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The headline environmental cases at the Supreme Court this term are of course about the Clean Air Act, specifically about its application to cross-state pollution (as Dan [has explained here](#)) and to greenhouse emissions (as Ann has addressed [here](#) and [here](#)). But sometimes cases that at first glance seem wholly unrelated to the environment could also have important implications for the future of environmental law. *Bond v. United States*, argued this week, is one of those case.

The underlying facts in *Bond* sound like they came from the pen of a TV screenwriter. As the Third Circuit explained, Carol Bond, who herself was unable to have children

was excited when her closest friend, Myrlinda Haynes, announced that she was pregnant. Bond's excitement turned to rage when she learned that her husband, Clifford Bond, was the child's father. She vowed revenge.

To that end, Bond acquired some highly toxic chemicals, buying one over the internet and stealing another from the chemical company where she worked. Over the course of the next several months, she tried repeatedly to poison her husband's mistress by spreading the chemicals on places Haynes would touch, like her doorknob, car door handles, and mailbox. Haynes avoided serious harm, but did suffer a chemical burn on her thumb. She sought help from the local police, who told her to regularly clean the locations where chemicals were being placed. Federal postal inspectors were more helpful, setting up surveillance cameras which caught Bond in the act.

That's when the legal drama began. Bond and her lawyers agree that she had surely committed some garden-variety state law crimes like assault and harassment. But those are not the charges she faced. For reasons that aren't clear in the judicial opinions, federal prosecutors charged her with violating the Chemical Weapons Convention Implementation Act, which true to its name implements the 1993 Chemical Weapons Convention, an international treaty to which the US is a party. Bond was convicted after her claim that the chemical weapons law could not

constitutionally be applied to her was rejected.

With the help of some very good lawyers, Bond has been litigating the constitutional issue ever since. Her claim is that federal law cannot criminalize her entirely local behavior (never mind that internet purchase), or at least cannot do so without requiring a federal jurisdictional nexus. The government's response has been that the international treaty provides all the authority needed.

And here, finally, is where the environmental connection appears. The government's argument is firmly supported by the Supreme Court's 1920 decision in *Missouri v. Holland* (252 U.S. 416), which upheld the Migratory Bird Treaty Act against constitutional challenge. Congress's first effort at protecting migratory birds from lax state hunting regulations had been struck down as exceeding federal constitutional authority. After the President negotiated the Migratory Bird Treaty with Canada, Congress tried again, imposing essentially the same restrictions based on the Treaty. This time the litigation reached the Supreme Court and the US won. The Court held that:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .

All that seemed to be required was that the treaty be valid. The Court didn't fully articulate any test for treaty validity, but it did note that the Migratory Bird Treaty did not "contravene any prohibitory words to be found in the Constitution," nor was it "forbidden by some invisible radiation from the general terms of the Tenth Amendment."

Since then, it has generally been thought that the Treaty Power provides at least some independent basis for federal legislation that would not pass a Commerce Clause test. For decades that extra power wasn't important, because the Commerce Clause was interpreted so expansively. But as the Court has cut back at least marginally on the reach of the Commerce Clause over the last two decades, the Treaty Power looms a bit larger. And it has attracted the attention of states' rights advocates who seek to cabin its reach.

*Bond v. U.S.* provides a clear opportunity to do so, courtesy of an aggressive U.S.

approach. It was pretty aggressive at the outset to charge Bond with a chemical weapons offense. Without condoning her behavior, it's easy to differentiate what she did from a national leader using chemical weapons against his people. The U.S. has been even more aggressive in its litigation position. Bond's lawyer, Paul Clement, urged the Court to find in favor of his client by interpreting the chemical weapons statute as criminalizing only warlike behavior, not the use of chemicals in fights between individuals (the transcript of oral argument is [here](#)). Justice Breyer, at least, was clearly attracted to that approach. Solicitor General Donald Verrilli, however, strongly opposed it in his argument for the U.S. Verrilli warned the Court that any attempt to narrow the statute's language could undermine ongoing nuclear non-proliferation negotiations. He went on to argue that because Bond conceded the validity of the chemical weapons treaty, the Court must find that the Act implementing that treaty is also valid.

Verrilli's strategy looks like a risky one, based on the oral argument transcript. He has tried to leave the Court with no way to find in favor of Bond without saying that legislation implementing a valid treaty is not necessarily valid. Given that six justices seemed to share the view that the government had overreached in Bond's case (heck, even I share that view and I'm not notably anti-government), it might have been wise to set the stage for a less drastic ruling. If the government firmly believes that no narrower path could be consistent with the national interest, it would have been wise to rein in its prosecutors more effectively.

That doesn't necessarily mean that disaster looms. It's entirely possible that the Court will take the statutory interpretation route over Verrilli's objection (it did, after all, take up the case over his objection). And even if the Court overrules Missouri v. Holland, that won't be the end of the Migratory Bird Treaty Act. Under the modern interpretation of the Commerce Clause, even as limited by See *United States v. Morrison*, 529 U.S. 598 (2000) (the Violence Against Women Act case) and *United States v. Lopez*, 514 U.S. 549 (1995) (the Gun-Free School Zone case), federal regulation of the hunting of birds that cross state lines seems well within the scope of federal power. But a broad decision in favor of Bond would be one more indication that the Court is serious about setting limits on federal power, and one more reason to worry about the future of the Endangered Species Act, which so far has withstood all constitutional challenges to its application to wholly intrastate species (we addressed the most recent decision [here](#), [here](#), and [here](#)), but which remains the subject of an active litigation campaign by the Pacific Legal Foundation.