions in the Convention. The statute makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1); cf. App., *infra*, 5a (Convention art. I, para. 1(a)).

2. Petitioner discovered that a friend, Myrlinda Haynes, had become pregnant as the result of an affair with petitioner's husband. Pet. App. 3, 91. In response, petitioner vowed to make Haynes's life "a living hell." *Id.* at 91.

Petitioner, a microbiologist, subsequently stole the arsenic-based specialty chemical 10-chlorophenoxarsine from her employer, the multinational chemical manufacturer Rohm & Haas. Pet. App. 49; C.A. App. 192. She also ordered a vial of potassium dichromate over the Internet. Pet. App. 49. Both of these "chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact." *Ibid.*

One-half of a teaspoon of 10-chlorophenoxarsine (which is not available to the general public) may be lethal orally to an adult, while a few ingested crystals could kill a child. J.A. 48, 54; Pet. App. 49 n.1, 96. One to one-and-one-half teaspoons may be lethal to the touch. J.A. 48. In 1946, the National Defense Research Committee (NDRC) examined 10-chlorophenoxarsine as a candidate chemical warfare agent. 1 NDRC, Office of Scientific Research & Dev., *Summary Technical Report of Division 9: Chemical Warfare Agents, and Related Chemical Problems* Pt. I, at 107 (1946).

The other chemical, potassium dichromate, is lethal in even smaller quantities. J.A. 59, 60; Pet. App. 49 n.1. The chemical is "extremely destructive to tissues of the mucous membranes and upper respiratory tract." *Id.* at 95. It can cause ulceration and perforation of the nasal septum and pulmonary edema. *Ibid.* "Any skin contact may cause redness, pain, and severe burn, and if exposed to broken skin it may cause ulcers (chrome sores) and absorption, which may cause systemic poisoning, affecting kidney and liver functions." *Ibid.*

Both chemicals are subject to federal regulations because of their toxic qualities. 40 C.F.R. 401.15 (listing arsenic- and chromium-containing compounds as "toxic pollutants" under the Clean Water Act, 33 U.S.C. 1251 *et seq.*); 29 C.F.R. 1910.1026 (regulating workplace exposure to hexavalent chromium, a component of potassium dichromate, under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*); 40 C.F.R. 302.4 (listing potassium bichromate, another name for potassium dichromate, as a "hazardous substance," under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*).

Petitioner "attempted to poison Haynes with the[se] chemicals at least 24 times over the course of several months" in late 2006 and early 2007. Pet. App. 49-50; J.A. 71-72. Petitioner spread the substances on Haynes's mailbox, the door handles of her car, and the door knob to her home. Pet. App. 50. Petitioner left the chemicals in sufficient quantities to be "potentially * * * lethal." J.A. 56, 61-63.

Haynes had to hold her young daughter in one hand while using the other to check for and remove the chemicals she repeatedly noticed on her car door handles. J.A. 75-78. Before finding out what the substances were, Haynes would use the same free hand to give her child a toy, which the child would put in her mouth. J.A. 75. Despite the precautions taken by Haynes, she once suffered a chemical burn from contact with one of the substances. J.A. 79-80.

During the course of these attacks, Haynes called local police "[a]bout a dozen times." J.A. 73. They suggested that the substances might be cocaine and told Haynes to take her car to the car wash. J.A. 73-74, 78;

Pet. App. 50. When Haynes found powder on her mailbox, she again called the police, who told her to call the post office. J.A. 81. She did so, and postal inspectors placed surveillance cameras in and around Haynes's home. *Ibid.* Inspectors then identified petitioner as the perpetrator of the attacks and also observed petitioner stealing Haynes's mail. Pet. App. 92-93.

3. A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 51.

a. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authority in enacting Section 229. Pet. App. 51. The district court denied the motion, holding that the statute covered petitioner's conduct and was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." *Id.* at 75.

Petitioner subsequently entered a conditional guilty plea, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 52.

b. Following oral argument on petitioner's appeal, the court of appeals requested supplemental briefing on petitioner's standing to assert a Tenth Amendment challenge to her conviction. Pet. App. 5 n.2. In response, the government argued that petitioner lacked standing to raise that claim, *ibid.*, and the court of appeals agreed, *id.* at 58-63.

c. This Court granted certiorari to address petitioner's standing. 131 S. Ct. at 2360. The government confessed error and filed a brief in support of petitioner's

argument that she had standing to challenge her conviction on federalism grounds. *Id.* at 2361.

This Court reversed and remanded, 131 S. Ct. at 2367, holding that, in an appropriate case, an individual litigant may challenge a law on the basis that it contravenes principles of federalism. *Id.* at 2365-2366. The Court "expresse[d] no view on the merits" of petitioner's constitutional claim. *Id.* at 2367.

4. On remand, the court of appeals affirmed petitioner's conviction. Pet. App. 1-47.

a. Rejecting petitioner's argument that the statute did not cover her conduct, the court of appeals explained that petitioner's use of "'highly toxic chemicals with the intent of harming Haynes,' can hardly be characterized as 'peaceful' under that word's commonly understood meaning" or the peaceful-purpose statutory exception. Pet. App. 10-11 (citation omitted).

b. The court of appeals also rejected petitioner's constitutional objection to her conviction. Pet. App. 12-36. The court emphasized that petitioner conceded that the Convention was a valid exercise of the Treaty Power. *Id.* at 20. The court found petitioner's concession wise, explaining: "[w]hatever the Treaty Power's proper bounds may be," the court was "confident that the Convention * * * falls comfortably within them." *Id.* at 26.

The court of appeals also concluded that Section 229 was "necessary and proper to carry the Convention into effect." Pet. App. 27. The court noted that this Court in *Missouri* v. *Holland*, 252 U.S. 416 (1920), in upholding the migratory-bird statute at issue in that case, had stated that "[i]f the treaty is valid there can be no dispute about the validity of the statute" implementing it "as a necessary and proper means to execute the powers of the Government." Pet. App. 27 (brackets in original)

(quoting 252 U.S. at 432). Here, the court observed, the treaty and the statute "are coextensive at least on the question of 'use,' which is the only point relevant to [petitioner's] as-applied challenge." *Id.* at 29 n.15; see *id.* at 34. The court also noted that the statute's application to petitioner did not "disrupt[] the balance of power between the federal government and the states." *Id.* at 36. It relied on this Court's holding in the context of Congress's Commerce Power that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Ibid.* (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005)).[1]

**SUMMARY OF ARGUMENT**

The prohibition on use of a chemical weapon in 18 U.S.C. 229 applied to petitioner's conduct, and that application is constitutional.

1. Petitioner's conduct violated the statute implementing the Convention. That law generally prohibits use of a chemical that can "cause death, temporary incapacitation, or permanent harm" to another, unless such use is for a "peaceful purpose." 18 U.S.C. 229(a)(1), 229F(1)(A), (7)(A) and (8)(A).

Contrary to petitioner's contention, her repeated use of highly toxic specialty chemicals to harm Myrlinda Haynes was not for a "peaceful purpose." That commonsense proposition is confirmed by the statutory definition of the term, which is limited to socially productive, non-malicious activities. The Act mirrors the

[1] Because the court of appeals affirmed application of the Act to petitioner as an exercise of the Treaty Power, it found it unnecessary to address the government's alternative Commerce Power argument. Pet. App. 27 n.14.

Convention's comprehensive prohibition on use of chemical weapons by States Parties "under any circumstances" not specifically permitted by the Convention, App., *infra*, 5a (art. I, para. 1). Petitioner notes that the Act's prohibitions should extend only to conduct that, if undertaken by a State Party, would violate the Convention, but that observation does not assist her. A State Party's malicious use of a toxic chemical to injure or kill an individual *is* prohibited by the Convention.

2. Congress had authority under both the Commerce and Treaty Powers, coupled with the Necessary and Proper Clause, to proscribe petitioner's conduct.

a. The federal prohibition on malicious use of toxic chemicals is within Congress's authority to regulate activities that substantially affect interstate commerce as part of a comprehensive regime regulating commercial activity. The Convention promotes free trade in chemicals and was predicated on the view that "the complete and effective prohibition" on such chemicals' use as weapons was a "necessary step" toward achieving that end. App., *infra*, 5a (preamble). The regime established by the Convention is therefore analogous to the regulation of controlled substances upheld as a proper exercise of Congress's Commerce Power in *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

b. The federal prohibition on petitioner's use of toxic chemicals to harm another was also a proper application of Congress's power to implement treaties.

Petitioner's attempt to carve out "local" conduct from the scope of the Treaty Power echoes arguments that have been made—and rejected—since the Founding. This Court's decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920), clearly articulated why such an exception to the Treaty Power would be incompatible with its inten-

tionally broad scope, but it was just one of many examples throughout American history.

The Court should decline petitioner's invitation to overrule *Holland*. The longstanding rule foreclosing a "local" subject-matter exception to the Treaty Power is entirely workable. It has not disrupted the federal-state balance established by the Framers, which is protected by structural safeguards on the Treaty Power, such as the requirement that treaties be approved by two-thirds of the Senate. Congress has not exercised a general police power under the guise of implementing a treaty despite petitioner's hypothetical parade of horribles.

It is petitioner's proffered rule—under which judges would engage in case-by-case invalidation of exercises of the Treaty Power when they thought conduct was too "local" to be regulated—that would be unworkable. That approach would hamstring U.S. treaty negotiators and undermine global confidence in the United States as a reliable treaty partner, to the detriment of the foreign policy and national security of the United States. It is thus not surprising that petitioner cites not one decision of this Court endorsing such case-by-case review of exercises of the Treaty Power.

## ARGUMENT

### PETITIONER WAS VALIDLY CONVICTED OF USING CHEMICAL WEAPONS UNDER 18 U.S.C. 229

Congress comprehensively banned non-peaceful uses of chemical weapons in 18 U.S.C. 229(a), in fulfillment of indisputably valid treaty obligations. Petitioner's conduct violated that criminal prohibition (which she concedes is constitutional on its face), and her as-applied constitutional challenges fail: the prohibition is valid as applied to her conduct both under Congress's power to regulate interstate commerce and under the Treaty

Power, each as implemented by the Necessary and Proper Clause.

The text and background of the underlying treaty show why States Parties agreed to penalize individual malicious use of toxic chemicals, and the Constitution's text, history, and this Court's precedents make clear that Congress has the power to implement that rational obligation. A ruling that Congress lacked such power would transgress long-settled Commerce Clause principles and impede the Nation's ability to ensure compliance with its valid international legal obligations. The Framers did not envision that the United States would lack power to act as one nation in making and fulfilling treaties; to the contrary, they wrote a Constitution that vested power to act in the national government, even when such action might implicate otherwise local affairs. Indeed, this Court has not once invalidated treaty-implementing legislation on federalism grounds, and petitioner's proposal that the Court begin doing so now through application of an ad hoc "too local" test would disrupt both settled constitutional understandings and the foreign policy of the United States.

## I. PETITIONER'S CONDUCT WAS PROSCRIBED BY THE ACT

Petitioner contends (Br. 51) that her conduct was not prohibited by Section 229 because it was not "warlike" or "terrorist." That interpretation of the statute is foreclosed by its plain text, and neither principles of constitutional avoidance nor presumptions against altering the federal-state balance (*id.* at 18, 42-44) can justify petitioner's nontextual and unnatural reading.

### A. Section 229 Broadly Prohibits Knowing Use Of A Chemical Weapon

Closely tracking the language of the Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." 18 U.S.C. 229(a)(1).[2] In relevant part, the Act defines the term "chemical weapon" as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A). The Act, in turn, defines a "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A); cf. App., *infra*, 7a (Convention art. II, para. 2) (same).

To ensure it does not reach non-malicious conduct, the Act contains a set of exemptions. In particular, the Act, tracking the Convention, exempts the use of chemicals for a "peaceful purpose," which the Act specifically defines as "[a]ny peaceful purpose related to an indus-

---

[2] Section 229's criminal prohibition and definitions also closely track model implementing legislation issued by the Organisation for the Prohibition of Chemical Weapons (OPCW), the international implementing body of the CWC. Compare 18 U.S.C. 229(a) and 229F, with OPCW, *OPCW: The Legal Texts* 387-388, 394-395 (2d ed. 2009) (*Legal Texts*). Petitioner states that possession is not prohibited under the Convention. Pet. Br. 45. While the Convention does not use the word "possess," it reflects the same concept by prohibiting States Parties from "acquir[ing], stockpil[ing] or retain[ing] chemical weapons." App., *infra*, 5a (art. I, para. 1(a)). And the OPCW's model implementing legislation includes a prohibition on "possessing" chemical weapons. *Legal Texts* 394. In any event, petitioner used the chemicals here, and she does not allege that the statute's prohibition on "use" varies from the Convention's prohibition on "use." Pet. App. 35.

trial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. 229F(7)(A).

**B. Petitioner's Use Of Toxic Chemicals To Harm Haynes Was Not For A "Peaceful Purpose"**

Petitioner does not dispute that she "knowingly" "use[d]" 10-chlorophenoxarsine and potassium dichromate in an attempt to harm Haynes. Indeed, she used the chemicals in quantities sufficient to kill Haynes and her infant daughter. See pp. 4-5, *supra*. Petitioner also does not dispute that the two substances are "toxic chemicals" within the meaning of the Act.[3]

Petitioner nonetheless argues that the statute's exception for "peaceful purposes," 18 U.S.C. 229F(7)(A), should be interpreted to protect her use of toxic chemicals. According to petitioner (Br. 18, 47), in "implement[ing] the Convention's direction to criminalize actions that would violate the Convention if undertaken by nation-states," Congress intended solely to criminalize "warlike conduct." Petitioner claims that her motivation (revenge) should be deemed "non-warlike" and hence "peaceful." *Id.* at 51. This contention fails for several reasons.

***1. Petitioner's interpretation of the statute is foreclosed by its plain text***

As a matter of simple English, use of a highly toxic chemical to injure or kill another individual is not use of the chemical for a "peaceful purpose." To the contrary, that is use of a "chemical" as a "weapon." Petitioner correctly observes that the Convention requires States

---

[3] Given that petitioner does not dispute that the specialized, highly toxic chemicals she used are "toxic chemicals" for purposes of the Act, this case presents no occasion to address whether Congress intended it to apply to common household substances. Cf. Pet. Br. 56.

Parties to prohibit conduct by an individual that, if taken by a state, would violate the Convention, but incorrectly argues that it follows that prohibitions implementing the Convention are limited to what she characterizes as "warlike" conduct.

States have used toxic chemicals to injure or kill individuals outside of war. *E.g.*, Christopher Andrew & Vasili Mitrokhin, *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* 361-362 (1999) (discussing KGB's targeted assassination of two Ukrainian nationalist leaders in the late 1950s with cyanide gas). Such state use of chemical weapons would violate the Convention. And the state would not be absolved of its violation if its use of the weapon were motivated by revenge (such as retaliation against an expatriate critic), as opposed to some other purpose. Prohibiting the use by an individual of toxic chemicals to injure or kill is entirely consistent with the Convention's requirements.

Petitioner's interpretation is also foreclosed by the statute's definition of "peaceful purpose" as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. 229F(7)(A). Petitioner's contention—under which use of toxic chemicals to harm another would apparently be encompassed by the "other activity" catch-all—is irreconcilable with the rule that "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St. Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008). The common thread running through the specifically-enumerated activities in the definition of "peaceful purpose" (industrial, agricultural, research, medical, and

pharmaceutical) is that they are non-malicious and socially beneficial. Petitioner's conduct was neither.

Finally, petitioner's interpretation is irreconcilable with Congress's inclusion of a provision stating that Section 229's prohibitions shall not "be construed to prohibit any individual self-defense device, including those using a pepper spray or chemical mace." 18 U.S.C. 229C. If Section 229 prohibited only what petitioner views as "warlike" use of chemical weapons, Section 229C would have been unnecessary. *American Bank & Trust Co.* v. *Dallas Cnty.*, 463 U.S. 855, 863-864 (1983) (provision's broad scope "reinforce[d]" by presence of statutory exemptions that would be "superfluous" if provision was given narrower interpretation).

#### *2. Petitioner's interpretation is incompatible with the history and context of the Convention*

The history of the Convention and its implementing legislation confirm the text's plain import, namely that its prohibitions extend beyond what petitioner characterizes as "warlike" uses of chemical weapons. Indeed, the Convention was enacted to take "a major step beyond the Geneva Protocol of 1925, which only banned the use in war of chemical agents." Senate Report 171. The Convention's "prohibition on the use of chemical weapons extends beyond solely their use in international armed conflicts, i.e. chemical weapons may not be used *in any type of situation*, including purely domestic conflicts, civil wars or state-sponsored terrorism." *Article-by-Article Analysis of the Convention*, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. 1, 4 (1993) (emphasis added) (Convention Analysis). That is why the Convention drafters prohibited state use of chemical weapons "*under any circumstances*." App., *infra*, 5a (art. I, para. 1) (emphasis added); Convention Analysis 4.

States Parties agreed to enact legislation that would prohibit individuals from "undertaking any activity prohibited to a State Party under this Convention." App., *infra*, 30a (art. VII, para. 1(a)). Accordingly, because States Parties are prohibited from using chemical weapons "under any circumstances"—whether or not in war—so too are individuals regulated by the penal legislation implementing the Convention.

This broad scope of coverage implements the nonproliferation and free-trade goals of the Convention. Forbidding misuse and diversion by any person, regardless of a terrorism nexus or state sponsorship, reduces illicit trafficking in toxic chemicals and promotes confidence in licit chemical markets. It also helps to prevent state actors or terrorists from adopting the "screen" of a private actor to further chemical weapons goals. Finally, prohibiting all use of chemical weapons limits the ability of terrorists and hostile states to study chemical weapon use by independent individuals in order to evaluate the chemicals' weaponization potential.

#### 3. *Section 229 cannot be interpreted to include a terrorism element*

Petitioner relatedly contends that Section 229 should be interpreted to include a terrorism element. Pet. Br. 54. This contention fails for all the reasons provided above; the Convention, and its implementing legislation, were intended to prohibit all malicious uses of chemical weapons, not just a subset. While the treaty history shows that Congress viewed the CWC as "a useful and readily available tool in the fight against terrorism," it emphasized that the Convention was not limited to counterterrorism. Senate Report 209 (the Convention "was *not* designed to prevent chemical terrorism") (emphasis

added). Instead, it was "an arms control and nonproliferation treaty." *Ibid.*

Petitioner derives her view of congressional purpose from Section 229's inclusion as a predicate offense in statutes that prohibit "[h]arboring or concealing terrorists," 18 U.S.C. 2339, and "[p]roviding material support to terrorists," 18 U.S.C. 2339A. But most of the other statutes listed as predicate offenses also lack a terrorist intent element. 18 U.S.C. 2339(a), 2339A(a) (citing, *e.g.*, 18 U.S.C. 32, 175, 1366, 2332a, 42 U.S.C. 2284, 49 U.S.C. 46502). In addition, the list of statutes referenced in 18 U.S.C. 2339A includes crimes like arson (18 U.S.C. 81) that have no necessary connection to terrorism.

Petitioner points out that when Congress enacted Section 229 it repealed a previous chemical weapons prohibition, 18 U.S.C. 2332c (Supp. II 1996), that was in the "Terrorism" chapter of Title 18, and suggests that this substitution supports her contention that Section 229 should be read to include a terrorism element. Pet. Br. 48-49. That assertion is doubly mistaken. First, Congress's decision to repeal Section 2332c and replace it with a different statute that is *not* codified in the terrorism chapter is consistent with Congress's intent to comprehensively address all aspects of chemical weapons use, not just those related to terrorism. Second, the repealed chemical weapons statute did not contain a terrorism motive element. 18 U.S.C. 2332c (Supp. II 1996).

**II. THE ACT'S APPLICATION TO PETITIONER IS CONSTITUTIONAL**

Section 229's prohibition on petitioner's use of chemical weapons is independently supported by both Congress's Commerce Power and its Treaty Power, as implemented by the Necessary and Proper Clause. While

petitioner has advanced no persuasive justification rooted in the Constitution's text, structure, or history, or in this Court's precedents, that would support the creation of a novel, ad hoc "local activities" carve-out from Congress's power to implement valid treaties, her argument also fails for the basic reason that her conduct was not too "local" to fall within Congress's enumerated powers, even apart from the Treaty Power. It is therefore useful first to examine how Congress's Commerce Power applies before refuting petitioner's treaty claim that the application of the Act here impermissibly extends federal law to inherently local activity.

### A. The Prohibition On Petitioner's Use Of Toxic Chemicals Is Within Congress's Commerce Power

#### *1. Section 229 is part of a comprehensive scheme of commodity regulation and thus within the Commerce Power*

a. Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States," and to "make all Laws which shall be necessary and proper for carrying into Execution" that power. U.S. Const. Art. I, § 8, Cls. 3, 18. Congress may use its Commerce Power to, among other things, "regulate activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005). When Congress uses its Commerce Power, it may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

b. Section 229—which is just one part of a larger, interconnected statutory scheme to promote legitimate trade in toxic chemicals both domestically and interna-

tionally through deterring impermissible use—is a proper exercise of Congress's Commerce Power.

One of the CWC's express objectives was "promot[ion of] free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties." App., *infra*, 4a (preamble); see *id.* at 64a (art. XI). And the Convention states that "a necessary step towards the achievement" of that "common objective[]" (as well as the others specified in the Convention's preamble) is "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons." *Id.* at 5a (preamble). Accordingly, each State Party agreed to "adopt the necessary measures to ensure that toxic chemicals and their precursors are *only* developed, produced, otherwise acquired, retained, transferred, or used within its territory * * * for purposes not prohibited under this Convention." *Id.* at 27a (art. VI, para. 2) (emphasis added).

To further the dual purposes of the Convention—both to promote legitimate commerce in chemicals and to eliminate chemical weapons that are a threat to that commerce—the Convention set forth verification measures, App., *infra*, 27a (art. VI, para. 2), and required States Parties to implement its ban on impermissible uses and transfers of toxic chemicals, *id.* at 29a-30a (art. VII). The Convention also created financial incentives for countries to join by restricting international trade in certain chemicals with nonparties. Verification Annex, pt. VI.

Congress's statute implementing the Convention in turn established a comprehensive regulatory scheme governing legitimate commerce in toxic chemicals while at the same time safeguarding against their diversion into illegal channels. In particular, the Act created inspection requirements for certain facilities dealing in those chemicals, 22 U.S.C. 6721 *et seq.*, while also creating the criminal prohibitions at issue in this case, 18 U.S.C. 229 *et seq.* The Commerce Department has promulgated extensive regulations to implement the statute. 15 C.F.R. Pts. 710-721.

Chemical industry representatives "worked closely with U.S. CWC negotiators for many years to develop treaty provisions" and also helped draft the implementing legislation. Senate Report 214-215. The trade group for the industry supported the Convention because it "provide[d] a unique balance between verification and deterrence needs, and the legitimate commercial interests of American business." *Id.* at 230.

c. The constitutionality of Section 229 as a component of a larger regulation of commercial commodities follows directly from this Court's decision in *Gonzales* v. *Raich*, which itself analogized to statutes indistinguishable from the Act.

In *Raich*, the respondents maintained that the "categorical prohibition" in the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, "of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes" exceeded Congress's authority under the Commerce Clause. 545 U.S. at 15. This Court rejected that argument. The Court explained that "the activities regulated by the CSA are quintessentially economic," as the statute is one "that regulates the production, distri-

bution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26.

The Court noted that many of the substances subject to the CSA "have a useful and legitimate medical purpose" and that "[t]he regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of" other substances. *Raich*, 545 U.S. at 24 (citation omitted); see *id.* at 14 (noting that drugs on CSA Schedule II are not prohibited entirely because "they have a currently accepted medical use"). Although acknowledging that the *Raich* respondents' own conduct was "noncommercial" and "different * * * from drug trafficking," *id.* at 26 (citation omitted), this Court held that these facts did not require an exemption from "the larger regulatory scheme," *id.* at 26-27.

*Raich*'s analysis of the CSA's regulation of drugs applies equally to the regulation of toxic chemicals by the Chemical Weapons Convention Implementation Act of 1998. There is a "lucrative, interstate market" (545 U.S. at 25-26) in chemicals, many of them toxic.[4] Such chemicals have "useful and legitimate" applications, *id.* at 24, and the statute is intended both to "foster [their] beneficial use" and "prevent their misuse," *ibid.* In fact, the Act's criminal provisions address commerce directly; they expressly permit use of toxic chemicals for "industrial, agricultural, research, medical, or pharmaceutical activity." 18 U.S.C. 229F(7)(A). And, far from standing alone, Section 229 is just one part of "a lengthy and

[4] The chemical industry is a significant part of the U.S. economy, with shipments valued at about $555 billion per year. U.S. Envtl. Prot. Agency, *Chemical Manufacturing*, http:// www.epa.gov/sectors/sectorinfo/sectorprofiles/chemical.html (last updated Jan. 12, 2011).

detailed statute creating a comprehensive framework for regulating the production, distribution, and possession" (*Raich*, 545 U.S. at 24) of toxic chemicals.

The Act's comprehensive framework—including its criminal prohibitions and forfeiture provisions, reporting and inspection requirements, export controls, and a detailed enforcement regime, see 22 U.S.C. ch. 75; 15 C.F.R. Pts. 710-721—is itself just one part of an even broader regulation of hazardous chemicals by various federal statutory schemes. Senate Report 217 (noting that the chemical industry is "one of the most widely and deeply regulated industrial sectors" in the United States). The toxic chemicals at issue in this case, for instance, are subject to numerous federal regimes. See p. 5, *supra*. And the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, authorizes the Environmental Protection Agency to limit the use (including intrastate use) of chemicals when the agency determines that they "present[] or will present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(a); see J. Aroesty et al., *Rand Publ'n Series No. R-3745-ACQ, Domestic Implementation of a Chemical Weapons Treaty* 23 (1989) (TSCA "was designed to regulate the 65,000 existing chemicals in commerce and the 1000 or so new chemicals that enter the market each year.").

Given the analytical parallels between the CSA and the statute at issue here, it is not surprising that the Court in *Raich* cited as examples of valid exercises of the Commerce Power a series of treaty-implementing criminal statutes that are materially indistinguishable from Section 229. 545 U.S. at 26 n.36. Those statutes include: 18 U.S.C. 175(a), which implements the Biological Weapons Convention by making it unlawful to

"knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831(a), which implements the Convention on the Physical Protection of Nuclear Material by making it unlawful under certain circumstances to "receive[], possess[], use[], transfer[], alter[], dispose[] of, or disperse[] any nuclear material"; and 18 U.S.C. 842(n)(1), which implements the Convention on the Marking of Plastic Explosives by making it unlawful "to ship, transport, transfer, receive, or possess any plastic explosive that does not contain a detection agent."

d. Petitioner describes her conduct as merely "local" and thus beyond Congress's regulatory power. Pet. Br. 11, 19. Even assuming *arguendo* that petitioner's characterization of her conduct is correct, its "local" nature would not invariably immunize it from Congress's authority under the Commerce Power. Congress is entitled to regulate "purely intrastate activity that is not itself 'commercial,' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. This Court in *Raich* had "no difficulty" concluding that Congress "had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22. The *de minimis* nature of a particular violation did not remove it from the ambit of Congress's authority. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (citation omitted). The Court distinguished its earlier decisions in *United*

*States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), both of which involved facial (not as-applied) challenges and neither of which involved regulation of commodities in a large interstate market. *Raich*, 545 U.S. at 23-26.

Here, as in *Raich*, Congress could reasonably have concluded that excising individual instances of diversion and abuse of toxic chemicals (based on the abuser's motivation or other malleable considerations) would undermine federal regulation of such commodities, *Raich*, 545 U.S. at 22, and *Lopez* and *Morrison* are distinguishable here for the same reasons that they were distinguishable in *Raich*. Indeed, exempting such individual activity could, for example, open the door to domestic and international black markets, private stockpiling of toxic chemicals for weapons purposes, and lone-wolf testing of the efficacy of toxic chemicals misused as weapons. And, more generally, such an exemption would undermine legitimate commerce in such chemicals, which requires assurances that the substances will not be misused and thus can be freely traded.

In any event, petitioner's conduct was not purely local but was instead subject to federal jurisdiction in several respects. She purchased potassium dichromate over the Internet, and she stole 10-chlorophenoxarsine from international conglomerate Rohm & Haas. Pet. App. 49; J.A. 37-38, 44. Moreover, she put the chemicals on her victim's mail box, thus naturally triggering an investigation by federal postal inspectors. *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'n,* 453 U.S. 114, 128 (1981) (residential letter box is "an essential part of the Postal Service's nationwide system for the delivery and receipt of mail"); *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 337 (1904) (plurality opin-

ion) ("The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.") (citation omitted).

#### *2. The Commerce Power basis for Section 229 is properly before the Court*

Petitioner has contended that the government's Commerce Power argument has been waived, Cert. Reply Br. 9, but that is incorrect.

In the district court, the government stated that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties," and it cited as evidence the statute's title ("Chemical Weapons Convention Implementation Act of 1998"). J.A. 31. That statement was accurate as a description of the power Congress invoked when enacting the Act. The government in the district court, however, mistakenly assumed that the statute could not be sustained under any power other than the one expressly invoked by Congress, and the district court made the same error, Pet. App. 75. But it has long been settled that, apart from any authority invoked by Congress, this Court "will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution." *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 657 (1890); see *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

A "statute is presumed constitutional and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) (brack-

ets in original; citations omitted). It would not be consistent with that principle to invalidate an Act of Congress properly enacted pursuant to one of its enumerated powers because government lawyers did not initially invoke that power in defense of the statute.

A finding of waiver would be particularly inappropriate in this case. Petitioner contends that the assertedly "local" character of her crime places it outside of Congress's necessary and proper power to implement a treaty. Pet. Br. 20-27, 46, 57-62. But where the statute in question is supported by one of Congress's other enumerated powers, the activity is plainly not too "local" to fall within federal authority, even apart from Congress's power to implement treaties.

### B. The Act's Application To Petitioner Is Independently Authorized By Congress's Power To Enact Laws Necessary And Proper To Carry Into Execution The Treaty Power

As the court of appeals held, Congress had the authority to prohibit petitioner's conduct under its power under the Necessary and Proper Clause to implement a treaty. That authority is broad in order to achieve its purpose: empowering the Nation to carry out its international legal commitments in furtherance of U.S. foreign policy and national security goals.

Petitioner concedes that the Convention itself is "valid," *e.g.*, Br. i, 16, and "admits 'that a treaty restricting chemical weapons is a "proper subject[] of negotiations between our government and other nations",'" Pet. App. 20; see *id.* at 38 (Rendell, J., concurring) (petitioner "unequivocally concedes that point"). Petitioner also concedes that Congress may implement a treaty such as the Convention through legislation and that the existence of a treaty "may alter the scope of what legislation

is necessary and proper." Pet. Br. 35; see *id.* at 57 (recognizing that "[t]he Convention may empower Congress to enact some legislation that would not be necessary or proper without it"). Moreover, while petitioner claims that the Act goes beyond the scope of the Convention in certain respects not material here, but see note 2, *supra*, she does not contend that it does so on the relevant prohibition on "use" of a chemical weapon, Pet. App. 34-35. And, in any event, petitioner has made clear that she "is *not* challenging 18 U.S.C. § 229 on its face." Pet. C.A. Supp. Br. 26; see Pet. App. 7 n.5.

"Instead, [petitioner] is raising a much more limited and narrowly focused as-applied challenge," contending that the facially valid Act, implementing a valid treaty, "cannot be constitutionally applied to her in the circumstances of this case." Pet. Supp. C.A. Br. 26; see Pet. Br. 57. According to this argument, any particular application of treaty-implementing legislation can be successfully challenged as unconstitutional if, in the particular case, a judge concludes that the application involves "local" activities. *Id.* at 22, 57-58. Moreover, petitioner contends that this is such a case, and that her conviction should therefore be set aside. Petitioner is mistaken. There is simply no basis in the Constitution, history, or this Court's precedents for carving out particular applications of a facially valid statute that implements a valid treaty on the ground that the conduct at issue is too local.

***1. The Treaty Power is exclusively federal***

The Treaty Clause grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, § 2, Cl. 2. Unlike the various "legislative Powers" specifically enumerated

in Article I, Section 8, the Constitution assigns the Treaty Power to the President and Senate as a separate "Article II power." *United States* v. *Lara*, 541 U.S. 193, 201 (2004).

The Supremacy Clause, in turn, provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Thus, it is well-established that the Treaty Clause allows the federal government "to enter into and enforce a treaty * * * despite state objections" and that a valid treaty preempts inconsistent state law. *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976).

The Constitution expressly makes the federal grant of treaty-making authority exclusive by prohibiting States from "enter[ing] into any Treaty, Alliance, or Confederation." Art. I, § 10, Cl. 1; see *id.* Cl. 3 (prohibition on States' entering into "any Agreement or Compact" with a foreign power without first obtaining the consent of Congress). Moreover, "the treaty-making power was never possessed or exercised by the states separately; but was originally acquired and always exclusively held by the Nation, and, therefore, could not have been among those carved from the mass of state powers, and handed over to the Nation." George Sutherland, *Constitutional Power and World Affairs* 156 (1919) (Sutherland); see generally *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-318 (1936) (*Curtiss-Wright*). Thus, the Tenth Amendment's reservation of rights to the States is "no barrier" to the adoption of treaties and to the enactment of treaty-implementing legislation. *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

Although the Treaty Clause "does not literally authorize Congress to act legislatively," *Lara*, 541 U.S. at 201, the Necessary and Proper Clause empowers Congress to enact "Laws" that are "necessary and proper for carrying into Execution" all powers conferred in the Constitution, including the Treaty Power, Art. I, § 8, Cl. 18. Accordingly, while treaties are the supreme law of the land under the Supremacy Clause, when "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Medellin* v. *Texas*, 552 U.S. 491, 505 (2008) (brackets and citation omitted); see *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

#### 2. *It has long been settled that the Treaty Power extends to matters ordinarily within the jurisdiction of the States*

The court of appeals correctly held that Congress's prohibition of petitioner's conduct was an appropriate exercise of its Necessary and Proper authority to implement a treaty and did not implicate any other constitutional constraints. The Constitution's text, structure, and history, as well as longstanding treaty practice and an unbroken line of precedents, both before and after *Missouri* v. *Holland*, 252 U.S. 416 (1920), all support that conclusion.

a. Petitioner's argument that the federal government cannot effectuate its treaty obligations if doing so would result in regulation in areas of traditional state authority has been advanced—and rejected—numerous times since the Founding.

i. *Framing of the Constitution*. The national government's inability to ensure treaty compliance—and need to rely on the States when attempting to do so—

were among the principal defects in the Articles of Confederation that led to adoption of the Constitution.

Under the Articles of Confederation, Congress concluded numerous treaties, but because it lacked the necessary authority to enact laws to implement them, it typically passed resolutions urging the state legislatures to do so. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 37-38 (2d ed. 1916) (Crandall). The States routinely ignored these resolutions. *Id.* at 39-42. As James Madison explained to his fellow delegates in Philadelphia, "[t]he tendency of the States to these violations has been manifested in sundry instances," and "[t]he files of Congs. contain complaints already, from almost every nation with which treaties have been formed." 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., rev. ed. 1966) (Farrand). When state legislatures failed to implement a provision of the 1783 peace treaty with Great Britain guaranteeing repayment of British debts, and state courts failed to recognize British creditors' ability to collect on those debts, Britain retaliated by refusing to relinquish forts on the northwest border it had agreed to abandon. Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 3-10 (1986).

Other nations also expressed reluctance to enter into agreements with the United States because they lacked confidence in the American government's power to implement binding agreements, given the need for state implementation. As Madison told the Virginia ratifying convention, the "Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they

may be violated at pleasure by any of the states." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135-136 (Jonathan Elliot ed., 2d ed. 1888) (*Elliot's Debates*). James Wilson made the same point to Pennsylvania delegates, noting that "[i]f we offer to treat with a nation, we receive this humiliating answer: 'You cannot, in propriety of language, make a treaty, because you have no power to execute it.'" 2 *Elliott's Debates* 526. One such humiliating answer came from a British diplomat in 1785, who advised his American counterpart: "The apparent determination of the respective States to regulate their own separate interests renders it absolutely necessary * * * that my court should be informed how far the [American] commissioners can be duly authorized to enter into any engagements with Great Britain, which it may not be in the power of any one of the States to render totally fruitless and ineffectual." Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785), *in* 2 *The Diplomatic Correspondence of the United States of America* 297-298 (1837).

Given this experience, the Framers viewed the inability of Congress to prevent the breach of treaties as one of the chief defects of the Articles of Confederation. Crandall 49, 51; 1 Farrand 19 (remarks of Edmund Randolph) (listing, among reasons for proposing a new constitution, the government's inability under the Articles of Confederation to "cause infractions of treaties or of the law of nations, to be punished"); *The Federalist No. 22*, at 110 (Alexander Hamilton) (Garry Wills ed., 1982) (The "faith, the reputation, the peace of the whole union" are "continually at the mercy of the prejudices, the passions, and the interests of every member [State]

of which it is composed."); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716 (2004).

The Constitution addressed the federal government's impotence under the Articles of Confederation to ensure treaty compliance by assigning the treaty-making power exclusively to the federal government and by ensuring that the power was "disembarrassed * * * of an exception [in the Articles of Confederation], under which treaties might be substantially frustrated by regulations of the States." *The Federalist No. 42*, at 211 (James Madison). At the same time, the Framers chose not to impose subject-matter limitations on the Treaty Power because "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition." 3 *Elliot's Debates* 363 (Edmund Randolph); see *id.* at 504 (Edmund Randolph).

The Framers safeguarded the interests of the States by requiring that treaties be approved by two-thirds of the Senate, which they saw as the protector of State sovereignty given the States' equal representation and the fact that Senators were (at that time and until ratification of the 17th Amendment in 1913) chosen by state legislatures. 2 *Elliot's Debates* 507 (James Wilson) ("[E]ven in the making of treaties, the states are immediately represented."); *The Federalist No. 64*, at 329 (John Jay) (addressing the "fears and apprehensions of some, that the President and Senate may make treaties without an equal eye to the interests of all the States" by explaining that "all the States are equally represented in the senate, and by men the most able and the most willing to promote the interests of their constituents"); *The Federalist No. 62*, at 313 (James Madison) (power of state legislatures to appoint Senators will "secure the authority" of state governments); see Oona A. Hathaway

et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 249 (2013) (Hathaway).

ii. *The Jay Treaty*. In 1795, the United States entered into a treaty with Great Britain to resolve mounting tensions that threatened to reignite warfare between the two nations. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. The treaty (known as the Jay Treaty) provided that British subjects could hold and alienate land in the United States. *Id.* art. 9. That controversial provision negated state common-law rules "subjecting alien-owned real property to forfeiture" and thus encroached on the police power of the States. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1158 (2000) (Golove). Senator Tazewell of Virginia accordingly asked the Senate to decline its consent on the ground that this land-ownership provision "unconstitutionally invaded" "the rights of the individual States." *(Authentic) Treaty of Amity, Commerce, and Navigation, Between His Britannick Majesty, and the United States of America. By Their President, With the Advice and Consent of Their Senate With an Addition of Two Important Motions* (1795), *reprinted in* 18 *The Papers of Alexander Hamilton* 391 n.2 (Harold C. Syrett ed. 1973) (*Hamilton Papers*). The Senate rejected that contention, voting down Tazewell's motion 19-10, and went on to give its advice and consent to the Jay Treaty. Golove 1159.

Before ratifying the treaty, President Washington asked for Hamilton's views. Letter from George Washington to Hamilton (July 3, 1795), *reprinted in* 18 *Hamilton Papers* 398-400. In response, Hamilton explained that Tazewell's federalism-based objection "would total-

ly subvert the power of making treaties." *Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Great Britain* (July 9-11, 1795), *reprinted in* 18 *Hamilton Papers* 428. Hamilton explained that a "Treaty cannot be made which alters the constitutions of the country or which infringes any express exceptions to the power in the constitution of the United States" but that "it is difficult to assign any other bounds to the power." *Ibid.* President Washington then ratified the treaty. Golove 1161.

Hamilton also publicly defended the Jay Treaty's constitutionality. In a series of essays, he explained that the Supremacy Clause's express reference to treaties was intended to dispel any "question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authority of the States." *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers* 15-16. In the face of these arguments, opponents of the Jay Treaty subsequently dropped their federalism-based constitutional objections. Golove 1175.

This Court later held that Article IX of the Jay Treaty was "the supreme law of the land" and rendered "ineffectual and void" contrary Virginia law. *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813) (Story, J.); see *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453, 461-464 (1819) (same); *Craig* v. *Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818) (same). In fact, the early Court repeatedly held that exercises of the Treaty Power validly regulated matters otherwise within the reserved police power of the States. *Chirac* v. *Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270-271 (1817) (Marshall, C.J.) (treaty with France governing land ownership of French citizens preempted contrary Mary-

land law); *Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Treaty of Peace with Great Britain took precedence over Virginia laws on debts).

iii. *Negro Seamen Act*. In 1822, South Carolina enacted the Negro Seamen Act, providing that when any ship calling at a South Carolina port "having on board any free negroes or persons of colour * * * such free negroes or persons of colour shall be liable to be seized and confined" in jail for the duration of the ship's stay. 1822 S.C. Acts 12. Great Britain objected that application of this law to its sailors violated an 1815 treaty, and when South Carolina jailed a British sailor pursuant to the law, Britain sought a writ of habeas corpus to free him. Golove 1212, 1214. South Carolina responded that the treaty with Great Britain could not displace the state statute because "the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" *Id.* at 1215 (citation omitted).

Justice Johnson, riding circuit, determined that the South Carolina statute was unconstitutional, both because it conflicted with the treaty with Britain and because it purported to regulate interstate and foreign commerce. *Elkison* v. *Deliesseline*, 8 F. Cas. 493, 494-496 (C.C.S.C. 1823) (No. 4,366). Attorney General Wirt also issued an opinion finding the South Carolina law incompatible with the treaty. 1 Op. Att'y Gen. 659, 661 (1824) ("By the national constitution, the power of making treaties with foreign nations is given to the general government: and the same constitution declares that all

the treaties so made shall constitute a part of the law of the land.").[5]

Justice Johnson subsequently expounded on his view of the Treaty Power in a series of essays published under a pen name. Golove 1219. He argued that "the President and Senate can by virtue of the Treaty-making power do many things to which Congress in the exercise of its legislative power is not competent." *Philonimus No. 6*, Charleston Mercury, Sept. 11, 1823. He went on to cite 36 treaties that had "acted upon subjects within the acknowledged reservation of the States." *Philonimus No. 7*, Charleston Mercury, Sept. 13, 1823.

iv. *Anti-Chinese and Anti-Japanese Laws*. An 1868 treaty with China and an 1894 treaty with Japan provided that subjects of those countries residing in the United States would enjoy the same rights and privileges as citizens of other nations residing in this country. Additional Articles to the Treaty of the 18th of June, 1858,

---

[5] Attorney General Berrien later issued an opinion stating that the South Carolina statute did not actually conflict with the treaty, 2 Opp. Att'y Gen. 426, 439-442 (1831), but that, if there were a conflict, the treaty had to give way because "Congress are under a constitutional obligation to respect" the "reserved powers of [the] State[s]" when engaged in the "formation of treaties," *id.* at 436-437. In an unpublished letter written the next year, new Attorney General Taney endorsed the view of Berrien but acknowledged that it was inconsistent with Supreme Court precedent. Golove 1227-1228 ("[J]udging from the past I think it highly probably that the [Supreme] Court will declare the law of S. Carolina null & void if contrary to the stipulations in the Treaty whenever the question comes before it.") (citation omitted). Opinions by subsequent attorneys general returned to the views expressed by Attorney General Wirt on the scope of the Treaty Power. 11 Op. O.L.C. 104, 108 (1987); 33 Op. Att'y Gen. 560, 562 (1923); 22 Op. Att'y Gen. 214, 215-218 (1898); 8 Op. Att'y Gen. 411, 414-418 (1857).

U.S.-China, arts. V, VI, July 4, 1868, 16 Stat. 740; Treaty on Commerce and Navigation, art. I, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848.

In the late nineteenth and early twentieth centuries, some States and localities nonetheless passed laws requiring Japanese and Chinese children to attend separate schools or otherwise disadvantaging subjects of those countries. Golove 1246-1254. Even though these laws involved matters, such as education, within the reserved police powers of the States, courts invalidated them on the ground that they were supplanted by the treaties. *E.g.*, *In re Parrott*, 1 F. 481, 494 (C.C. Cal. 1880) (opinion of Hoffman, J.) ("[E]ven if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty."); *Baker* v. *Portland*, 2 F. Cas. 472, 474 (C.C. Or. 1879) (No. 777) ("[T]he treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.").

Secretary of State Elihu Root addressed the American Society of International Law during this period and explained that the United States had taken legal action to enjoin a discriminatory school ordinance passed by the city of San Francisco as in conflict with U.S. treaty obligations. *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273, 276 (1907) (Root). Root emphasized that, under the Constitution, "[l]egislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature

has authority," but that, in contrast, "[t]he treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states." *Id.* at 278. Accordingly, like Hamilton and Justice Johnson before him, Root explained that when the national government acts pursuant to the Treaty Power, "there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question." *Id.* at 279.

b. This Court's decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920) (Holmes, J.), rearticulated this well-established understanding of the Treaty Power and demonstrates why Section 229 falls squarely within the federal government's authority to ensure compliance with its treaty obligations.

i. In the Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 (Migratory Bird Convention), the United States and Great Britain mutually agreed to protect certain species of birds that, in their annual migrations, crossed between the United States and Canada. The treaty further provided that each country would "propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution" of the treaty, art. VIII, which the United States accomplished through the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755. That statute prohibited the killing, capturing, or selling of any of the migratory birds included within the terms of the treaty except as permitted by certain regulations.

Missouri argued that "the statute [was] an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" and sought to enjoin its enforcement. *Holland*, 252 U.S. at 430-431. The

Court explained that "[t]o answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States," because the Constitution "delegated expressly" the treaty-making power to the national government and provided that such treaties were "the supreme law of the land." *Id.* at 432 (citing U.S. Const. Arts. II, § 2, and VI).

The Court accordingly rejected Missouri's argument that "a treaty cannot do" "what an act of Congress could not do unaided." *Holland*, 252 U.S. at 432. The Court explained that while "the great body of private relations usually fall within the control of the State," "a treaty may override its power" according to the express design of the Constitution. *Id.* at 434-435. The Migratory Bird Convention did not "contravene any prohibitory words to be found in the Constitution," and the implementing statute, which closely tracked the treaty, was "a necessary and proper means to execute the powers of the Government." *Id.* at 431-433.

The Court found compelling practical reasons for the Founders' conferral of a broad Treaty Power on the federal government because treaties often deal with matters of the "sharpest exigency for the national well being." *Holland*, 252 U.S. at 433. And observing that the Constitution expressly renders States "incompetent to act" on treaties, the Court further explained that it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Ibid.* (citation omitted).

ii. *Holland* makes clear that Section 229 is a necessary and proper effectuation of U.S. treaty obligations. Petitioner contends (Br. 29) that the Court in *Holland* affirmed the Migratory Bird Convention only after

weighing for itself "the relative national and state interests" at stake. That is incorrect. The Court noted that "the great body of private relations usually fall within the control of the State" and held as a categorical matter that "a treaty may override its power." 252 U.S. at 434 (citing eight decisions of this Court in support); see *id.* at 432 (supporting same rule based on text and structure of Constitution). The Court later observed that "a national interest of very nearly the first magnitude" was involved in the Migratory Bird Convention and that Missouri's interest was insubstantial, *id.* at 435, but it nowhere suggested that its holding depended on a balancing of these interests. And petitioner points to no decision of this Court invalidating an exercise of the Treaty Power through application of any such balancing test.

In all events, *Holland*'s discussion of the Migratory Bird Convention itself is not directly relevant to petitioner's claim because petitioner here concedes that the CWC is valid. See p. 26, *supra*. Petitioner nonetheless appears to argue that *Holland*'s determination that the implementing legislation was constitutional is inapplicable here because in *Holland* there was a "tight nexus between the treaty and the legislation." Pet. Br. 29. But the same "tight nexus" is present here. See note 2, *supra*; Pet. App. 34. Upholding the application of the Act to petitioner's conduct does not imply a general "police power" to legislate solely to "protect the public" or safeguard "public safety." *Kebodeaux* v. *United States*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (citation omitted). Rather, the Act aims at distinctly international and national concerns embodied in a valid treaty: the attainment of a global scheme to protect against the malicious use of

chemical weapons while preserving beneficial, socially desirable uses and commerce—aims vital to national security.

Even assuming the Necessary and Proper Clause applies identically to treaty-implementation legislation as to other legislation, this Court's recent decisions on the scope of Congress's necessary-and-proper power in the domestic context leave no doubt that Section 229 was constitutionally applied to petitioner. *E.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010). Analysis under that precedent also refutes petitioner's suggestion that upholding her conviction would imply a limitless congressional power to legislate on all local matters, thereby displacing state authority. Pet. Br. 20-26, 38-39 (describing hypothetical slippery slope concerns); see also pp. 32-33, *supra* (noting structural checks against such federal action in the treaty context).

First, the Constitution "grants Congress broad authority to enact federal legislation," *Comstock*, 130 S. Ct. at 1956, and that principle applies no less here than elsewhere. Indeed, federal authority is at its apex on matters related to foreign affairs. *Curtiss-Wright*, 299 U.S. at 315-318. Second, Section 229 adds incrementally to pre-existing and extensive federal regulation of harmful chemicals, see pp. 5, 22, *supra*; cf. *Comstock*, 130 S. Ct. at 1958-1961, and implements a treaty on weapons—a quintessentially international subject matter.[6] Third, Congress's judgment to adopt penal legisla-

---

[6] Weapons have long been the subject of treaty-making. See, *e.g.*, p. 2, *supra* (discussing 1925 Geneva Protocol); International Convention with Respect to the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 (outlawing "dum dum" bullets and asphyxiating gases); Convention Regarding Navigation, Fishing, and Trading art. 5, U.S.-Russia, Apr. 17, 1824, 8 Stat. 304

tion that mirrored the terms of the Convention and thus regulated comprehensively was plainly reasonable. Cf. *id.* at 1961-1962. Fourth, the statute does not displace the authority of the States. Cf. *id.* at 1962-1963. Pennsylvania remained free to prosecute petitioner, *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (dual sovereign doctrine), and, in this case, petitioner's victim gave local authorities every opportunity to investigate and prosecute, but they declined. See pp. 5-6, *supra*. Fifth, "the links" between the Act and the Treaty Power "are not too attenuated." *Comstock*, 130 S. Ct. at 1963. Indeed, the prohibition at issue here "closely adheres to the language of the . . . Convention," which itself addresses a matter at the historical core of treaty-making. Pet. App. 34 (citation omitted). The statute's links to the treaty are tangible, direct, and strong. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). Accordingly, under *Comstock*'s analysis, Section 229 is valid necessary-and-proper legislation, and upholding it does not remotely suggest that "any one government [has] complete jurisdiction over all the concerns of public life." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011).[7]

iii. In the more than two centuries of American history, this Court has never invalidated Congress's implementation of a treaty on federalism grounds. In declining to do so, *Holland* articulated a settled understand-

---

(prohibiting sales of "fire-arms, other arms, powder, and munitions of war of every kind" to "native[]" tribes); see generally Congressional Research Service, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements* (2013).

[7] Section 229 clearly does not transgress any structural state-sovereignty limitations identified in this Court's decisions on "proper" legislation, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 161-166 (1992), and petitioner does not contend otherwise.

ing announced and applied by this Court in numerous cases before and after *Holland* itself. *Holland*, 252 U.S. at 434 (citing earlier cases); see *Lara*, 541 U.S. at 201 (citing *Holland*); *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (citing *Holland*); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691-692 (1979) (citing *Holland*); *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (citing *Holland*); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924) (citing *Holland*).[8]

---

[8] In the 1950s, Congress considered a constitutional amendment to abandon the rule applied in *Holland* and other cases. (The proposed amendment was one of several offered during this time by Senator John Bricker to modify the Treaty Power. The proposals are collectively referred to as the "Bricker Amendment." Golove 1273-1278.) In particular, the amendment would have provided that a "treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." *Treaties and Executive Agreements: Hearings on S.J. Res. 1, Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties and Other International Agreements Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong., 1st Sess. 280 (1955) (Statement of Att'y Gen. Herbert Brownell, Jr.) (Bricker Hearings); see *id.* at 22 (Senator Bricker's statement that "[t]his part of the amendment would repeal *Missouri* v. *Holland*"). After President Eisenhower and Secretary of State Dulles "convinced much of the Senate that *Missouri* could not be overturned without seriously endangering the conduct of U.S. foreign policy and the interests of American citizens abroad," "support in the Senate evaporated," and Senator Bricker abandoned this component of his proposal. Golove 1276; see Bricker Hearings 283 (Statement of Att'y Gen. Herbert Brownell, Jr.) (warning that "many existing treaties and international agreements would be threatened with possible attack in the courts if the proposal is put on the books" and that the proposal represents a "real and grave threat to our national security and our existing constitutional system"); *id.* at 986-992 (State Department list of 84 treaties entered into by the United

Indeed, nearly 20 years before *Holland*, the Court issued a parallel holding in *Neely* v. *Henkel*, 180 U.S. 109 (1901). In that case, an individual subject to an extradition statute enacted pursuant to a treaty with Spain argued that the statute was "not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress," Transcript of Record at 2, *Neely*, *supra*; *Neely*, 180 U.S. at 121-122. In a unanimous opinion written by Justice Harlan, the Court rejected that contention on the ground that the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power." *Id.* at 121. The Court thus found it unnecessary to decide whether the extradition statute might have been supported by another enumerated power. *Id.* at 122.

Given this history, it is not surprising that the leading constitutional commentators writing before *Holland* expressed views on the scope of the Treaty Power fully supportive of the decision's analysis. See, *e.g.*, Sutherland 153-165[9]; William H. Taft, *The United States and Peace* 76-79 (1914) (Taft); Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* (1913); 1 & 2 Charles Henry Butler, *The Treaty Making Power of the United States* (1902). But see Henry St. George Tucker,

States since 1920 that could not have been made effective under the Bricker Amendment because they "relate[] in part to subject matter not within the delegated powers of the Congress").

[9] Indeed, future Justice Sutherland anticipated *Holland*'s holding and reasoning when discussing the nascent constitutional challenge to the statute implementing the Migratory Bird Convention. Sutherland 154-155.

*Limitations on the Treaty-Making Power Under the Constitution of the United States* 284-341, 380-419 (1915) (contending that the Treaty Power is limited by the police powers of the States and that, contrary to the argument of Secretary of State Root, pp. 37-38, *supra*, treaties with Japan and China could not supplant the reserved right of States to exclude from schools foreign children "whose social, moral, or racial habits may tend to break down, instead of build up American character").

Petitioner makes no effort to deal with this considerable body of authority, but instead contends that *Holland*'s holding is contrary to three earlier decisions. Pet. Br. 26-27, 30. That is incorrect.

*Mayor of New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662 (1836), addressed whether the treaty with Spain ceding Louisiana to the United States also ceded to the federal government the right to dispose of certain public lands. The case turned entirely on the scope of the treaty in question, not on any constitutional limitation on Congress's authority to implement it. The Court held that the United States lacked the power to convey the lands because the original sovereigns—France and Spain—lacked that power, so they could not have conveyed it to the United States. *Id.* at 726, 731-732. In that particular context, the Court observed that "federal jurisdiction" cannot "be enlarged under the treaty-making power," *id.* at 736, but the Court also noted that if the Spanish king had enjoyed the right to dispose of the land, "there can be no doubt that it [would have] passed under the treaty to the United States." *Ibid.*

Far from supporting petitioner, *Geofroy* v. *Riggs*, 133 U.S. 258 (1890), reaffirms the broad scope of the Treaty Power. That decision held that a treaty with France governing inheritance of land—a subject quin-

tessentially within the police power of the States—displaced a state common law rule. *Id.* at 272-273. The Court emphasized that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations." *Id.* at 266.

The Court noted that the Treaty Power would not "authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent." *Geofroy,* 133 U.S. at 267; accord *Covert*, 354 U.S. at 16-19 (plurality opinion). But it contrasted those accepted limitations involving the Constitution's express prohibitions (such as those in the Bill of Rights) and structural features of American government (such as the composition of the Senate or the structure of state governments) with repeatedly rejected subject-matter-based limitations on the Treaty Power. Regarding that second category, the Court explained, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." *Geofroy*, 133 U.S. at 267 (citing cases); see Sutherland 161-162 (drawing same distinction).

The Court in *Holden* v. *Joy*, 84 U.S. (17 Wall.) 211 (1872), reflected the same distinction when it stated that the Treaty Power "is given, in general terms, without any description of the objects intended to be embraced within its scope" and "extend[s] to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States." *Id.* at 243.

***3. There is no basis for overruling* Holland**

The Court should reject petitioner's invitation (Br. 33) to overrule *Holland*. This Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here. And "[s]tare decisis has added force" when the Political Branches have "acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Since the founding, U.S. diplomats have negotiated with foreign powers armed with the assurance that the United States possesses the authority to ensure implementation of its treaty obligations, even in areas generally reserved to the States.

a. The rule articulated in *Holland* (and applied repeatedly by this Court both before and after) has not proven "unworkable in practice." *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (citation omitted). To the contrary, the Nation's experience with treaty-making demonstrates that the Framers did not envision a judicially enforceable "too local" limit on congressional power to implement a treaty and were correct in their conclusion that requiring both Presidential approval and the concurrence of two-thirds of the Senate would provide robust protection for the interests of the States in the treaty-making process. See pp. 32-33, *supra*. And to enact implementing legislation, the House of Representatives must also agree to the new law, thus providing another layer of safeguards.

The Senate has frequently imposed conditions or reservations on treaties to reflect federalism concerns. *E.g.*, *United Nations Convention Against Corruption*, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. 9 (2006)

(resolution of advice and consent) ("The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism."); see Hathaway 315-316 (listing instances when "the Senate increasingly asserted its role as the guardian of [States'] interests against federal encroachment" in the treaty realm); Louis Henkin, *Foreign Affairs and the Constitution* 392 n.66 (1972).

The Executive Branch also takes into account federalism concerns—as well as the practical necessity of securing the support of two-thirds of the Senate—in developing the United States' position in treaty negotiations. For example, U.S. treaty negotiators can steer negotiations away from provisions that would needlessly federalize an issue best left to individual States or persuade other nations to address federalism in the treaty itself. *E.g.*, *Council of Europe Convention on Cybercrime*, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. XXI-XXII, 21-22 (2003) (providing federalism carve-out in Article 41).[10]

b. It is petitioner's proffered alternative, not *Holland*, that is unworkable. Petitioner suggests that if the President and Senate want to achieve an important foreign policy or national security objective through a treaty that would require regulation of a matter otherwise within the States' jurisdiction, then the national

[10] It is also not unusual for Senators to oppose treaties based in part on their concerns about a treaty's potential interference with state or local affairs. *E.g.*, *Convention on the Elimination of All Forms of Discrimination Against Women*, S. Exec. Rep. No. 9, 107th Cong., 2d Sess. 15 (2002) ("[I]mportant issues concerning division of Federal-State powers are presented by several of its provisions.") (Minority Views of Sens. Helms et al.).

government must look to "state law" to implement the U.S. obligation. Pet. Br. 60-61.

But it was the national government's crippling need to rely on the States to implement U.S. treaty obligations under the Articles of Confederation, and the resulting denigration of American authority and negotiating power on the world stage, that led to the framing of the Constitution's treaty provisions in the first place. See pp. 29-33, *supra*. Those provisions cannot now sensibly be read to require the very same chaotic practice of mandatory State treaty-implementation they were intended to end. While the Federal Government may *choose* to rely on state law to put the United States in compliance with a treaty obligation, that does not mean the Court should invalidate the political branches' considered judgment that the best way to ensure United States compliance with the obligation at issue here was to pass a comprehensive federal law. The Constitution gives the federal government exclusive power to enter into and negotiate treaties, and the Framers concluded that the federal government must have the concomitant power to ensure compliance.

Petitioner's suggestion that the treaty implementation power of the United States be subject to a case-by-case negation whenever a judge determines that the conduct regulated is too "local" or not of sufficiently "international" interest (Pet. Br. 22) would compound the unworkability of her proffered alternative to *Holland*.[11] American treaty negotiators must have confi-

---

[11] For the reasons given above (see pp. 24-25, *supra*) petitioner's conduct was not "local," so she would not prevail even under her (unworkable) test. Nor is petitioner's claim advanced by her extended discussion of jurisdictional elements. Pet. Br. 38-42. She cites no

dence that the federal government possesses the authority to ensure compliance with U.S. treaty obligations and also have a clear understanding of the scope of their authority. Subjecting treaty-implementing legislation to ad-hoc, after-the-fact review and nullification on localism grounds would undermine both imperatives. Likewise, negotiators from other countries must have confidence that U.S. negotiators can deliver on their promises before agreeing to make their own commitments. *The Federalist No. 64*, at 329 (John Jay) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."). If U.S. treaty-implementation measures are judicially negated after-the-fact, the underlying international law treaty obligations would remain, and the United States could be subject to countermeasures, such as other states' retaliatory suspension of their treaty obligations to the United States. Restatement (Third) of the Foreign Relations of the United States § 905 & cmt. b, at 380, 381 (1987).

It is therefore unsurprising that petitioner cites not one decision in which this Court has ever engaged in (or even suggested the appropriateness of) this kind of case-by-case, as-applied examination of the Treaty Power to see whether the regulated conduct is too "local." As in the context of analysis under the Commerce Clause, courts do not "excise individual components" of a facially valid "larger scheme" enacted under the Treaty Power on the ground that they regulate "some purely intrastate activity." *Raich,* 545 U.S. at 22.

---

precedent requiring any such element in treaty-implementing legislation.

The treaty at issue here demonstrates why this is so. Through the Convention, the United States manifested its judgment that use and proliferation of chemical weapons represented a grave threat to the national security of the United States. By entering into the Convention, it secured other nations' categorical commitment against such use and proliferation—"under any circumstances" not expressly permitted by the Convention. App., *infra*, 5a (art. I, para. 1). In return for that benefit and to support that non-proliferation goal, the United States made reciprocal commitments, including the commitment to enact penal legislation forbidding individuals from using chemical weapons "under any circumstances" not expressly permitted by the Convention. *Ibid.*; see *id.* at 30a (art. VII, para. 1(a)). That was a commitment that the President and two-thirds of the Senate believed necessary to make in order to secure the foreign-policy, national-security, and economic benefits that would flow from the Convention.

Congress therefore enacted legislation coextensive with the Nation's treaty obligations. The implementing legislation banned conduct like petitioner's while exempting use of toxic chemicals only for "peaceful purposes" and other purposes expressly exempted by the Convention itself. Congress did not add additional exemptions, such as one for "local" use of a chemical weapon. Indeed, the fashioning of legislative exceptions not found in the Convention itself could have encouraged other States Parties to adopt their own novel exceptions, thus undermining both the Convention and the national security interests of the United States. The Treaty Power should not be read to require that very same exemption in the guise of an "as-applied" adjudication. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659,

1664 (2013) (warning against "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) (it would be "danger[ous]" to find a "prosecution barred based on * * * foreign policy concerns" that the Court "ha[s] neither aptitude, facilities nor responsibility to evaluate") (internal quotation marks omitted). Here, the President, two-thirds of the Senate (and then majorities of both Houses in passing the Act) determined that the Nation's paramount chemical weapons nonproliferation goals would be furthered by agreeing to the Convention and that the comprehensive penal legislation it called for was an integral part of that global nonproliferation framework. The courts should not second-guess that considered judgment.

c. *Holland* has not been undermined by subsequent decisions. Cf. Pet. Br. 33. *Holland* itself recognized that implementing legislation cannot override the "prohibitory words" of the Constitution applicable to all exercises of federal power, 252 U.S. at 433, and *Covert*, 354 U.S. at 16-17 (plurality opinion), reaffirmed that rule. Accord, *e.g.*, *Geofroy*, 133 U.S. at 267.[12] Indeed,

[12] The Solicitor General's position in the oral argument in *Golan* v. *Holder*, 132 S. Ct. 873 (2012), is consistent with that position. Cf. Pet. Br. 37. That case involved the question whether a copyright statute violated the First Amendment or transgressed "an impenetrable barrier to the extension of copyright protection to authors whose writings, for whatever reason, are in the public domain." 132 S. Ct. at 884. The Solicitor General agreed that the Treaty Power would not permit Congress to breach prohibitory words applicable to all exercises of federal power, but explained that, contrary to petitioners' submission in that case, "no textual limit in the Copyright Clause * * * would preclude Congress from enacting this statute." Transcript of Oral Argument at 33, *Golan*, *supra*; see *ibid.* (statute did not violate First Amendment); Resps. Br. at 13-14, *Golan*, *supra*, (ex-

the *Covert* plurality emphasized that "there is nothing in [*Holland*] which is contrary to the position" taken in *Covert*. 354 U.S. at 18 (plurality opinion). The plurality explained that *Holland* "was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government." *Ibid.* "To the extent that the United States can validly make treaties," the plurality continued, "the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid.*

Nor is it at all anomalous that the federal government may accomplish an end through use of one specified power that it could not through another. Cf. Pet. Br. 24. For example, Congress's power "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution," even though the spending power, like the other grants of legislative power, is in Article I. *United States* v. *Butler*, 297 U.S. 1, 66 (1936). Even less reason exists for assuming that the federal government's Article II Treaty Power is limited to those Article I direct grants of legislative authority, given the unique and compelling foreign affairs interests served by the Treaty Power.

*Holland* is also consistent with recent decisions on the Tenth Amendment and the scope of Congress's other enumerated powers. Cf. Pet. Br. 35 (citing, *e.g.*, *Lopez, supra*). Petitioner's contrary argument simply

---

plaining that statute did not transcend any of the "constraints" imposed on congressional authority by Copyright Clause); see *Railway Labor Execs. Ass'n* v. *Gibbons*, 455 U.S. 457, 468-469 (1982) (uniformity requirement of Bankruptcy Clause would apply even if Congress acted pursuant to another enumerated power).

ignores the fundamental distinction between national actions taken pursuant to the Treaty Power and those taken pursuant to enumerated Article I powers.

When Congress lacks legislative authority under one of its enumerated powers, state authority remains over the subject, so there is no gap. Root 278. By contrast, the States are prohibited from engaging in treaty-making; the power is not distributed. *Ibid.*; accord Taft 76-77. That reflects the larger, "irrefutable postulate" that, in international affairs, the federal government has complete sovereignty and acts on behalf of all the citizens of the Nation. *Curtiss-Wright*, 299 U.S. at 317; see *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States," but "is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 62-64 & n.11 (1941). "Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in [Pennsylvania] equally with every citizen of the United States residing elsewhere." Root 279. And it follows from the national government's exclusive power to make treaties that it must have the power to ensure treaty compliance.

The flat constitutional prohibition on state treaty-making plainly distinguishes exercises of the Treaty Power from exercises of other enumerated powers, which inherently "presuppose[] something not enumerated." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Given that the Constitution "expressly forbid[s]" States from entering into treaties, the Court has recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein* v. *Lynham*, 100 U.S. 483, 490

(1880). As Attorney General Cushing explained in 1857, "[t]hat is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency." 8 Op. Att'y Gen. at 415. Without the power to implement treaty obligations, "the United States is not completely sovereign." *Curtiss-Wright*, 299 U.S. at 318; see *Holland*, 252 U.S. at 433.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
JOHN P. CARLIN
*Acting Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
JOSEPH R. PALMORE
*Assistant to the Solicitor General*
VIRGINIA M. VANDER JAGT
ADITYA BAMZAI
*Attorneys*

AUGUST 2013

## APPENDIX

## CONSTITUTIONAL, TREATY AND STATUTUTORY PROVISIONS INVOLVED

1. U.S. Const. Art. I, Section 8, Cl. 3 provides:

To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes.

2. U.S. Const. Art. I, Section 8, Cl. 18 provides:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. U.S. Const. Art. I, Section 10, Cl. 1 provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

4. U.S. Const. Art. I, Section 10, Cl. 3 provides:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage

in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

5. U.S. Const. Art. II, Section 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

6. U.S. Const. Art. VI, Cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

7. U.S. Const. Amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

8. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CCWC) provides:[*]

**PREAMBLE**

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

---

[*] The Annexes to the Convention are not reproduced here.

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

**ARTICLE I**

**GENERAL OBLIGATIONS**

1. Each State Party to this Convention undertakes never under any circumstances:

   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

   (b) To use chemical weapons;

   (c) To engage in any military preparations to use chemical weapons;

   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of an-

other State party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State party undertakes not to use riot control agents as a method of warfare.

## ARTICLE II

## DEFINITIONS AND CRITERIA

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:

   (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

   (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

   (c) Any equipment specifically designed for use directly in connection with the employment of

munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final

product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means:

   (a) Chemical weapons which were produced before 1925; or

   (b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. "Abandoned Chemical Weapons" means:

   Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

7. "Riot Control Agent" means:

   Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":

   (a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

      (i) As part of the stage in the production of chemicals ("final technological stage")

where the material flows would contain, when the equipment is in operation:

(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or

(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, inter alia, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

(i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;

(ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 percent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

    The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

12. For the purposes of Article VI:

    (a) "Production" of a chemical means its formation through chemical reaction;

    (b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;

    (c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

**ARTICLE III**

**DECLARATIONS**

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:

   (a) With respect to chemical weapons:

      (i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;

      (ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the Verification Annex, except for those chemical weapons referred to in sub-subparagraph (iii);

      (iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;

      (iv) Declare whether it has transferred or received, directly or indirectly, any chemi-

cal weapons since 1 January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;

(v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;

(b) With respect to old chemical weapons and abandoned chemical weapons:

(i) Declare whether it has on its territory old chemical weapons and provide all available information in accordance with Part IV (B), paragraph 3, of the Verification Annex;

(ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information in accordance with Part IV (B), paragraph 8, of the Verification Annex;

(iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information in accordance with Part IV (B), paragraph 10, of the Verification Annex;

(c) With respect to chemical weapons production facilities:

(i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;

(ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, in accordance with Part V, paragraph 1, of the Verification Annex, except for those facilities referred to in sub-paragraph (iii);

(iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, in accordance with Part V, paragraph 2, of the Verification Annex;

(iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, in accordance with Part V, paragraphs 3 to 5, of the Verification Annex;

(v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 6, of the Verification Annex;

(vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 1 (i), of the Verification Annex;

(vii) Provide its general plan for any temporary conversion of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, into a chemical weapons destruction facility, in accordance with Part V, paragraph 7, of the Verification Annex;

(d) With respect to other facilities:

Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, inter alia, laboratories and test and evaluation sites;

(e) With respect to riot control agents:

Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

**ARTICLE IV**

**CHEMICAL WEAPONS**

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instru-

ments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

   (a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

   (b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical

weapons storage and their destruction among States Parties.

To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;

(b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons

unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

**ARTICLE V**

**CHEMICAL WEAPONS PRODUCTION FACILITIES**

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.

4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.

5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.

6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.

7. Each State Party shall:

    (a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and

    (b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.

8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.

9. Each State Party shall:

   (a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;

   (b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed.

10. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 8, it shall destroy chemical weapons

production facilities specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

11. Each State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions.

12. Chemical weapons production facilities specified in paragraph 1 may be temporarily converted for destruction of chemical weapons in accordance with Part V, paragraphs 18 to 25, of the Verification Annex. Such a converted facility must be destroyed as soon as it is no longer in use for destruction of chemical weapons but, in any case, not later than 10 years after entry into force of this Convention.

13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility specified in paragraph 1 for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval

is contingent in accordance with Part V, Section D, of the Verification Annex.

14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.

15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex.

16. In carrying out verification activities pursuant to this Article and Part V of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons production facilities and their destruction among States Parties.

    To this end, the Executive Council shall decide to limit the verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

    (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part V of the Verification Annex;

(b) Implementation of the agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

17. If the Executive Council takes a decision pursuant to paragraph 16, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

18. Nothing in paragraphs 16 and 17 shall affect the obligation of a State Party to make declarations pursuant to Article III, this Article and Part V of the Verification Annex.

19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

**ARTICLE VI**

**ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION**

1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

2. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under the Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.

3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention, transfer and use as specified in Part VI of the Verification Annex. It shall

subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.

4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

6. Each State party shall subject facilities specified in Part IX of the Verification Annex to data monitoring and eventual on-site verification in accordance with that Part of the Verification Annex unless decided otherwise by the Conference of the States Parties pursuant to Part IX, paragraph 22, of the Verification Annex.

7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.

8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.

9. For the purpose of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Verification Annex.

10. In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (hereinafter referred to as "Confidentiality Annex").

11. The provisions of this Article shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

## ARTICLE VII

## NATIONAL IMPLEMENTATION MEASURES

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary

measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

## ARTICLE VIII

## THE ORGANIZATION

### A. GENERAL PROVISIONS

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.

3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands.

4. There are hereby established as the organs of the Organization: the Conference of the States Parties, the Executive Council, and the Technical Secretariat.

5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on

civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.

6. In undertaking its verification activities the Organization shall consider measures to make use of advances in science and technology.

7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V. Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget. The budget of the Organization shall comprise two separate chapters, one relating to administrative and other costs, and one relating to verification costs.

8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

**B. THE CONFERENCE OF THE STATES PARTIES**

Composition, procedures and decision-making

9. The Conference of the States Parties (hereinafter referred to as "the Conference") shall be composed of all members of this Organization. Each member shall have one representative in the Conference, who may be accompanied by alternates and advisers.

10. The first session of the Conference shall be convened by the depositary not later than 30 days after the entry into force of this Convention.

11. The Conference shall meet in regular sessions which shall be held annually unless it decides otherwise.

12. Special sessions of the Conference shall be convened:

    (a) When decided by the Conference;

    (b) When requested by the Executive Council;

    (c) When requested by any member and supported by one third of the members; or

    (d) In accordance with paragraph 22 to undertake reviews of the operation of this Convention.

    Except in the case of subparagraph (d), the special session shall be convened not later than 30 days after receipt of the request by the Director-General of the Technical Secretariat, unless specified otherwise in the request.

13. The Conference shall also be convened in the form of an Amendment Conference in accordance with Article XV, paragraph 2.
14. Sessions of the Conference shall take place at the seat of the Organization unless the Conference decides otherwise.
15. The Conference shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next regular session.
16. A majority of the members of the Organization shall constitute a quorum for the Conference.
17. Each member of the Organization shall have one vote in the Conference.
18. The Conference shall take decisions on questions of procedure by a simple majority of the members present and voting. Decisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this Convention. When the

issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.

Powers and functions

19. The Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council.

20. The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this Convention to either of them in the exercise of their functions.

21. The Conference shall:

    (a) Consider and adopt at its regular sessions the report, programme and budget of the Organization, submitted by the Executive Council, as well as consider other reports;

(b) Decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7;

(c) Elect the members of the Executive Council;

(d) Appoint the Director-General of the Technical Secretariat (hereinafter referred to as "the Director-General");

(e) Approve the rules of procedure of the Executive Council submitted by the latter;

(f) Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention;

(g) Foster international cooperation for peaceful purposes in the field of chemical activities;

(h) Review scientific and technological developments that could affect the operation of this Convention and, in this context, direct the Director-General to establish a Scientific Advisory Board to enable him, in the performance of his functions, to render specialized advice in areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties. The Scientific Advisory Board shall be composed of independent experts appointed in accordance with terms of reference adopted by the Conference;

(i) Consider and approve at its first session any draft agreements, provisions and guidelines developed by the Preparatory Commission;

(j) Establish at its first session the voluntary fund for assistance in accordance with Article X;

(k) Take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention, in accordance with Article XII.

22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

### C. THE EXECUTIVE COUNCIL

Composition, procedure and decision-making

23. The Executive Council shall consist of 41 members. Each State Party shall have the right, in accordance with the principle of rotation, to serve on the Executive Council. The members of the Executive Council shall be elected by the Confer-

ence for a term of two years. In order to ensure the effective functioning of this Convention, due regard being specially paid to equitable geographical distribution, to the importance of chemical industry, as well as to political and security interests, the Executive Council shall be composed as follows:

(a) Nine States Parties from Africa to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(b) Nine States Parties from Asia to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, four members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these four memebers;

(c) Five States Parties from Eastern Europe to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these five States Parties, one member shall, as a rule, be the State Party with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating this one member;

(d) Seven States Parties from Latin America and the Caribbean to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these seven States Parties, three members shall, as a rule, be the States Parties with the most significant national chemistry industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(e) Ten States Parties from among Western European and other States to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these 10 States Parties, 5 members shall, as a rule, be the States Parties with the most significant national chemistry industry in the region as determined by internationally

reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these five members;

(f) One further State Party to be designated consecutively by States Parties located in the regions of Asia and Latin America and the Caribbean. As a basis for this designation it is understood that this State Party shall be a rotating member from these regions.

24. For the first election of the Executive Council 20 members shall be elected for a term of one year, due regard being paid to the established numerical proportions as described in paragraph 23.

25. After the full implementation of Articles IV and V the Conference may, upon the request of a majority of the members of the Executive Council, review the composition of the Executive Council taking into account developments related to the principles specified in paragraph 23 that are governing its composition.

26. The Executive Council shall elaborate its rules of procedure and submit them to the Conference for approval.

27. The Executive Council shall elect its Chairman from among its members.

28. The Executive Council shall meet for regular sessions. Between regular sessions it shall meet

as often as may be required for the fulfilment of its powers and functions.

29. Each member of the Executive Council shall have one vote. Unless otherwise specified in this Convention, the Executive Council shall take decisions on matters of substance by a two-thirds majority of all its members. The Executive Council shall take decisions on questions of procedure by a simple majority of all its members. When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Executive Council by the majority required for decisions on matters of substance.

Powers and functions

30. The Executive Council shall be the executive organ of the Organization. It shall be responsible to the Conference. The Executive Council shall carry out the powers and functions entrusted to it under this Convention, as well as those functions delegated to it by the Conference. In so doing, it shall act in conformity with the recommendations, decisions and guidelines of the Conference and assure their proper and continuous implementation.

31. The Executive Council shall promote the effective implementation of, and compliance with, this Convention. It shall supervise the activities of the Technical Secretariat, cooperate with the National Authority of each State Party and facilitate con-

sultations and cooperation among States Parties at their request.

32. The Executive Council shall:

    (a) Consider and submit to the Conference the draft programme and budget of the Organization;

    (b) Consider and submit to the Conference the draft report of the Organization on the implementation of this Convention, the report on the performance of its own activities and such special reports as it deems necessary or which the Conference may request;

    (c) Make arrangements for the sessions of the Conference including the preparation of the draft agenda.

33. The Executive Council may request the convening of a special session of the Conference.

34. The Executive Council shall:

    (a) Conclude agreements or arrangements with States and international organizations on behalf of the Organization, subject to prior approval by the Conference;

    (b) Conclude agreements with States Parties on behalf of the Organization in connection with Article X and supervise the voluntary fund referred to in Article X;

    (c) Approve agreements or arrangements relating to the implementation of verification activities,

negotiated by the Technical Secretariat with States Parties.

35. The Executive Council shall consider any issue or matter within its competence affecting this Convention and its implementation, including concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference.

36. In its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, inter alia, abuse of the rights provided for under this Convention, the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, inter alia, one or more of the following measures:

   (a) Inform all States Parties of the issue or matter;

   (b) Bring the issue or matter to the attention of the Conference;

   (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

   The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, in-

cluding relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

### D. THE TECHNICAL SECRETARIAT

37. The Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this Convention. It shall carry out the other function entrusted to it under this Convention as well as those functions delegated to it by the Conference and the Executive Council.

38. The Technical Secretariat shall:

    (a) Prepare and submit to the Executive Council the draft programme and budget of the Organization;

    (b) Prepare and submit to the Executive Council the draft report of the Organization on the implementation of this Convention and such other reports as the Conference or the Executive Council may request;

    (c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;

    (d) Address and receive communications on behalf of the Organization to and from States Parties

on matters pertaining to the implementation of this Convention;

(e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.

39. The Technical Secretariat shall:

(a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;

(b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7 (b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21 (i) above;

(c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties or between a State Party and the Organization for the purposes of Article X.

40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.

41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.

42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.

43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.

44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall

serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.

45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21 (h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who shall serve in their individual capacity. The members of the Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instruction from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as in-

ternational officers responsible only to the Conference and the Executive Council.

47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

**E. PRIVILEGES AND IMMUNITIES**

48. The Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

49. Delegates of States Parties, together with their alternates and advisers, representatives appointed to the Executive Council together with their alternates and advisers, the Director-General and the staff of the Organization shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization.

50. The legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organization and the States Parties as well as in an agreement between the Organization and the State in which the headquarters of the Organization is seated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21 (i).

51. Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director-General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex.

## ARTICLE IX

## CONSULTATIONS, COOPERATION AND FACT-FINDING

1. States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention.

2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as pos-

sible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

Procedure for requesting clarification

3. A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.

4. A State Party shall have the right to request the Executive Council to obtain clarification from another State party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:

(a) The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;

(b) The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;

(c) The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;

(d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;

(e) For the purpose of obtaining further clarification requested under subparagraph (d), the Executive Council may call on the Director-General to establish a group of experts from the Technical Secretariat, or if appropriate staff are not available in the Technical Secretariat, from elsewhere, to examine all available information and data relevant to the situation causing the concern. The group of experts shall submit a factual report to the Executive Council on its findings;

(f) If the requesting State Party considers the clarification obtained under subparagraphs (d)

and (e) to be unsatisfactory, it shall have the right to request a special session of the Executive Council in which States Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

5. A State Party shall also have the right to request the Executive Council to clarify any situation which has been considered ambiguous or has given rise to a concern about its possible non-compliance with this Convention. The Executive Council shall respond by providing such assistance as appropriate.

6. The Executive Council shall inform the States Parties about any request for clarification provided in this Article.

7. If the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or it believes its doubts warrant urgent consideration, notwithstanding its right to request a challenge inspection, it may request a special session of the Conference in accordance with Article VIII, paragraph 12 (c). At such a special session, the Conference shall consider the matter and may recom-

mend any measure it deems appropriate to resolve the situation.

Procedures for challenge inspections

8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

9. Each State Party is under the obligation to keep the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this Convention as specified in the Verification Annex. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.

10. For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct

the on-site challenge inspection pursuant to paragraph 8.

11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:

    (a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfil its mandate;

    (b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and

    (c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.

12. With regard to an observer, the following shall apply:

    (a) The requesting State Party may, subject to the agreement of the inspected State Party, send a representative who may be a national either of the requesting State Party or of a third State Party, to observe the conduct of the challenge inspection.

(b) The inspected State Party shall then grant access to the observer in accordance with the Verification Annex.

(c) The inspected State Party shall, as a rule, accept the proposed observer, but if the inspected State Party exercises a refusal, that fact shall be recorded in the final report.

13. The requesting State Party shall present an inspection request for an on-site challenge inspection to the Executive Council and at the same time to the Director-General for immediate processing.

14. The Director-General shall immediately ascertain that the inspection request meets the requirements specified in Part X, paragraph 4, of the Verification Annex, and, if necessary, assist the requesting State Party in filing the inspection request accordingly. When the inspection request fulfils the requirements, preparations for the challenge inspection shall begin.

15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.

16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.

17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.

18. The Director-General shall issue an inspection mandate for the conduct of the challenge inspection. The inspection mandate shall be the inspection request referred to in paragraphs 8 and 9 put into operational terms, and shall conform with the inspection request.

19. The challenge inspection shall be conducted in accordance with Part X or, in the case of alleged use, in accordance with Part XI of the Verification Annex. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.

20. The inspected State Party shall assist the inspection team throughout the challenge inspection and

facilitate its task. If the inspected State Party proposes, pursuant to Part X, Section C, of the Verification Annex, arrangements to demonstrate compliance with this Convention, alternative to full and comprehensive access, it shall make every reasonable effort, through consultations with the inspection team, to reach agreement on the modalities for establishing the facts with the aim of demonstrating its compliance.

21. The final report shall contain the factual findings as well as an assessment by the inspection team of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Director-General shall promptly transmit the final report of the inspection team to the requesting State Party, to the inspected State Party, to the Executive Council and to all other State Parties. The Director-General shall further transmit promptly to the Executive Council the assessments of the requesting and of the inspected States Parties, as well as the views of other States Parties which may be conveyed to the Director-General for that purpose, and then provide them to all States Parties.

22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:

    (a) Whether any non-compliance has occurred;

(b) Whether the request had been within the scope of this Convention; and

(c) Whether the right to request a challenge inspection had been abused.

23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection.

24. The requesting State Party and the inspected State Party shall have the right to participate in the review process. The Executive Council shall inform the States Parties and the next session of the Conference of the outcome of the process.

25. If the Executive Council has made specific recommendations to the Conference, the Conference shall consider action in accordance with Article XII.

**ARTICLE X**

**ASSISTANCE AND PROTECTION AGAINST CHEMICAL WEAPONS**

1. For the purposes of this Article, "Assistance" means the coordination and delivery to States Parties of protection against chemical weapons, in-

cluding, inter alia, the following: detection equipment and alarm systems; protective equipment; decontamination equipment and decontaminants; medical antidotes and treatments; and advice on any of these protective measures.

2. Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention.

3. Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons.

4. For the purposes of increasing the transparency of national programmes related to protective purposes, each State Party shall provide annually to the Technical Secretariat information on its programme, in accordance with procedures to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

5. The Technical Secretariat shall establish, not later than 180 days after entry into force of this Convention and maintain, for the use of any requesting State Party, a data bank containing freely available information concerning various means of protection against chemical weapons as well as such information as may be provided by States Parties.

The Technical Secretariat shall also, within the resources available to it, and at the request of a State Party, provide expert advice and assist the State Party in identifying how its programmes for the development and improvement of a protective capacity against chemical weapons could be implemented.

6. Nothing in this Convention shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency procurement of assistance.

7. Each State Party undertakes to provide assistance through the Organization and to this end to elect to take one or more of the following measures:

   (a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;

   (b) To conclude, if possible not later than 180 days after this Convention enters into force for it, agreements with the Organization concerning the procurement, upon demand, of assistance;

   (c) To declare, not later than 180 days after this Convention enters into force for it, the kind of assistance it might provide in response to an appeal by the Organization. If, however, a State Party subsequently is unable to provide the assistance envisaged in its declaration, it is

still under the obligation to provide assistance in accordance with this paragraph.

8. Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that:

   (a) Chemical weapons have been used against it;

   (b) Riot control agents have been used against it as a method of warfare; or

   (c) It is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

9. The request, substantiated by relevant information, shall be submitted to the Director-General, who shall transmit it immediately to the Executive Council and to all States Parties. The Director-General shall immediately forward the request to States Parties which have volunteered, in accordance with paragraphs 7 (b) and (c), to dispatch emergency assistance in case of use of chemical weapons or use of riot control agents as a method of warfare, or humanitarian assistance in case of serious threat of use of chemical weapons or serious threat of use of riot control agents as a method of warfare to the State Party concerned not later than 12 hours after receipt of the request. The Director-General shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for further action.

He shall complete the investigation within 72 hours and forward a report to the Executive Council. If additional time is required for completion of the investigation, an interim report shall be submitted within the same time-frame. The additional time required for investigation shall not exceed 72 hours. It may, however, be further extended by similar periods. Reports at the end of each additional period shall be submitted to the Executive Council. The investigation shall, as appropriate and in conformity with the request and the information accompanying the request, establish relevant facts related to the request as well as the type and scope of supplementary assistance and protection needed.

10. The Executive Council shall meet not later than 24 hours after receiving an investigation report to consider the situation and shall take a decision by simple majority within the following 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. The Technical Secretariat shall immediately transmit to all States Parties and relevant international organizations the investigation report and the decision taken by the Executive Council. When so decided by the Executive Council, the Director-General shall provide assistance immediately. For this purpose, the Director-General may cooperate with the requesting State Party, other States Parties and relevant international organizations. The

States Parties shall make the fullest possible efforts to provide assistance.

11. If the information available from the ongoing investigation or other reliable sources would give sufficient proof that there are victims of use of chemical weapons and immediate action is indispensable, the Director-General shall notify all States Parties and shall take emergency measures of assistance, using the resources the Conference has placed at his disposal for such contingencies. The Director-General shall keep the Executive Council informed of actions undertaken pursuant to this paragraph.

**ARTICLE XI**

**ECONOMIC AND TECHNOLOGICAL DEVELOPMENT**

1. The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

2. Subject to the provisions of this Convention and without prejudice to the principles and applicable rules of international law, the States Parties shall:

(a) Have the right, individually or collectively, to conduct research with, to develop, produce, acquire, retain, transfer, and use chemicals;

(b) Undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention.

(c) Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(d) Not use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention nor use any other international agreement for pursuing an objective inconsistent with this Convention;

(e) Undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention.

## ARTICLE XII

## MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.

3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.

4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

**ARTICLE XIII**

**RELATION TO OTHER INTERNATIONAL AGREEMENTS**

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

**ARTICLE XIV**

**SETTLEMENT OF DISPUTES**

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this Convention and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or

application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Or-

ganization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).

6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

**ARTICLE XV**

**AMENDMENTS**

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.

2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depositary. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amend-

ment Conference be held less than 60 days after the circulation of the proposed amendment.

3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:

   (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and

   (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

(a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the

recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

**ARTICLE XVI**

**DURATION AND WITHDRAWAL**

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its

country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

**ARTICLE XVII**

**STATUS OF THE ANNEXES**

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

**ARTICLE XVIII**

**SIGNATURE**

This Convention shall be open for signature for all States before its entry into force.

**ARTICLE XIX**

**RATIFICATION**

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

## ARTICLE XX

## ACCESSION

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

## ARTICLE XXI

## ENTRY INTO FORCE

1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature.
2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.

## ARTICLE XXII

## RESERVATIONS

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

## ARTICLE XXIII

## DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, inter alia:

(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Convention, and of the receipt of other notices;

(b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and

(c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.

**ARTICLE XXIV**

**AUTHENTIC TEXTS**

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to the effect, have signed this Convention.

Done at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

9. The Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 provides:

DIVISION I—CHEMICAL WEAPONS CONVENTION

**SECTION 1. SHORT TITLE.**

This Division may be cited as the "Chemical Weapons Convention Implementation Act of 1998".

**SEC. 2. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

Sec. 3. Definitions.

TITLE I—GENERAL PROVISIONS

Sec. 101. Designation of United States National Authority.

Sec. 102. No abridgement of constitutional rights.

Sec. 103. Civil liability of the United States.

TITLE II—PENALTIES FOR UNLAWFUL ACTIVITIES SUBJECT TO THE JURISDICTION OF THE UNITED STATES

Subtitle A—Criminal and Civil Penalties

Sec. 201. Criminal and civil provisions.

Subtitle B—Revocations of Export Privileges

Sec. 211. Revocations of export privileges.

TITLE III—INSPECTIONS

Sec. 301. Definitions in the title.

Sec. 302. Facility agreements.

Sec. 303. Authority to conduct inspections.

Sec. 304. Procedures for inspections.

Sec. 305. Warrants.

Sec. 306. Prohibited acts relating to inspections.

Sec. 307. National security exception.

Sec. 308. Protection of constitutional rights of contractors.

Sec. 309. Annual report on inspections.

Sec. 310. United States assistance in inspections at private facilities.

TITLE IV—REPORTS

Sec. 401. Reports required by the United States National Authority.

Sec. 402. Prohibition relating to low concentrations of schedule 2 and 3 chemicals.

Sec. 403. Prohibition relating to unscheduled discrete organic chemicals and coincidental byproducts in waste streams.

Sec. 404. Confidentiality of information.

Sec. 405. Recordkeeping violations.

TITLE V—ENFORCEMENT

Sec. 501. Penalties.

Sec. 502. Specific enforcement.

Sec. 503. Expedited judicial review.

TITLE VI—MISCELLANEOUS PROVISIONS

Sec. 601. Repeal.

Sec. 602. Prohibition.

Sec. 603. Bankruptcy actions.

**SEC. 3. DEFINITIONS. [22 U.S.C. 6701]**

In this Act:

(1) CHEMICAL WEAPON.—The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this Act as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) ORGANIZATION.—The term "Organization" means the Organization for the Prohibition of Chemical Weapons.

(6) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(7) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(8) PURPOSES NOT PROHIBITED BY THIS ACT.—The term "purposes not prohibited by this Act" means the following:

(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(9) TECHNICAL SECRETARIAT.—The term "Technical Secretariat" means the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

(10) SCHEDULE 1 CHEMICAL AGENT.—The term 'Schedule 1 chemical agent' means any of the following, together or separately:

(A) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) alkyl

(Me, Et, n-Pr or i-Pr)-phosphonofluoridates

(e.g. Sarin: O-Isopropyl methyIphosphonofluoridate

Soman: O-Pinacolyl methyIphosphonofluoridate).

(B) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) N,N-dialkyI

(Me, Et, n-Pr or i-Pr)-phosphoramidocyanidates

(e.g. Tabnn: O-Ethyl N,N-dimethyl phosphoramidocyanidate).

(C) O-AlkyI (H or $\leq C_{10}$, incl. cycloalkyl) S-2-dialkyl

(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl

(Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts

(e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate).

(D) Sulfur mustards:

2-Chloroethylchloromethylsulfide

Mustard gas: (Bis(2-chloroethyl)sulfide

Bis(2-chloroethylthio)methane

Sesquimustard: 1,2-Bis(2-chloroethylthio) ethane

1,3Bis(2-chloroethylthio)-n-propane

1,4Bis(2-chloroethylthio)-n-butane

1,5Bis(2-chloroethylthio)-n-pentane

Bis(2-chloroethylthiomethyI)ether

O-Mustard: Bis(2-chloroethylthioethyl) ether.

(E) Lewisites:

Lewisite 1: 2-Chlorovinyldichloroarsine

Lewisite 2: Bis(2-chlorovinyl)chloroarsine

Lewisite 3: Tris (2-clorovinyl)arsine.

(F) Nitrogen mustards:

HN1: Bis(2-chloroethyl)ethylamine

HN2: Bis(2-chloroethyl)methylamine

HN3: Tris(2-chloroethyl)amine.

(G) Saxitoxin.

(H) Ricin.

(I) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldi-

fluorides

e.g. DF: Methylphosphonyldifluoride.

(J) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl)O-2-dialkyl

(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl

(Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts

e.g. QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite.

(K) Chlorosarin: O-Isopropyl methylphosphonochloridate.

(L) Chlorosoman: O-Pinacolyl methylphosphonochloridate.

(11) SCHEDULE 2 CHEMICAL AGENT.—The term 'Schedule 2 chemical agent' means the following, together or separately:

(A) Amiton: O,O-Diethyl S-[2-(diethylamino)-ethyl] phosphorothiolate and corresponding alkylated or protonated salts.

(B) PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene.

(C) BZ: 3-Quinuclidinyl benzilate

(D) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms,

e.g. Methylphosphonyl dichloride Dimethyl methylphosphonate

Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphonothiolothionate.

(E) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides.

(F) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates.

(G) arsenic trichloride.

(H) 2,2-Diphenyl-2-hydroxyacetic acid.

(I) Quinuclidine-3-ol.

(J) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts.

(K) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts

Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts N, N-Diethylaminoethanol and corresponding protonated salts.

(L) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts.

(M) Thiodiglycol: Bis(2-hydroxyethyl)sulfide.

(N) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol.

(12) SCHEDULE 3 CHEMICAL AGENT.—The term 'Schedule 3 chemical agent' means any the following, together or separately:

(A) Phosgene: carbonyl dichloride.

(B) Cyanogen chloride.

(C) Hydrogen cyanide.

(D) Chloropicrin: trichloronitromethane.

(E) Phosphorous oxychloride.

(F) Phosphorous trichloride.

(G) Phosphorous pentachloride.

(H) Trimethyl phosphite.

(I) Triethyl phosphite.

(J) Dimethyl phosphite.

(K) Diethyl phosphite.

(L) Sulfur monochloride.

(M) Sulfur dichloride.

(N) Thionyl chloride.

(O) Ethyldiethanolamine.

(P) Methyldiethanolamine.

(Q) Triethanolamine.

(13) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and re-

gardless of whether they are produced in facilities, in munitions or elsewhere.

(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(14) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 3(b) of the Maritime Drug Enforcement Act, as amended (46 U.S.C., App. sec. 1903(b)).

(15) UNSCHEDULED DISCRETE ORGANIC CHEMICAL.—The term "unscheduled discrete organic chemical" means any chemical not listed on any schedule contained in the Annex on Chemicals of the Convention that belongs to the class of chemical compounds consisting of all com-

pounds of carbon, except for its oxides, sulfides, and metal carbonates.

## TITLE I—GENERAL PROVISIONS

### SEC. 101. DESIGNATION OF UNITED STATES NATIONAL AUTHORITY. [22 U.S.C. 6711]

(a) DESIGNATION.—Pursuant to paragraph 4 of Article VII of the Chemical Weapons Convention, the President shall designate the Department of State to be the United States National Authority.

(b) PURPOSES.—The United States National Authority shall—

(1) serve as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and other States Parties to the Convention; and

(2) implement the provisions of this Act in coordination with an interagency group designated by the President consisting of the Secretary of Commerce, Secretary of Defense, Secretary of Energy, the Attorney General, and the heads of agencies considered necessary or advisable by the President.

(c) DIRECTOR.—The Secretary of State shall serve as the Director of the United States National Authority.

(d) POWERS.—The Director may utilize the administrative authorities otherwise available to the Secretary of State in carrying out the responsibilities of the Director set forth in this Act.

(e) IMPLEMENTATION.—The President is authorized to implement and carry out the provisions of this Act and the Convention and shall designate through Executive order which agencies of the United States shall issue, amend, or revise the regulations in order to implement this Act and the provisions of the Convention. The Director of the United States National Authority shall report to the Congress on the regulations that have been issued, implemented, or revised pursuant to this section.

**SEC. 102. NO ABRIDGEMENT OF CONSTITUTIONAL RIGHTS. [22 U.S.C. 6712]**

No person may be required, as a condition for entering into a contract with the United States or as a condition for receiving any benefit from the United States, to waive any right under the Constitution for any purpose related to this Act or the Convention.

**SEC. 103. CIVIL LIABILITY OF THE UNITED STATES. [22 U.S.C. 6713]**

(a) CLAIMS FOR TAKING OF PROPERTY.—

(1) JURISDICTION OF COURTS OF THE UNITED STATES.—

(A) UNITED STATES COURT OF FEDERAL CLAIMS.—The United States Court of Federal Claims shall, subject to subparagraph (B), have jurisdiction of any civil action or claim against the United States for any taking of property without just compensation that occurs by reason of the action of any officer or employee of the Organization for the Prohibition of Chemical Weapons, including

any member of an inspection team of the Technical Secretariat, or by reason of the action of any officer or employee of the United States pursuant to this Act or the Convention. For purposes of this subsection, action taken pursuant to or under the color of this Act or the Convention shall be deemed to be action taken by the United States for a public purpose.

(B) DISTRICT COURTS.—The district courts of the United States shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of any civil action or claim described in subparagraph (A) that does not exceed $10,000.

(2) NOTIFICATION.—Any person intending to bring a civil action pursuant to paragraph (1) shall notify the United States National Authority of that intent at least one year before filing the claim in the United States Court of Federal Claims. Action on any claim filed during that one-year period shall be stayed. The one-year period following the notification shall not be counted for purposes of any law limiting the period within which the civil action may be commenced.

(3) INITIAL STEPS BY UNITED STATES GOVERNMENT TO SEEK REMEDIES.—During the period between a notification pursuant to paragraph (2) and the filing of a claim covered by the notification in the United States Court of Federal Claims, the United States National Authority shall pursue all diplomatic and other remedies that the United States National

Authority considers necessary and appropriate to seek redress for the claim including, but not limited to, the remedies provided for in the Convention and under this Act.

(4) BURDEN OF PROOF.—In any civil action under paragraph (1), the plaintiff shall have the burden to establish a prima facie case that, due to acts or omissions of any official of the Organization or any member of an inspection team of the Technical Secretariat taken under the color of the Convention, proprietary information of the plaintiff has been divulged or taken without authorization. If the United States Court of Federal Claims finds that the plaintiff has demonstrated such a prima facie case, the burden shall shift to the United States to disprove the plaintiff's claim. In deciding whether the plaintiff has carried its burden, the United States Court of Federal Claims shall consider, among other things—

(A) the value of proprietary information;

(B) the availability of the proprietary information;

(C) the extent to which the proprietary information is based on patents, trade secrets, or other protected intellectual property;

(D) the significance of proprietary information; and

(E) the emergence of technology elsewhere a reasonable time after the inspection.

(b) TORT LIABILITY.—The district courts of the United States shall have exclusive jurisdiction of civil actions for money damages for any tort under the Constitution or any Federal or State law arising from the acts or omissions of any officer or employee of the United States or the Organization, including any member of an inspection team of the Technical Secretariat, taken pursuant to or under color of the Convention or this Act.

(c) WAIVER OF SOVEREIGN IMMUNITY OF THE UNITED STATES.—In any action under subsection (a) or (b), the United States may not raise sovereign immunity as a defense.

(d) AUTHORITY FOR CAUSE OF ACTION.—

(1) UNITED STATES ACTIONS IN UNITED STATES DISTRICT COURT.—Notwithstanding any other law, the Attorney General of the United States is authorized to bring an action in the United States District Court for the District of Columbia against any foreign nation for money damages resulting from that nation's refusal to provide indemnification to the United States for any liability imposed on the United States by virtue of the actions of an inspector of the Technical Secretariat who is a national of that foreign nation acting at the direction or the behest of that foreign nation.

(2) UNITED STATES ACTIONS IN COURTS OUTSIDE THE UNITED STATES.—The Attorney General is authorized to seek any and all available redress in any international tribunal for indemnification to the United States for any liability imposed on the United

States by virtue of the actions of an inspector of the Technical Secretariat, and to seek such redress in the courts of the foreign nation from which the inspector is a national.

(3) ACTIONS BROUGHT BY INDIVIDUALS AND BUSINESSES.—Notwithstanding any other law, any national of the United States, or any business entity organized and operating under the laws of the United States, may bring a civil action in a United States District Court for money damages against any foreign national or any business entity organized and operating under the laws of a foreign nation for an unauthorized or unlawful acquisition, receipt, transmission, or use of property by or on behalf of such foreign national or business entity as a result of any tort under the Constitution or any Federal or State law arising from acts or omissions by any officer or employee of the United States or any member of an inspection team of the Technical Secretariat taken pursuant to or under the color of the Convention or this Act.

(e) RECOUPMENT.—

(1) POLICY.—It is the policy of the United States to recoup all funds withdrawn from the Treasury of the United States in payment for any tort under Federal or State law or taking under the Constitution arising from the acts or omissions of any foreign person, officer, or employee of the Organization, including any member of an inspection team of the Technical Secretariat, taken under color of the Chemical Weapons Convention or this Act.

(2) SANCTIONS ON FOREIGN COMPANIES.—

(A) IMPOSITION OF SANCTIONS.—The sanctions provided in subparagraph (B) shall be imposed for a period of not less than ten years upon—

(i) any foreign person, officer, or employee of the Organization, including any member of an inspection team of the Technical Secretariat, for whose actions or omissions the United States has been held liable for a tort or taking pursuant to this Act; and

(ii) any foreign person or business entity organized and operating under the laws of a foreign nation which knowingly assisted, encouraged or induced, in any way, a foreign person described in clause (i) to publish, divulge, disclose, or make known in any manner or to any extent not authorized by the Convention any United States confidential business information.

(B) Sanctions.—

(i) ARMS EXPORT TRANSACTIONS.—The United States Government shall not sell to a person described in subparagraph (A) any item on the United States Munitions List and shall terminate sales of any defense articles, defense services, or design and construction services to a person described in subparagraph (A) under the Arms Export Control Act.

(ii) SANCTIONS UNDER EXPORT ADMINISTRATION ACT OF 1979.—The authorities under section 6 of the Export Administration Act of 1979 shall be used to prohibit the export of any goods or technology on the control list established pursuant to section 5(c)(1) of that Act to a person described in subparagraph (A).

(iii) INTERNATIONAL FINANCIAL ASSISTANCE.—The United States shall oppose any loan or financial or technical assistance by international financial institutions in accordance with section 701 of the International Financial Institutions Act to a person described in subparagraph (A).

(iv) EXPORT-IMPORT BANK TRANSACTIONS.—The United States shall not give approval to guarantee, insure, or extend credit, or to participate in the extension of credit to a person described in subparagraph (A) through the Export-Import Bank of the United States.

(v) PRIVATE BANK TRANSACTIONS.—Regulations shall be issued to prohibit any United States bank from making any loan or providing any credit to a person described in subparagraph (A).

(vi) BLOCKING OF ASSETS.—The President shall take all steps necessary to block any transactions in any property subject to the jurisdiction of the United States in which a person described in subparagraph (A) has any in-

terest whatsoever, for the purpose of recouping funds in accordance with the policy in paragraph (1).

(vii) DENIAL OF LANDING RIGHTS.—Landing rights in the United States shall be denied to any private aircraft or air carrier owned by a person described in subparagraph (A) except as necessary to provide for emergencies in which the safety of the aircraft or its crew or passengers is threatened.

(3) SANCTIONS ON FOREIGN GOVERNMENTS.—

(A) IMPOSITION OF SANCTIONS.—Whenever the President determines that persuasive information is available indicating that a foreign country has knowingly assisted, encouraged or induced, in any way, a person described in paragraph (2)(A) to publish, divulge, disclose, or make known in any manner or to any extent not authorized by the Convention any United States confidential business information, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination and, subject to the requirements of paragraphs (4) and (5), impose the sanctions provided under subparagraph (B) for a period of not less than five years.

(B) SANCTIONS.—

(i) ARMS EXPORT TRANSACTIONS.—The United States Government shall not sell a country described in subparagraph (A) any

item on the United States Munitions List, shall terminate sales of any defense articles, defense services, or design and construction services to that country under the Arms Export Control Act, and shall terminate all foreign military financing for that country under the Arms Export Control Act.

(ii) DENIAL OF CERTAIN LICENSES.—Licenses shall not be issued for the export to the sanctioned country of any item on the United States Munitions List or commercial satellites.

(iii) DENIAL OF ASSISTANCE.—No appropriated funds may be used for the purpose of providing economic assistance, providing military assistance or grant military education and training, or extending military credits or making guarantees to a country described in subparagraph (A).

(iv) SANCTIONS UNDER EXPORT ADMINISTRATION ACT OF 1979.—The authorities of section 6 of the Export Administration Act of 1979 shall be used to prohibit the export of any goods or technology on the control list established pursuant to section 5(c)(1) of that Act to a country described in subparagraph (A).

(v) INTERNATIONAL FINANCIAL ASSISTANCE.—The United States shall oppose any loan or financial or technical assistance by international financial institutions in accordance

with section 701 of the International Financial Institutions Act to a country described in subparagraph (A).

(vi) TERMINATION OF ASSISTANCE UNDER FOREIGN ASSISTANCE ACT OF 1961.—The United States shall terminate all assistance to a country described in subparagraph (A) under the Foreign Assistance Act of 1961, except for urgent humanitarian assistance.

(vii) PRIVATE BANK TRANSACTIONS.—The United States shall not give approval to guarantee, insure, or extend credit, or participate in the extension of credit through the Export-Import Bank of the United States to a country described in subparagraph (A).

(viii) PRIVATE BANK TRANSACTIONS.—Regulations shall be issued to prohibit any United States bank from making any loan or providing any credit to a country described in subparagraph (A).

(ix) DENIAL OF LANDING RIGHTS.—Landing rights in the United States shall be denied to any air carrier owned by a country described in subparagraph (A), except as necessary to provide for emergencies in which the safety of the aircraft or its crew or passengers is threatened.

(4) SUSPENSION OF SANCTIONS UPON RECOUPMENT BY PAYMENT.—Sanctions imposed under paragraph (2) or (3) may be suspended if the sanctioned

person, business entity, or country, within the period specified in that paragraph, provides full and complete compensation to the United States Government, in convertible foreign exchange or other mutually acceptable compensation equivalent to the full value thereof, in satisfaction of a tort or taking for which the United States has been held liable pursuant to this Act.

(5) WAIVER OF SANCTIONS ON FOREIGN COUNTRIES.—The President may waive some or all of the sanctions provided under paragraph (3) in a particular case if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that such waiver is necessary to protect the national security interests of the United States. The certification shall set forth the reasons supporting the determination and shall take effect on the date on which the certification is received by the Congress.

(6) NOTIFICATION TO CONGRESS.—Not later than five days after sanctions become effective against a foreign person pursuant to this Act, the President shall transmit written notification of the imposition of sanctions against that foreign person to the chairmen and ranking members of the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate.

(f) SANCTIONS FOR UNAUTHORIZED DISCLOSURE OF UNITED STATES CONFIDENTIAL BUSINESS INFORM-

ATION.—The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States any alien who, after the date of enactment of this Act—

(1) is, or previously served as, an officer or employee of the Organization and who has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties, or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, such practice or disclosure having resulted in financial loses or damages to a United States person and for which actions or omissions the United States has been found liable of a tort or taking pursuant to this Act;

(2) traffics in United States confidential business information, a proven claim to which is owned by a United States national;

(3) is a corporate officer, principal, shareholder with a controlling interest of an entity which has been involved in the unauthorized disclosure of United States confidential business information, a proven claim to which is owned by a United States national; or

(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

(g) UNITED STATES CONFIDENTIAL BUSINESS INFORMATION DEFINED.—In this section, the term "United

States confidential business information" means any trade secrets or commercial or financial information that is privileged and confidential—

(1) including—

(A) data described in section 304(e)(2) of this Act,

(B) any chemical structure,

(C) any plant design process, technology, or operating method,

(D) any operating requirement, input, or result that identifies any type or quantity of chemicals used, processed, or produced, or

(E) any commercial sale, shipment, or use of a chemical, or

(2) as described in section 552(b)(4) of title 5, United States Code, and that is obtained—

(i) from a United States person; or

(ii) through the United States Government or the conduct of an inspection on United States territory under the Convention.

## TITLE II—PENALTIES FOR UNLAWFUL ACTIVITIES SUBJECT TO THE JURISDICTION OF THE UNITED STATES

### Subtitle A—Criminal and Civil Penalties

**SEC. 201. CRIMINAL AND CIVIL PROVISIONS.**

(a) IN GENERAL.—Part I of title 18, United States Code, is amended by inserting after chapter 11A the following new chapter:

**"CHAPTER 11B—CHEMICAL WEAPONS**

"Sec.

"229. Prohibited activities.

"229A. Penalties.

"229B. Criminal forfeitures; destruction of weapons.

"229C. Individual self-defense devices.

"229D. Injunctions.

"229E. Requests for military assistance to enforce prohibition in certain emergencies.

"229F. Definitions.

**"§ 229. Prohibited activities**

"(a) UNLAWFUL CONDUCT.—Except as provided in subsection (b), it shall be unlawful for any person knowingly—

"(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain,

own, possess, or use, or threaten to use, any chemical weapon; or

"(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

"(b) EXEMPTED AGENCIES AND PERSONS.—

"(1) IN GENERAL.—Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

"(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

"(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

"(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

"(c) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

"(1) takes place in the United States;

"(2) takes place outside of the United States and is committed by a national of the United States;

"(3) is committed against a national of the United States while the national is outside the United States; or

"(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

**"§ 229A. Penalties**

"(a) CRIMINAL PENALTIES.—

"(1) IN GENERAL.—Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

"(2) DEATH PENALTY.—Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

"(b) CIVIL PENALTIES.—

"(1) IN GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

"(2) RELATION TO OTHER PROCEEDINGS.—The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is

available by law to the United States or any other person.

"(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under subsection (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property that was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

**"§ 229B. Criminal forfeitures; destruction of weapons**

"(a) PROPERTY SUBJECT TO CRIMINAL FORFEITURE.—Any person convicted under section 229A(a) shall forfeit to the United States irrespective of any provision of State law—

"(1) any property, real or personal, owned, possessed, or used by a person involved in the offense;

"(2) any property constituting, or derived from, and proceeds the person obtained, directly or indirectly, as the result of such violation; and

"(3) any of the property used in any manner or part, to commit, or to facilitate the commission of, such violation.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant

to section 229A(a), that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by section 229A(a), a defendant who derived profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

"(b) PROCEDURES.—

"(1) GENERAL.—Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by subsections (b) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except that any reference under those subsections to—

"(A) 'this subchapter or subchapter II' shall be deemed to be a reference to section 229A(a); and

"(B) 'subsection (a)' shall be deemed to be a reference to subsection (a) of this section.

"(2) TEMPORARY RESTRAINING ORDERS.—

"(A) IN GENERAL.—For the purposes of forfeiture proceedings under this section, a temporary restraining order may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if, in addition to the circumstances described in section 413(e)(2) of the Comprehensive Drug Abuse Prevention and Control Act of

1970 (21 U.S.C. 853(e)(2)), the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and exigent circumstances exist that place the life or health of any person in danger.

"(B) WARRANT OF SEIZURE.—If the court enters a temporary restraining order under this paragraph, it shall also issue a warrant authorizing the seizure of such property.

"(C) APPLICABLE PROCEDURES.—The procedures and time limits applicable to temporary restraining orders under section 413(e)(2) and (3) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(e)(2) and (3)) shall apply to temporary restraining orders under this paragraph.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense against a forfeiture under subsection (b) that the property—

"(1) is for a purpose not prohibited under the Chemical Weapons Convention; and

"(2) is of a type and quantity that under the circumstances is consistent with that purpose.

"(d) DESTRUCTION OR OTHER DISPOSITION.—The Attorney General shall provide for the destruction or other appropriate disposition of any chemical weapon seized and forfeited pursuant to this section.

"(e) ASSISTANCE.—The Attorney General may request the head of any agency of the United States to assist in the handling, storage, transportation, or destruction of property seized under this section.

"(f) OWNER LIABILITY.—The owner or possessor of any property seized under this section shall be liable to the United States for any expenses incurred incident to the seizure, including any expenses relating to the handling, storage, transportation, and destruction or other disposition of the seized property.

**"§ 229C. Individual self-defense devices**

"Nothing in this chapter shall be construed to prohibit any individual self-defense device, including those using a pepper spray or chemical mace.

**"§ 229D. Injunctions**

"The United States may obtain in a civil action an injunction against—

"(1) the conduct prohibited under section 229 or 229C of this title; or

"(2) the preparation or solicitation to engage in conduct prohibited under section 229 or 229D of this title.

**"§ 229E. Requests for military assistance to enforce prohibition in certain emergencies**

"The Attorney General may request the Secretary of Defense to provide assistance under section 382 of title 10 in support of Department of Justice activities relating to the enforcement of section 229 of this title in an emer-

gency situation involving a chemical weapon. The authority to make such a request may be exercised by another official of the Department of Justice in accordance with section 382(f)(2) of title 10.

**"§ 229F. Definitions**

"In this chapter:

"(1) CHEMICAL WEAPON.—The term 'chemical weapon' means the following, together or separately:

"(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

"(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

"(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

"(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms 'Chemical Weapons Convention' and 'Convention' mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

"(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term 'key component of a binary or multicomponent chemical system' means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

"(4) NATIONAL OF THE UNITED STATES.—The term 'national of the United States' has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

"(5) PERSON.—The term 'person', except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

"(6) PRECURSOR.—

"(A) IN GENERAL.—The term 'precursor' means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

"(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention

are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

"(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term 'purposes not prohibited by this chapter' means the following:

"(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

"(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

"(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

"(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

"(8) TOXIC CHEMICAL.—

"(A) IN GENERAL.—The term 'toxic chemical' means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of

production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

"(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

"(9) UNITED STATES.—The term 'United States' means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

"(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

"(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

"(C) any vessel of the United States, as such term is defined in section 3(b) of the Maritime Drug Enforcement Act, as amended (46 U.S.C., App. sec. 1903(b)).".

(b) CONFORMING AMENDMENTS.—

(1) WEAPONS OF MASS DESTRUCTION.—Section 2332a of title 18, United States Code, is amended—

(A) by striking "**§ 2332a. Use of weapons of mass destruction**" and inserting "**§ 2332a. Use of certain weapons of mass destruction**";

(B) in subsection (a), by inserting "(other than a chemical weapon as that term is defined in section 229F)" after "weapon of mass destruction"; and

(C) in subsection (b), by inserting "(other than a chemical weapon (as that term is defined in section 229F))" after "weapon of mass destructtion".

(2) TABLE OF CHAPTERS.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item for chapter 11A the following new item:

**"11B. Chemical Weapons....................................229".**

(c) REPEALS.—The following provisions of law are repealed:

(1) Section 2332c of title 18, United States Code, relating to chemical weapons.

(2) In the table of sections for chapter 113B of title 18, United States Code, the item relating to section 2332c.

**Subtitle B—Revocations of Export Privileges**

**SEC. 211. REVOCATIONS OF EXPORT PRIVILEGES.**

If the President determines, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that any person within the

United States, or any national of the United States located outside the United States, has committed any violation of section 229 of title 18, United States Code, the President may issue an order for the suspension or revocation of the authority of the person to export from the United States any goods or technology (as such terms are defined in section 16 of the Export Administration Act of 1979 (50 U.S.C. App. 2415)).

**TITLE III—INSPECTIONS**

**SEC. 301. DEFINITIONS IN THE TITLE. [22 U.S.C. 6721]**

(a) IN GENERAL.—In this title, the terms "challenge inspection", "plant site", "plant", "facility agreement", "inspection team", and "requesting state party" have the meanings given those terms in Part I of the Annex on Implementation and Verification of the Chemical Weapons Convention. The term "routine inspection" means an inspection, other than an "initial inspection", undertaken pursuant to Article VI of the Convention.

(b) DEFINITION OF JUDGE OF THE UNITED STATES.—In this title, the term "judge of the United States" means a judge or magistrate judge of a district court of the United States.

**SEC. 302. FACILITY AGREEMENTS. [22 U.S.C. 6722]**

(a) AUTHORIZATION OF INSPECTIONS.—Inspections by the Technical Secretariat of plants, plant sites, or other facilities or locations for which the United States has a facility agreement with the Organization shall be conducted in accordance with the facility agreement. Any such facility agreement may not in any way limit the right

of the owner or operator of the facility to withhold consent to an inspection request.

(b) TYPES OF FACILITY AGREEMENTS.—

(1) SCHEDULE TWO FACILITIES.—The United States National Authority shall ensure that facility agreements for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 4 of Article VI of the Convention are concluded unless the owner, operator, occupant, or agent in charge of the facility and the Technical Secretariat agree that such an agreement is not necessary.

(2) SCHEDULE THREE FACILITIES.—The United States National Authority shall ensure that facility agreements are concluded for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 5 or 6 of Article VI of the Convention if so requested by the owner, operator, occupant, or agent in charge of the facility.

(c) NOTIFICATION REQUIREMENTS.—The United States National Authority shall ensure that the owner, operator, occupant, or agent in charge of a facility prior to the development of the agreement relating to that facility is notified and, if the person notified so requests, the person may participate in the preparations for the negotiation of such an agreement. To the maximum extent practicable consistent with the Convention, the owner and the operator, occupant or agent in charge of a facility may observe negotiations of the agreement between the United States and the Organization concerning that facility.

(d) CONTENT OF FACILITY AGREEMENTS.—Facility agreements shall—

(1) identify the areas, equipment, computers, records, data, and samples subject to inspection;

(2) describe the procedures for providing notice of an inspection to the owner, occupant, operator, or agent in charge of a facility;

(3) describe the timeframes for inspections; and

(4) detail the areas, equipment, computers, records, data, and samples that are not subject to inspection.

**SEC. 303. AUTHORITY TO CONDUCT INSPECTIONS. [22 U.S.C. 6723]**

(a) PROHIBITION.—No inspection of a plant, plant site, or other facility or location in the United States shall take place under the Convention without the authorization of the United States National Authority in accordance with the requirements of this title.

(b) AUTHORITY.—

(1) TECHNICAL SECRETARIAT INSPECTION TEAMS.—Any duly designated member of an inspection team of the Technical Secretariat may inspect any plant, plant site, or other facility or location in the United States subject to inspection pursuant to the Convention.

(2) UNITED STATES GOVERNMENT REPRESENTATIVES.—The United States National Authority shall coordinate the designation of employees of the Fed-

eral Government to accompany members of an inspection team of the Technical Secretariat and, in doing so, shall ensure that—

(A) a special agent of the Federal Bureau of Investigation, as designated by the Federal Bureau of Investigation, accompanies each inspection team visit pursuant to paragraph (1);

(B) no employee of the Environmental Protection Agency or the Occupational Safety and Health Administration accompanies any inspection team visit conducted pursuant to paragraph (1); and

(C) the number of duly designated representatives shall be kept to the minimum necessary.

(3) OBJECTIONS TO INDIVIDUALS SERVING AS INSPECTORS.—

(A) IN GENERAL.—In deciding whether to exercise the right of the United States under the Convention to object to an individual serving as an inspector, the President shall give great weight to his reasonable belief that—

(i) such individual is or has been a member of, or a participant in, any group or organization that has engaged in, or attempted or conspired to engage in, or aided or abetted in the commission of, any terrorist act or activity;

(ii) such individual has committed any act or activity which would be a felony under the laws of the United States; or

(iii) the participation of such individual as a member of an inspection team would pose a risk to the national security or economic well-being of the United States.

(B) NOT SUBJECT TO JUDICIAL REVIEW.—Any objection by the President to an individual serving as an inspector, whether made pursuant to this section or otherwise, shall not be reviewable in any court.

**SEC. 304. PROCEDURES FOR INSPECTIONS. [22 U.S.C. 6724]**

(a) TYPES OF INSPECTIONS.—Each inspection of a plant, plant site, or other facility or location in the United States under the Convention shall be conducted in accordance with this section and section 305, except where other procedures are provided in a facility agreement entered into under section 302.

(b) NOTICE.—

(1) IN GENERAL.—An inspection referred to in subsection (a) may be made only upon issuance of an actual written notice by the United States National Authority to the owner and to the operator, occupant, or agent in charge of the premises to be inspected.

(2) TIME OF NOTIFICATION.—The notice for a routine inspection shall be submitted to the owner and to the operator, occupant, or agent in charge within six hours of receiving the notification of the inspection from the Technical Secretariat or as soon as possible thereafter. Notice for a challenge inspection shall be

provided at any appropriate time determined by the United States National Authority. Notices may be posted prominently at the plant, plant site, or other facility or location if the United States is unable to provide actual written notice to the owner, operator, or agent in charge of the premises.

(3) CONTENT OF NOTICE.—

(A) IN GENERAL.—The notice under paragraph (1) shall include all appropriate information supplied by the Technical Secretariat to the United States National Authority concerning—

(i) the type of inspection;

(ii) the basis for the selection of the plant, plant site, or other facility or location for the type of inspection sought;

(iii) the time and date that the inspection will begin and the period covered by the inspection; and

(iv) the names and titles of the inspectors.

(B) SPECIAL RULE FOR CHALLENGE INSPECTIONS.—In the case of a challenge inspection pursuant to Article IX of the Convention, the notice shall also include all appropriate evidence or reasons provided by the requesting state party to the Convention for seeking the inspection.

(4) SEPARATE NOTICES REQUIRED.—A separate notice shall be provided for each inspection, except that a notice shall not be required for each

entry made during the period covered by the inspection.

(c) CREDENTIALS.—The head of the inspection team of the Technical Secretariat and the accompanying employees of the Federal government shall display appropriate identifying credentials to the owner, operator, occupant, or agent in charge of the premises before the inspection is commenced.

(d) TIMEFRAME FOR INSPECTIONS.—Consistent with the provisions of the Convention, each inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner.

(e) SCOPE.—

(1) IN GENERAL.—Except as provided in a warrant issued under section 305 or a facility agreement entered into under section 302, an inspection conducted under this title may extend to all things within the premises inspected (including records, files, papers, processes, controls, structures and vehicles) related to whether the requirements of the Convention applicable to such premises have been complied with.

(2) EXCEPTION.—Unless required by the Convention, no inspection under this title shall extend to—

(A) financial data;

(B) sales and marketing data (other than shipment data);

(C) pricing data;

(D) personnel data;

(E) research data;

(F) patent data;

(G) data maintained for compliance with environmental or occupational health and safety regulations; or

(H) personnel and vehicles entering and personnel and personal passenger vehicles exiting the facility.

(f) SAMPLING AND SAFETY.—

(1) IN GENERAL.—The Director of the United States National Authority is authorized to require the provision of samples to a member of the inspection team of the Technical Secretariat in accordance with the provisions of the Convention. The owner or the operator, occupant or agent in charge of the premises to be inspected shall determine whether the sample shall be taken by representatives of the premises or the inspection team or other individuals present. No sample collected in the United States pursuant to an inspection permitted by this Act may be transferred for analysis to any laboratory outside the territory of the United States.

(2) COMPLIANCE WITH REGULATIONS.—In carrying out their activities, members of the inspection team of the Technical Secretariat and representatives of agencies or departments accompanying the inspection team shall observe safety regulations established at the premises to be inspected, including those for

protection of controlled environments within a facility and for personal safety.

(g) COORDINATION.—The appropriate representatives of the United States, as designated, if present, shall assist the owner and the operator, occupant or agent in charge of the premises to be inspected in interacting with the members of the inspection team of the Technical Secretariat.

**SEC. 305. WARRANTS. [22 U.S.C. 6725]**

(a) IN GENERAL.—The United States Government shall seek the consent of the owner or the operator, occupant, or agent in charge of the premises to be inspected prior to any inspection referred to in section 304(a). If consent is obtained, a warrant is not required for the inspection. The owner or the operator, occupant, or agent in charge of the premises to be inspected may withhold consent for any reason or no reason. After providing notification pursuant to subsection (b), the United States Government may seek a search warrant from a United States magistrate judge. Proceedings regarding the issuance of a search warrant shall be conducted ex parte, unless otherwise requested by the United States Government.

(b) ROUTINE INSPECTIONS.—

(1) OBTAINING ADMINISTRATIVE SEARCH WARRANTS.—For any routine inspection conducted on the territory of the United States pursuant to Article VI of the Convention, where consent has been withheld, the United States Government shall first obtain an administrative search warrant from a judge of the

United States. The United States Government shall provide to the judge of the United States all appropriate information supplied by the Technical Secretariat to the United States National Authority regarding the basis for the selection of the plant site, plant, or other facility or location for the type of inspection sought. The United States Government shall also provide any other appropriate information available to it relating to the reasonableness of the selection of the plant, plant site, or other facility or location for the inspection.

(2) CONTENT OF AFFIDAVITS FOR ADMINISTRATIVE SEARCH WARRANTS.—The judge of the United States shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the United States Government showing that—

(A) the Chemical Weapons Convention is in force for the United States;

(B) the plant site, plant, or other facility or location sought to be inspected is required to report data under title IV of this Act and is subject to routine inspection under the Convention;

(C) the purpose of the inspection is—

(i) in the case of any facility owned or operated by a non-Government entity related to Schedule 1 chemical agents, to verify that the facility is not used to produce any Schedule 1 chemical agent except for declared chemicals; quantities of Schedule 1 chemicals produced, processed, or consumed are correctly declared

and consistent with needs for the declared purpose; and Schedule 1 chemicals are not diverted or used for other purposes;

(ii) in the case of any facility related to Schedule 2 chemical agents, to verify that activities are in accordance with obligations under the Convention and consistent with the information provided in data declarations; and

(iii) in the case of any facility related to Schedule 3 chemical agents and any other chemical production facility, to verify that the activities of the facility are consistent with the information provided in data declarations;

(D) the items, documents, and areas to be searched and seized;

(E) in the case of a facility related to Schedule 2 or Schedule 3 chemical agents or unscheduled discrete organic chemicals, the plant site has not been subject to more than 1 routine inspection in the current calendar year, and, in the case of facilities related to Schedule 3 chemical agents or unscheduled discrete organic chemicals, the inspection will not cause the number of routine inspections in the United States to exceed 20 in a calendar year;

(F) the selection of the site was made in accordance with procedures established under the Convention and, in particular—

(i) in the case of any facility owned or operated by a non-Government entity related to Schedule 1 chemical agents, the intensity, duration, timing, and mode of the requested inspection is based on the risk to the object and purpose of the Convention by the quantities of chemical produced, the characteristics of the facility and the nature of activities carried out at the facility, and the requested inspection, when considered with previous such inspections of the facility undertaken in the current calendar year, shall not exceed the number reasonably required based on the risk to the object and purpose of the Convention as described above;

(ii) in the case of any facility related to Schedule 2 chemical agents, the Technical Secretariat gave due consideration to the risk to the object and purpose of the Convention posed by the relevant chemical, the characteristics of the plant site and the nature of activities carried out there, taking into account the respective facility agreement as well as the results of the initial inspections and subsequent inspections; and

(iii) in the case of any facility related to Schedule 3 chemical agents or unscheduled discrete organic chemicals, the facility was selected randomly by the Technical Secretariat using appropriate mechanisms, such as specifically designed computer software, on the basis

of two weighting factors: (I) equitable geographical distribution of inspections; and (II) the information on the declared sites available to the Technical Secretariat, related to the relevant chemical, the characteristics of the plant site, and the nature of activities carried out there;

(G) the earliest commencement and latest closing dates and times of the inspection; and

(H) the duration of inspection will not exceed time limits specified in the Convention unless agreed by the owner, operator, or agent in charge of the plant.

(3) CONTENT OF WARRANTS.—A warrant issued under paragraph (2) shall specify the same matters required of an affidavit under that paragraph. In addition to the requirements for a warrant issued under this paragraph, each warrant shall contain, if known, the identities of the representatives of the Technical Secretariat conducting the inspection and the observers of the inspection and, if applicable, the identities of the representatives of agencies or departments of the United States accompanying those representatives.

(4) CHALLENGE INSPECTIONS.—

(A) CRIMINAL SEARCH WARRANT.—For any challenge inspection conducted on the territory of the United States pursuant to Article IX of the Chemical Weapons Convention, where consent has been withheld, the United States Government

shall first obtain from a judge of the United States a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the person or things to be seized.

(B) INFORMATION PROVIDED.—The United States Government shall provide to the judge of the United States—

(i) all appropriate information supplied by the Technical Secretariat to the United States National Authority regarding the basis for the selection of the plant site, plant, or other facility or location for the type of inspection sought;

(ii) any other appropriate information relating to the reasonableness of the selection of the plant, plant site, or other facility or location for the inspection;

(iii) information concerning—

(I) the duration and scope of the inspection;

(II) areas to be inspected;

(III) records and data to be reviewed; and

(IV) samples to be taken;

(iv) appropriate evidence or reasons provided by the requesting state party for the inspection;

(v) any other evidence showing probable cause to believe that a violation of this Act has occurred or is occurring; and

(vi) the identities of the representatives of the Technical Secretariat on the inspection team and the Federal Government employees accompanying the inspection team.

(C) CONTENT OF WARRANT.—The warrant shall specify—

(i) the type of inspection authorized;

(ii) the purpose of the inspection;

(iii) the type of plant site, plant, or other facility or location to be inspected;

(iv) the areas of the plant site, plant, or other facility or location to be inspected;

(v) the items, documents, data, equipment, and computers that may be inspected or seized;

(vi) samples that may be taken;

(vii) the earliest commencement and latest concluding dates and times of the inspection; and

(viii) the identities of the representatives of the Technical Secretariat on the inspection teams and the Federal Government employees accompanying the inspection team.

**SEC. 306. PROHIBITED ACTS RELATING TO INSPECTIONS. [22 U.S.C. 6726]**

It shall be unlawful for any person willfully to fail or refuse to permit entry or inspection, or to disrupt, delay, or otherwise impede an inspection, authorized by this Act.

**SEC. 307. NATIONAL SECURITY EXCEPTION. [22 U.S.C. 6727]**

Consistent with the objective of eliminating chemical weapons, the President may deny a request to inspect any facility in the United States in cases where the President determines that the inspection may pose a threat to the national security interests of the United States.

**SEC. 308. PROTECTION OF CONSTITUTIONAL RIGHTS OF CONTRACTORS. [41 U.S.C. 2309]**

(a) The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) is amended by adding at the end the following:

**"SEC. 39. PROTECTION OF CONSTITUTIONAL RIGHTS OF CONTRACTORS.**

"(a) PROHIBITION.—A contractor may not be required, as a condition for entering into a contract with the Federal Government, to waive any right under the Constitution for any purpose related to Chemical Weapons Convention Implementation Act of 1997 or the Chemical Weapons Convention (as defined in section 3 of such Act.)

"(b) CONSTRUCTION.—Nothing in subsection (a) shall be construed to prohibit an executive agency from including in a contract a clause that requires the contractor

to permit inspections for the purpose of ensuring that the contractor is performing the contract in accordance with the provisions of the contract.".

(b) The table of contents in section 1(b) of such Act is amended by adding at the end the following:

**"Sec. 39. Protection of constitutional rights of contractors."**

**SEC. 309. ANNUAL REPORT ON INSPECTIONS. [22 U.S.C. 6728]**

(a) IN GENERAL.—Not later than one year after the date of enactment of this Act, and annually thereafter, the President shall submit a report in classified and unclassified form to the appropriate congressional committees on inspections made under the Convention during the preceding year.

(b) CONTENT OF REPORTS.—Each report shall contain the following information for the reporting period:

(1) The name of each company or entity subject to the jurisdiction of the United States reporting data pursuant to title IV of this Act.

(2) The number of inspections under the Convention conducted on the territory of the United States.

(3) The number and identity of inspectors conducting any inspection described in paragraph (2) and the number of inspectors barred from inspection by the United States.

(4) The cost to the United States for each inspection described in paragraph (2).

(5) The total costs borne by United States business firms in the course of inspections described in paragraph (2).

(6) A description of the circumstances surrounding inspections described in paragraph (2), including instances of possible industrial espionage and misconduct of inspectors.

(7) The identity of parties claiming loss of trade secrets, the circumstances surrounding those losses, and the efforts taken by the United States Government to redress those losses.

(8) A description of instances where inspections under the Convention outside the United States have been disrupted or delayed.

(c) DEFINITION.—The term "appropriate congressional committees" means the Committee on the Judiciary, the Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary, the Committee on International Relations, and the Permanent Select Committee on Intelligence of the House of Representatives.

**SEC. 310. UNITED STATES ASSISTANCE IN INSPECTIONS AT PRIVATE FACILITIES. [22 U.S.C. 6729]**

(a) ASSISTANCE IN PREPARATION FOR INSPECTIONS.—At the request of an owner of a facility not owned or operated by the United States Government, or contracted for use by or for the United States Government,

the Secretary of Defense may assist the facility to prepare the facility for possible inspections pursuant to the Convention.

(b) REIMBURSEMENT REQUIREMENT.—

(1) IN GENERAL.—Except as provided in paragraph (2), the owner of a facility provided assistance under subsection (a) shall reimburse the Secretary for the costs incurred by the Secretary in providing the assistance.

(2) EXCEPTION.—In the case of assistance provided under subsection (a) to a facility owned by a person described in subsection (c), the United States National Authority shall reimburse the Secretary for the costs incurred by the Secretary in providing the assistance.

(c) OWNERS COVERED BY UNITED STATES NATIONAL AUTHORITY REIMBURSEMENTS.—Subsection (b)(2) applies in the case of assistance provided to the following:

(1) SMALL BUSINESS CONCERNS.—A small business concern as defined in section 3 of the Small Business Act.

(2) DOMESTIC PRODUCERS OF SCHEDULE 3 OR UNSCHEDULED DISCRETE ORGANIC CHEMICALS.—Any person located in the United States that—

(A) does not possess, produce, process, consume, import, or export any Schedule 1 or Schedule 2 chemical; and

(B) in the calendar year preceding the year in which the assistance is to be provided, produced—

(i) more than 30 metric tons of Schedule 3 or unscheduled discrete organic chemicals that contain phosphorous, sulfur, or fluorine; or

(ii) more than 200 metric tons of unscheduled discrete organic chemicals.

## TITLE IV—REPORTS

### SEC. 401. REPORTS REQUIRED BY THE UNITED STATES NATIONAL AUTHORITY. [22 U.S.C. 6741]

(a) REGULATIONS ON RECORDKEEPING.—

(1) REQUIREMENTS.—The United States National Authority shall ensure that regulations are prescribed that require each person located in the United States who produces, processes, consumes, exports, or imports, or proposes to produce, process, consume, export, or import, a chemical substance that is subject to the Convention to—

(A) maintain and permit access to records related to that production, processing, consumption, export, or import of such substance; and

(B) submit to the Director of the United States National Authority such reports as the United States National Authority may reasonably require to provide to the Organization, pursuant to subparagraph 1(a) of the Annex on Confidentiality of the Convention, the minimum amount of information and data necessary for the timely and effi-

cient conduct by the Organization of its responsibilities under the Convention.

(2) RULEMAKING.—The Director of the United States National Authority shall ensure that regulations pursuant to this section are prescribed expeditiously.

(b) COORDINATION.—

(1) AVOIDANCE OF DUPLICATION.—To the extent feasible, the United States Government shall not require the submission of any report that is unnecessary or duplicative of any report required by or under any other law. The head of each Federal agency shall coordinate the actions of that agency with the heads of the other Federal agencies in order to avoid the imposition of duplicative reporting requirements under this Act or any other law.

(2) DEFINITION.—As used in paragraph (1), the term "Federal agency" has the meaning given the term "agency" in section 551(1) of title 5, United States Code.

**SEC. 402. PROHIBITION RELATING TO LOW CONCENTRATIONS OF SCHEDULE 2 AND 3 CHEMICALS. [22 U.S.C. 6742]**

(a) PROHIBITION.—Notwithstanding any other provision of this Act, no person located in the United States shall be required to report on, or to submit to, any routine inspection conducted for the purpose of verifying the production, possession, consumption, exportation, importation, or proposed production, possession, consump-

tion, exportation, or importation of any substance that contains less than—

(1) 10 percent concentration of a Schedule 2 chemical; or

(2) 80 percent concentration of a Schedule 3 chemical.

(b) STANDARD FOR MEASUREMENT OF CONCENTRATION.—The percent concentration of a chemical in a substance shall be measured on the basis of volume or total weight, which measurement yields the lesser percent.

**SEC. 403. PROHIBITION RELATING TO UNSCHEDULED DISCRETE ORGANIC CHEMICALS AND COINCIDENTAL BYPRODUCTS IN WASTE STREAMS. [22 U.S.C. 6743]**

(a) PROHIBITION.—Notwithstanding any other provision of this Act, no person located in the United States shall be required to report on, or to submit to, any routine inspection conducted for the purpose of verifying the production, possession, consumption, exportation, importation, or proposed production, possession, consumption, exportation, or importation of any substance that is—

(1) an unscheduled discrete organic chemical; and

(2) a coincidental byproduct of a manufacturing or production process that is not isolated or captured for use or sale during the process and is routed to, or escapes, from the waste stream of a stack, incinerator,

or wastewater treatment system or any other waste stream.

**SEC. 404. CONFIDENTIALITY OF INFORMATION. [22 U.S.C. 6744]**

(a) FREEDOM OF INFORMATION ACT EXEMPTION FOR CERTAIN CONVENTION INFORMATION.—Except as provided in subsection (b) or (c), any confidential business information, as defined in section 103(g), reported to, or otherwise acquired by, the United States Government under this Act or under the Convention shall not be disclosed under section 552(a) of title 5, United States Code.

(b) EXCEPTIONS.—

(1) INFORMATION FOR THE TECHNICAL SECRETARIAT.—Information shall be disclosed or otherwise provided to the Technical Secretariat or other states parties to the Chemical Weapons Convention in accordance with the Convention, in particular, the provisions of the Annex on the Protection of Confidential Information.

(2) INFORMATION FOR CONGRESS.—Information shall be made available to any committee or subcommittee of Congress with appropriate jurisdiction upon the written request of the chairman or ranking minority member of such committee or subcommittee, except that no such committee or subcommittee, and no member and no staff member of such committee or subcommittee, shall disclose such information or material except as otherwise required or authorized by law.

(3) INFORMATION FOR ENFORCEMENT ACTIONS.—Information shall be disclosed to other Federal agencies for enforcement of this Act or any other law, and shall be disclosed or otherwise provided when relevant in any proceeding under this Act or any other law, except that disclosure or provision in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding.

(c) INFORMATION DISCLOSED IN THE NATIONAL INTEREST.—

(1) AUTHORITY.—The United States Government shall disclose any information reported to, or otherwise required by the United States Government under this Act or the Convention, including categories of such information, that it determines is in the national interest to disclose and may specify the form in which such information is to be disclosed.

(2) NOTICE OF DISCLOSURE.—

(A) REQUIREMENT.—If any Department or agency of the United States Government proposes pursuant to paragraph (1) to publish or disclose or otherwise provide information exempt from disclosure under subsection (a), the United States National Authority shall, unless contrary to national security or law enforcement needs, provide notice of intent to disclose the information—

(i) to the person that submitted such information; and

(ii) in the case of information about a person received from another source, to the person to whom that information pertains.

The information may not be disclosed until the expiration of 30 days after notice under this paragraph has been provided.

(B) PROCEEDINGS ON OBJECTIONS.—In the event that the person to which the information pertains objects to the disclosure, the agency shall promptly review the grounds for each objection of the person and shall afford the objecting person a hearing for the purpose of presenting the objections to the disclosure. Not later than 10 days before the scheduled or rescheduled date for the disclosure, the United States National Authority shall notify such person regarding whether such disclosure will occur notwithstanding the objections.

(d) CRIMINAL PENALTY FOR WRONGFUL DISCLOSURE.—Any officer or employee of the United States, and any former officer or employee of the United States, who by reason of such employment or official position has obtained possession of, or has access to, information the disclosure or other provision of which is prohibited by subsection (a), and who, knowing that disclosure or provision of such information is prohibited by such subsection, willfully discloses or otherwise provides the information in any manner to any person (including any person located outside the territory of the United States) not authorized to receive it, shall be fined under title 18,

United States Code, or imprisoned for not more than five years, or both.

(e) CRIMINAL FORFEITURE.—The property of any person who violates subsection (d) shall be subject to forfeiture to the United States in the same manner and to the same extent as is provided in section 229C of title 18, United States Code, as added by this Act.

(f) INTERNATIONAL INSPECTORS.—The provisions of this section shall also apply to employees of the Technical Secretariat.

**SEC. 405. RECORDKEEPING VIOLATIONS. [22 U.S.C. 6745]**

It shall be unlawful for any person willfully to fail or refuse—

(1) to establish or maintain any record required by this Act or any regulation prescribed under this Act;

(2) to submit any report, notice, or other information to the United States Government in accordance with this Act or any regulation prescribed under this Act; or

(3) to permit access to or copying of any record that is exempt from disclosure under this Act or any regulation prescribed under this Act.

## TITLE V—ENFORCEMENT

### SEC. 501. PENALTIES. [22 U.S.C. 6761]

(a) CIVIL.—

(1) PENALTY AMOUNTS.—

(A) PROHIBITED ACTS RELATING TO INSPECTIONS.—Any person that is determined, in accordance with paragraph (2), to have violated section 306 of this Act shall be required by order to pay a civil penalty in an amount not to exceed $25,000 for each such violation. For purposes of this paragraph, each day such a violation of section 306 continues shall constitute a separate violation of that section.

(B) RECORDKEEPING VIOLATIONS.—Any person that is determined, in accordance with paragraph (2), to have violated section 405 of this Act shall be required by order to pay a civil penalty in an amount not to exceed $5,000 for each such violation.

(2) HEARING.—

(A) IN GENERAL.—Before imposing an order described in paragraph (1) against a person under this subsection for a violation of section 306 or 405, the Secretary of State shall provide the person or entity with notice and, upon request made within 15 days of the date of the notice, a hearing respecting the violation.

(B) CONDUCT OF HEARING.—Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code. If no hearing is so requested, the Secretary of State's imposition of the order shall constitute a final and unappealable order.

(C) ISSUANCE OF ORDERS.—If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated section 306 or 405, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (1).

(D) FACTORS FOR DETERMINATION OF PENALTY AMOUNTS.—In determining the amount of any civil penalty, the administrative law judge shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, the existence of an internal compliance program, and such other matters as justice may require.

(3) ADMINISTRATIVE APPELLATE REVIEW.—The decision and order of an administrative law judge shall become the final agency decision and order of the head

of the United States National Authority unless, within 30 days, the head of the United States National Authority modifies or vacates the decision and order, with or without conditions, in which case the decision and order of the head of the United States National Authority shall become a final order under this subsection.

(4) OFFSETS.—The amount of the civil penalty under a final order of the United States National Authority may be deducted from any sums owed by the United States to the person.

(5) JUDICIAL REVIEW.—A person adversely affected by a final order respecting an assessment may, within 30 days after the date the final order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit or for any other circuit in which the person resides or transacts business.

(6) ENFORCEMENT OF ORDERS.—If a person fails to comply with a final order issued under this subsection against the person or entity—

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (5), or

(B) after a court in an action brought under paragraph (5) has entered a final judgment in favor of the United States National Authority,

the Secretary of State shall file a suit to seek compliance with the order in any appropriate district court of the

United States, plus interest at currently prevailing rates calculated from the date of expiration of the 30-day period referred to in paragraph (5) or the date of such final judgment, as the case may be. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(b) CRIMINAL.—Any person who knowingly violates any provision of section 306 or 405 of this Act, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) for such violation, be fined under title 18, United States Code, imprisoned for not more than one year, or both.

**SEC. 502. SPECIFIC ENFORCEMENT. [22 U.S.C. 6762]**

(a) JURISDICTION.—The district courts of the United States shall have jurisdiction over civil actions to—

(1) restrain any violation of section 306 or 405 of this Act; and

(2) compel the taking of any action required by or under this Act or the Convention.

(b) CIVIL ACTIONS.—

(1) IN GENERAL.—A civil action described in subsection (a) may be brought—

(A) in the case of a civil action described in subsection (a)(1), in the United States district court for the judicial district in which any act, omission, or transaction constituting a violation of

section 306 or 405 occurred or in which the defendant is found or transacts business; or

(B) in the case of a civil action described in subsection (a)(2), in the United States district court for the judicial district in which the defendant is found or transacts business.

(2) SERVICE OF PROCESS.—In any such civil action process may be served on a defendant wherever the defendant may reside or may be found, whether the defendant resides or may be found within the United States or elsewhere.

**SEC. 503. EXPEDITED JUDICIAL REVIEW. [22 U.S.C. 6763]**

(a) CIVIL ACTION.—Any person or entity subject to a search under this Act may file a civil action challenging the constitutionality of any provision of this Act. Notwithstanding any other provision of law, during the full calendar year of, and the two full calendar years following, the enactment of this Act, the district court shall accord such a case a priority in its disposition ahead of all other civil actions except for actions challenging the legality and conditions of confinement.

(b) EN BANC REVIEW.—Notwithstanding any other provision of law, during the full calendar year of, and the two full calendar years following, the enactment of this Act, any appeal from a final order entered by a district court in an action brought under subsection (a) shall be heard promptly by the full Court of Appeals sitting en banc.

## TITLE VI—MISCELLANEOUS PROVISIONS

### SEC. 601. REPEAL.

Section 808 of the Department of Defense Appropriation Authorization Act, 1978 (50 U.S.C. 1520; relating to the use of human subjects for the testing of chemical or biological agents) is repealed.

### SEC. 602. PROHIBITION. [22 U.S.C. 6771]

(a) IN GENERAL.—Neither the Secretary of Defense nor any other officer or employee of the United States may, directly or by contract—

(1) conduct any test or experiment involving the use of any chemical or biological agent on a civilian population; or

(2) use human subjects for the testing of chemical or biological agents.

(b) CONSTRUCTION.—Nothing in subsection (a) may be construed to prohibit actions carried out for purposes not prohibited by this Act (as defined in section 3(8)).

(c) BIOLOGICAL AGENT DEFINED.—In this section, the term "biological agent" means any micro-organism (including bacteria, viruses, fungi, rickettsiae or protozoa), pathogen, or infectious substance, or any naturally occurring, bio-engineered or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, capable of causing—

(1) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(2) deterioration of food, water, equipment, supplies, or materials of any kind; or

(3) deleterious alteration of the environment.

**SEC. 603. BANKRUPTCY ACTIONS.**

Section 362(b) of title 11, United States Code, is amended—

(1) by striking paragraphs (4) and (5); and

(2) by inserting after paragraph (3) the following:

"(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;".