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Chemical Weapons Act Upheld by 3rd Circuit on Remand From High Court

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While it was "questionable" that a spurned spouse's alleged revenge plot became the subject of a federal prosecution under the law banning the use of chemical weapons, the U.S. Court of Appeals for the Third Circuit declined to say the Chemical Weapons Act was unconstitutional as applied in the case, it said in a lawsuit on remand from the U.S. Supreme Court.

Last year, the high court vacated the Third Circuit's earlier ruling that Carol Anne Bond lacked standing to bring her claims of constitutional violations. Now, a panel has addressed the merits of the case, which stemmed from marital upheaval between Bond and her husband, who fathered a child with her friend, Myrlinda Haynes.

In an act of revenge, Bond stole highly toxic chemicals from her employer, chemical manufacturer Rohm and Haas, and left volatile concoctions on Haynes' mailbox, car door handles and house doorknob, according to the opinion.

She was charged under the Chemical Weapons Act, which was passed by Congress in 1998 to implement rules agreed upon by an international convention in 1993. The Third Circuit affirmed her conviction.

"While Bond's prosecution seems a questionable exercise of prosecutorial discretion, and indeed appears to justify her assertion that this case 'trivializes the concept of chemical weapons,' the treaty that gave rise to it was implemented by sufficiently related legislation," Judge Kent A. Jordan wrote on behalf of a unanimous three-judge panel that included Judges Marjorie O. Rendell and Thomas Ambro in *United States v. Bond*.

Bond argued that the prosecution's decision to invoke the act was a violation of the 10th Amendment's protection of state sovereignty.

The case, which drew Paul D. Clement, a former solicitor general in the George W. Bush administration, to represent Bond, offers the possibility for the high court to address the balance between federal and state powers — an opportunity that Howard J. Bashman, who practices appellate law and writes a column for *The*

Legal, expects the U.S. Supreme Court to seize upon.

He expects that it will grant certiorari in the case again, "but this time, to address the federalism concerns," Bashman said. In his 2011 opinion for the Supreme Court on the standing issue, Justice Anthony Kennedy said, "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."

The high court's recent interest in federal and state powers adds to the likelihood that it will hear the case as well as Ambro's concurring opinion that expressly invites the court to examine the issue.

Without clarification from the high court, Ambro said, "a blank check exists for the federal government to enact any laws that are rationally related to a valid treaty."

Reversing the Third Circuit on its opinion denying Bond standing, Kennedy said, "The court of appeals held that because a state was not a party to the federal criminal proceeding, petitioner had no standing to challenge the statute as an infringement upon the powers reserved to the states."

In rejecting Bond's constitutional claim, the Third Circuit relied heavily on the Supreme Court's 1920 opinion in *Missouri v. Holland*, which said that Congress has the power to "legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state's traditional province," Jordan said. The only relevant question is whether or not the treaty is valid.

Bond did not claim that the treaty was invalid, but rather, that the act implementing its rules has unreasonable reach.

She accepts that the convention from which the act sprang falls within the treaty powers granted Congress in the Constitution.

But she does raise the question of the proper scope of Congress' ability to effectuate a treaty.

"Despite the long history of that view of the treaty power, the tide of opinion, at least in some quarters, has shifted decisively in the last half-century," Jordan said. "Many influential voices now urge that there is no limitation on the treaty power, at least not in the way understood from the founding through to the middle of the 20th century."

Since the convention falls within the treaty power's traditional bounds, the act that followed it is within the federal government's constitutional powers, Jordan reasoned, unless it goes too far.

Bond argued that it did because it regulates activities that were not banned by the convention.

"The convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons ... while the act makes it unlawful to 'receive, stockpile, retain, own, possess, use, or threaten to use' a chemical weapon," Jordan said. But, he said, "those differences in wording do not prove that the act has materially expanded on the convention."

The opinion will likely stand as an important one on the issue of the treaty power, said Robert A. Zauzmer, an assistant U.S. attorney who worked on the case.

The *Bond* case has put "a very interesting question out there," said Kermit Roosevelt, a professor of constitutional law at University of Pennsylvania Law School, because it approaches the as yet undefined bounds of the treaty powers. However, he said, the court wasn't able to answer the question because the chemical weapons treaty at issue in this particular case falls reasonably within Congress's constitutional ability to enforce international treaties.

Clement, of Bancroft in Washington, D.C., argued on behalf of Bond and could not be reached for comment.

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(Copies of the 48-page opinion in United States v. Bond, PICS No. 12-0904, are available from The Legal Intelligencer. Please call the [Pennsylvania Instant Case Service](#) at 800-276-PICS to order or for information.) •

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