

LEGAL PERSPECTIVES

Legal Perspectives is aimed at informing healthcare providers, emergency planners, and other decision makers about important legal issues related to public health and healthcare preparedness and response. The articles describe these potentially challenging topics and conclude with the authors' suggestions for further action. The articles do not provide legal advice. Therefore, those affected by the issues discussed in this column should seek further guidance from legal counsel. Readers may submit topics of interest to the Journal's editorial office at jfox@upmc-biosecurity.org.

CAROL ANNE BOND V THE UNITED STATES OF AMERICA: HOW A WOMAN SCORNED THREATENED THE CHEMICAL WEAPONS CONVENTION

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The case of *Carol Anne Bond v the United States of America* stemmed from a domestic dispute when Ms. Bond attempted to retaliate against her best friend by attacking her with chemical agents. What has emerged is a much greater issue—a test of standing on whether a private citizen can challenge the Tenth Amendment. Instead of being prosecuted in state court for assault, Ms. Bond was charged and tried in district court under a federal criminal statute passed as part of implementation of the Chemical Weapons Convention (CWC). Ms. Bond's argument rests on the claim that the statute exceeded the federal government's enumerated powers in criminalizing her behavior and violated the Constitution, while the government contends legislation implementing treaty obligations is well within its purview. This question remains unanswered because there is dispute among the lower courts as to whether Ms. Bond, as a citizen, even has the right to challenge an amendment guaranteeing states rights when a state is not a party to the action. The Supreme Court heard the case on February 22, 2011, and, if it decides to grant Ms. Bond standing to challenge her conviction, the case will be returned to the lower courts. Should the court decide Ms. Bond has the standing to challenge her conviction and further questions the constitutionality of the law, it would be a significant blow to implementation of the CWC in the U.S. and the effort of the federal government to ensure we are meeting our international obligations.

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CAROL ANNE BOND'S BEST FRIEND was Myrlinda Haynes—that is, until Ms. Haynes became pregnant and Ms. Bond discovered the father of the baby was her own husband. Ms. Bond allegedly wanted to exact revenge and drew on her background in microbiology to do so. Ms. Bond attempted to poison Ms. Haynes 24 times using 10-chloro-10-H phenoxarsine and potassium dichromate, both of which are skin irritants and toxic in high doses if ingested or exposed to skin. Fortunately for Ms. Haynes, who was aware of Ms. Bond's intent to "make her life hell," she suffered only a small chemical burn to her thumb as a result of these incidents.¹

Each time Ms. Haynes called the local police, they tested the powders for drugs but did not initiate a serious investigation. After several months of repeated occurrences, Ms. Haynes finally contacted the postal inspector's office, hoping they would investigate.¹ Postal inspectors acquired surveillance video of Ms. Bond spreading chemicals on several surfaces and placing potassium dichromate inside envelopes in Ms. Haynes's mailbox. Search warrants issued by the postal inspector's office resulted in further evidence against Ms. Bond and the confiscation of stocks of both 10-chloro-10-H phenoxarsine and potassium dichromate. On June 7, 2007, authorities arrested Carol Anne Bond for spreading chemical powders on Ms. Haynes's car, door, and mailbox.

Instead of being prosecuted in state court for assault, Ms. Bond was charged and tried in district court under federal criminal statute 18 USC § 229(a)(1) with 2 counts of "knowingly acquiring, transferring, receiving, retaining, or possessing a chemical weapon."¹ This particular criminal statute was passed as part of implementation of an international treaty known as the Chemical Weapons Convention (CWC).

In 1997, the Senate approved and the President ratified the CWC, formally known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction. To

ensure treaty compliance, Congress passed the Chemical Weapons Convention Implementation Act of 1998,² including the penal legislation at issue here. The intent of the CWC is to prevent the use, spread, and development of chemical weapons, and it includes a requirement that States Parties to the treaty implement national legislation to ensure its obligations are met.

TREATIES AND FEDERAL LAW

Upon approval by the Senate and ratification by the President, treaties become the equivalent of federal law, considered to be the "supreme law of the land" (based on the treaties clause of the Constitution [Article VI, clause 2]). Treaties are often accompanied by what is known as implementing legislation, as is the case with the CWC, either because this is expressly required by the terms of the international agreement itself, or in an effort to give domestic power to ensure the effective fulfillment of federal obligations under an international agreement. Such legislation ensures that the U.S. will meet treaty obligations through the dual track of domestic and international law. Article VII of the CWC, the text of which can be found in the sidebar, requires countries signing the treaty to incorporate the provisions into their own domestic law, including enacting penal legislation that would punish those in violation.

The section of law used to charge Ms. Bond was incorporated into the U.S. criminal code for this express purpose. The CWC is just one example of an international agreement using criminal legislation to bring the treaty to life; the majority of arms control treaties have implementing legislation.

Another example, the Biological and Toxin Weapons Convention (BWC), was implemented through the Biological Weapons Anti-Terrorism Act of 1989, with criminal legislation adopted as 18 USC § 175. Numerous people have been prosecuted under the BWC implementing

Article VII of the Chemical Weapons Convention: National Implementation Measures

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.

Source: Text from the Chemical Weapons Convention www.opcw.org

legislation, with the first convictions in 1994 and 1995.³ While several U.S. states do have statutes prohibiting possession or use of biological and toxin weapons, the federal criminal statute is essential to the implementation of the BWC and to ensuring the national security of the people of the U.S. Although states have the authority to legislate on similar subject matter, and they often pass stricter laws than the federal government (eg, state laws to ban smoking), because of the Supremacy Clause, any state law in conflict with a federal law is preempted and the federal law stands.⁴

MS. BOND GOES TO JAIL

Ms. Bond's lawyers argued the chemical weapons charges should be dismissed because the statute "exceeded the federal government's enumerated powers, violated bedrock federalism principles guaranteed under the Tenth Amendment, and impermissibly criminalized conduct that lacked a nexus to any legitimate federal interest."¹ The Eastern District of Pennsylvania ruled the statute was constitutional and that it did not impinge on principles of federalism. The court denied her motion to dismiss the claims, and Ms. Bond eventually pleaded guilty to 2 counts of possessing and using a chemical weapon, in violation of 18 USC § 229(a)(1); she was sentenced to 6 years in prison.¹

Convicted of her crime and sitting in federal prison, Ms. Bond brought the case to the Court of Appeals for the Third Circuit. She appealed on several grounds, including that the statute passed by Congress effectively setting forth provisions to address criminal conduct was unconstitutionally applied to address a matter that is under the jurisdiction of the state and beyond the reach of the federal government under the Tenth Amendment (the federalism clause of the Constitution, stating those powers not explicitly granted to the federal government, unless forbidden, are reserved for the states). The government, on the other hand, argued Section 229 was "enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause."⁵ In the end, the Third Circuit did not respond to Ms. Bond's constitutional arguments; it instead concluded Ms. Bond lacked the standing to challenge the statute on Tenth Amendment grounds where the state or its instrumentalities are not involved (see *Tennessee Electric Co. v Tennessee Valley Authority*, where the Supreme Court concluded private companies did not have standing to challenge a federal regulation in violation of the Tenth Amendment).

Although the Supreme Court (and the Third Circuit) avoided the question of whether the statute itself is improper at this time, a determination that Ms. Bond has standing would presumably return the issue to the Third Circuit on remand to address the constitutionality of the legislation. Moreover, should the Court decide in Ms.

Bond's favor, it could potentially open the door to challenges on other legislation, not only that which implements treaties, but legislation that may be seen as Congress overreaching states' rights. The government argues that under the Necessary and Proper Clause of Article I of the Constitution, Congress has the ability to enforce a legitimate treaty—in this case, a treaty to prevent the spread and use of chemical weapons. What began as a case of a woman scorned exacting revenge has evolved into a potential challenge to federal treaty implementation in the U.S.

Because of conflict among appellate courts on the standing issue, the Supreme Court accepted the case in October 2010 on the matter of: "Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment"—in other words, does a party have the right to challenge a federal conviction based on the reasoning that when applied to her, the law goes beyond the powers given to the federal government in the Constitution?⁶ To invoke standing in federal court, a party must demonstrate they have suffered an injury—that is, according to the Supreme Court, "an actual or imminent invasion of a legally protected interest."⁷ Interestingly, in the interim the federal government reversed its position on the question of Ms. Bond's standing, with the result that the Court will rule on an issue on which both plaintiff and defendant agree.⁶

DISCUSSION

The issue in front of the Supreme Court is whether Ms. Bond can challenge her conviction under the CWC implementing legislation because, as applied to her as an individual, the law is overreaching and beyond the federal government's powers. Without federal-level criminal statutes implementing the CWC in the U.S., Ms. Bond's prosecution would have been for assault and/or harassment,¹ rather than for specific actions prohibited under the CWC. In the Third Circuit appeal, the defendant argued her actions were not focused on proliferating chemical weapons and so do not violate the spirit of the CWC. Nevertheless, her actions clearly violate articles of the treaty banning the use of a chemical weapon.⁸

The case was heard before the Court on February 22, 2011. While both parties agreed on the issue of standing, the government maintained its stance that a law written by Congress to enforce a treaty is fully within its powers, and Ms. Bond maintained her Tenth Amendment argument against the constitutionality of the law. The parties to the case in court, and supporters of either side in briefs, continue to belabor this point. The Third Circuit maintains that when states are not a party to the suit, a private citizen has no standing to challenge a statute in violation of the Tenth Amendment. In the end, the majority of justices

seemed inclined to agree that Bond should have the standing to argue the statute is unconstitutional (although we will not know for sure until the opinion comes out).⁹

The Court's decision on whether Ms. Bond has standing could have major political consequences, not only for its impact on treaty implementation, but because it could lead to an expanded interpretation of the Tenth Amendment, thereby limiting federal power. If the Court rules the defendant has standing and her claim is returned to the lower courts, the domestic implications could be vast, depending on the decision. The contention made by Ms. Bond, that Congress does not have the authority to enact a law impinging on state authority, is the main argument being used by those trying to limit healthcare reform as outlined in the Patient Protection and Affordable Care Act.¹⁰

There has been a sea change in decisions from the Supreme Court surrounding issues of federalism in the past 2 decades. Congress garners a lot of its power to legislate under the Commerce Clause, which, under Article 1, Section 8, of the Constitution, allows regulation of interstate commerce. Not since World War II has there been a case limiting the vast power this provides the federal government; then, in 1995, the first of a series of opinions challenging the Commerce Clause and federal power in general was handed down. In *United States v Lopez*, a student carrying a gun was charged with violating the federal Gun-Free School Zones Act of 1990, which made it illegal to possess firearms in a school zone.¹¹ Ultimately, the court struck down the law as unconstitutional, holding that regulation of handguns exceeded the power of Congress to legislate under the Commerce Clause and that there was not enough evidence to support the notion that "carrying them affected the economy on a massive scale."¹¹ (Of note, after the decision, the law was rewritten with language similar to that used in other federal gun laws and it has not since been challenged.) Since *Lopez*, several other Supreme Court decisions have limited Congress's power, and those opposed to the new healthcare law see *Lopez* as support for its unconstitutionality (other cases include *United States v Morrison* and *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*).¹²

Should the court rule Ms. Bond has standing to challenge her conviction, it could be the first steps down a path leading to a significant blow to treaty implementation in the U.S. and the effort of the federal government to ensure we are meeting our international obligations—not only in Washington, but also in every state, district, and town throughout the country. As with many treaties, the successful implementation of the CWC hinges on U.S. principles of federalism, and, in this case, the success happens to hinge on creation of penalties at the federal level to meet our treaty obligations.

If the case is returned to lower courts to answer the question of whether the CWC should apply to Ms. Bond, the resulting outcome could have a major impact on our ability to enforce treaties domestically. This in turn affects

how we are viewed in the international community, how the U.S. is viewed as respecting international law, and how other countries choose to enforce their own treaties. Our domestic treatment of international treaties colors our interactions in international fora and negotiations. This undermines the domestic effect of an internationally negotiated and ratified arms control treaty, which can have far-reaching consequences.

Yet, the laws need to be applied appropriately, and there is no doubt the government must be careful not to overstep its reach, as the Court determined Congress had done in *Lopez*. Bond's side maintained she never should have been prosecuted under a treaty like the CWC. In a way, Ms. Bond is correct that when the CWC was conceptualized, it was not necessarily meant to punish her—although it was expressly written to ensure that action by individuals as well as governments would be prohibited. Without such federal legislation, the government is significantly weakened when the real criminals come along with much more than a broken heart and powder on a mailbox.

While Ms. Bond's infraction may be one of the lesser crimes that could be prosecuted under this statute, the law is crucial in the prosecution of those with much more serious and large-scale intentions. Declaring 18 USC § 229(a)(1) unconstitutional would make federal prosecution of individuals who did intend to use similar chemicals for a larger attack much more difficult and could lead to questions surrounding those brought to court for violation of 18 USC § 175 (regarding biological weapons). The ability to arrest and charge individuals stockpiling, transporting, or using chemicals covered under the CWC before they cross state lines, and without requiring every U.S. state to pass similar legislation, is a useful tool in counterterrorism efforts and for national security.

Eventually, it is likely the Supreme Court will choose to answer the question of the Treaty Clause versus the Tenth Amendment (whether with this case or another), and there is no absolute guarantee they will uphold the current assumptions that support these federal criminal statutes. Should the Court decide Ms. Bond has standing and return the case to the Third Circuit, her lawyers seem to believe it will return to the Supreme Court to answer the Treaty Clause question.⁹ Thus, this is a case well worth tracking for the U.S. international law and non-proliferation community as it progresses in the months to come.

UPDATE

On June 16, 2011, the Supreme Court released its decision in *Bond v United States*. In a unanimous decision, the Court ruled the defendant does have standing to challenge the constitutionality of the statute and remanded the case to the Court of Appeals. In deciding Ms. Bond has standing, the Court reasoned, "an individual has a direct interest in

objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.” (*Bond v United States*, 564 U. S. ____ [2011]). The Court of Appeals is now tasked with determining whether §229, the statute implementing the Chemical Weapons Convention, is “necessary and proper” for executing the President’s Treaty Power, or whether it overreaches the government’s power in violation of the 10th Amendment. A decision that the statute is invalid would have broad implications for treaty implementation in the United States.

REFERENCES

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2. Chemical Weapons Convention Implementation Act of 1998, Pub L No. 105-277, 112 Stat 2681-856 (Oct. 21, 1998).
3. Carus WS. *Bioterrorism and Biocrimes: The Illicit Use of Biological Agents Since 1900*. Amsterdam: Fredonia Books; 2002.
4. *Gibbons v Ogden*, 22 U.S. 1 (1824).
5. *Carol Anne Bond v U.S.*, Petition for Writ of Certiorari: Brief for the United States (2010) (citing Gov’t. C.A. Br. 18).
6. Supreme Court Docket #09-1227. *Carol Anne Bond v U.S.* <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-1227.htm>
7. *Lujan v Defenders of Wildlife*, 504 U.S. 555 (1992).
8. Both the CWC and 18 USC § 229(a) use the following definitions: *chemical weapon*—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; *toxin chemical*—any chemical which through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals.
9. Hearing transcript. Supreme Court Docket #09-1227. *Carol Anne Bond v U.S.* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1227.pdf
10. *Commonwealth of Virginia et al v Sebelius*, Civil Action No. 3:10CV188-HEH. Memorandum Opinion (2010).
11. *United States v Alfonso Lopez, Jr.*, 514 U.S. 549 (1995).
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