NO. 12-158

In the
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

ASHLEY C. PARRISH
ADAM M. CONRAD
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

ROBERT E. GOLDMAN
ROBERT E. GOLDMAN LLC
P.O. Box 239
Fountainville, PA 18923
(215) 348-2605

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 8, 2013

QUESTION PRESENTED

Two years ago, this Court held that petitioner had standing to challenge her criminal conviction as a violation of the Constitution's structural limits on federal authority. *See Bond v. United States*, 131 S. Ct. 2355 (2011). The Court rejected the argument that Congress' reliance on the treaty power defeated petitioner's standing. On remand, however, the court of appeals held that, while petitioner had standing, her constitutional challenge was a non-starter because the basic limits on the federal government's power are not "applicable" to statutes purporting to implement a valid treaty. Pet.App.36 n.21. Although it had grave misgivings about its decision, the Third Circuit viewed this startling result compelled by dictum in *Missouri v. Holland*, which states that "if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920). The court thus broadly construed *Holland* as allowing the Senate and the President to expand the federal government's constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress' enumerated powers.

The questions presented are:

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state

prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations?

Can the provisions of the Chemical Weapons Convention Implementation Act, codified at 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
A. The Chemical Weapons Convention 3
B. Ratification and Implementing Legislation 6
C. The Underlying Domestic Dispute 9
D. Procedural History 11
SUMMARY OF ARGUMENT 16
ARGUMENT 20
I. The Constitution Does Not Grant Congress A Police Power, And The Ratification Of A Valid Non-Self-Executing Treaty Does Not Change That Bedrock Principle 20
A. Congress Does Not Have the Power To Make Every Malicious Use of Chemicals a Federal Crime 20
B. A Treaty Cannot Grant Congress the Very Police Power the Constitution Withholds 24
C. *Missouri v. Holland* Does Not Eliminate Federalism Principles as a Constraint on the Treaty Power 27

1. *Holland* does not establish the sweeping proposition the federal government attributes to it 28
2. The federal government's reading of *Holland* ignores critical differences between self-executing and non-self-executing treaties.................................. 31
3. If *Holland* does eliminate federalism as a check on the treaty power, it should be overruled............................... 33

D. As in Other Contexts, the Presence or Absence of a Jurisdictional Element Informs the Constitutionality of Treaty-Implementing Legislation........................... 38

II. Section 229 Need Not And Should Not Be Construed To Reach Petitioner's Conduct......... 42

A. Settled Canons of Statutory Construction Counsel Against Reading Section 229 To Apply to Petitioner's Conduct....................... 42

B. Congress Enacted Section 229 To Target the Deployment of Chemical Weapons by Terrorists, Not To Upset the Federal-State Balance... 46

C. The Statute's "Peaceful Purposes" Provision Must Be Construed Sensibly To Effect Congress' Intent........................... 50

III. If The Statute Cannot Be Construed To Avoid The Question, It Is Unconstitutional As Applied To Petitioner 57

CONCLUSION 62

STATUTORY APPENDIX 1a
U.S. Const. art. I, § 8, cl. 18 .... 1a
U.S. Const. art. II, § 2, cl. 2................................ 2a
U.S. Const. amend. X 3a
18 U.S.C. § 229 .... 4a
18 U.S.C. § 229A.. 6a
18 U.S.C. § 229F 8a
18 U.S.C. § 2331 .... 12a
18 U.S.C. § 2332c (1996) 14a
18 U.S.C. § 2339 .... 16a
18 U.S.C. § 2339A.. 17a
Excerpts from the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 19a
Preamble 19a
Article I.. 21a
Article II 22a
Article IV 28a
Article VII.. 33a

TABLE OF AUTHORITIES

Cases

Bond v. United States,
131 S. Ct. 2355 (2011) .... *passim*

Boos v. Barry,
485 U.S. 312 (1988) 27

City of Boerne v. Flores,
521 U.S. 507 (1997) 25, 58

City of New Orleans v. United States,
35 U.S. 662 (1836) 26

Cleveland v. United States,
531 U.S. 12 (2000) 44

College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 25

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 43

Foster v. Neilson,
27 U.S. 253 (1829) 5

Geofroy v. Riggs,
133 U.S. 258 (1890) 26, 30

Gonzales v. Raich,
545 U.S. 1 (2005) 36

Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg.,
545 U.S. 308 (2005) 29

Gregory v. Ashcroft,
501 U.S. 452 (1991) 43, 46

Holden v. Joy,
84 U.S. 211 (1873) 26

Hooper v. California,
155 U.S. 648 (1895) 43

Jones v. United States,
529 U.S. 848 (2000) .... *passim*

Jordan v. K. Tashiro,
278 U.S. 123 (1928) 27

McCulloch v. Maryland,
17 U.S. 316 (1819) 61

Medellin v. Texas,
552 U.S. 491 (2008) 4, 5, 32, 60

Missouri v. Holland,
252 U.S. 416 (1920) .... *passim*

Montana v. Engelhoff,
518 U.S. 37 (1996) 21

New York v. United States,
505 U.S. 144 (1992) 21, 24, 35, 39

NFIB v. Sebelius,
132 S. Ct. 2566 (2012) 25, 34, 36, 61

Prigg v. Pennsylvania,
41 U.S. 539 (1842) 35

Printz v. United States,
521 U.S. 898 (1997) 25, 35, 36

Reid v. Covert,
354 U.S. 1 (1957) 26, 27, 33

United States v. Bass,
404 U.S. 336 (1971) .... *passim*

United States v. Comstock,
130 S. Ct. 1949 (2010) 20, 34

United States v. Lopez,
514 U.S. 549 (1995) .... *passim*

United States v. Morrison,
529 U.S. 598 (2000) .... *passim*

Whitney v. Robertson,
124 U.S. 190 (1888) 5

Constitutional Provision

U.S. Const. art. I, § 8 60

Statutes

10 U.S.C. § 382(a) 49

16 U.S.C. § 668(a) 45

18 U.S.C. § 175(a) 45

18 U.S.C. § 229(a)(1) 7, 45

18 U.S.C. § 229A 7

18 U.S.C. § 229E 49

18 U.S.C. § 229F 8, 44, 51

18 U.S.C. § 831 45

18 U.S.C. § 842(n)(1) 45

18 U.S.C. § 1708 12

18 U.S.C. § 2252(a)(4)(B) 45

18 U.S.C. § 2331 .... 47, 54

18 U.S.C. § 2332a (1996) 7

18 U.S.C. § 2332a(c)(2) 49

18 U.S.C. § 2332b 7, 48

18 U.S.C. § 2332c (1996) 6, 48

18 U.S.C. § 2339 .... 7, 47

18 U.S.C. § 2339A (1996) 6

18 U.S.C. § 2339A.................................... 7, 45, 47, 49
18 U.S.C. § 3142(f)(1)(A) 7
22 U.S.C. § 3201 52
22 U.S.C. § 3221 52
22 U.S.C. § 3242 52
42 U.S.C. § 2153b 52
42 U.S.C. § 2164 52
42 U.S.C. § 2295 52
50 U.S.C. § 1520a 52
51 U.S.C. § 20102 52
51 U.S.C. § 70901 52
Antiterrorism and Effective Death Penalty
Act of 1996, Pub. L. No. 104-132,
110 Stat. 1214... 6
Chemical Weapons Convention
Implementation Act of 1998,
Pub. L. No. 105-277, 112 Stat. 2681,
codified at 18 U.S.C. §§ 229 *et seq.* 7
18 Pa. Cons. Stat. § 2701.................................... 11, 59
18 Pa. Cons. Stat. § 2702.................................... 11, 59
18 Pa. Cons. Stat. § 2709.................................... 11, 59

Other Authorities

143 Cong. Rec. S3309 (daily ed. Apr. 17,
1997) (statement of Sen. Reid)............................ 6
Agreement Concerning Cooperation on the
Civil International Space Station, Jan.
29, 1998, ftp://ftp.hq.nasa.gov/pub/pao/
reports/1998/IGA.html 54

Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, http://www.nsf.gov/od/opp/antarct/anttrty.jsp 54

Br. for *Amicus*, *Bond v. United States*, No. 09-1227 (Jan. 20, 2011)............................... 13

Br. for United States, *Bond v. United States*, No. 09-1227 (Dec. 3, 2010) 13

Br. for United States, *Golan v. Holder*, No. 10-545 (Aug. 3, 2011).. 37

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993 .... *passim*

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000)............................ 31

Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998)............................... 39

Int'l Comm. of the Red Cross Advisory Serv. on Int'l Humanitarian Law, Fact Sheet: 1993 Chemical Weapons Convention (2003), *available at* http://www.vertic.org/media/assets/nim_docs/Reference%20(general%20background%20information)/ICRC%20factsheet-CWC-English.pdf.......................... 4

Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867 (2005) 25

Oral Argument Tr., *Bond v. United States*,
No. 09-1227 (2011)...44

Oral Argument Tr., *Golan v. Holder*,
No. 10-545 (2011)...37

Oral Argument Tr., *United States v. Lopez*,
No. 93-1260 (1994)..23

Restatement (Third) of Foreign Relations
Law § 321 cmt. b (2012) 59

Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735
(2001) 25

Shorter Oxford English Dictionary
(5th ed. 2002) 53

The American Heritage College Dictionary
(3d ed. 1997)..53

The Federalist No. 45 (James Madison)
(Jacob E. Cooke ed., 1961)..................................24

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967,
18 U.S.T. 2410,
http://www.state.gov/t/isn/5181.htm.................53

OPINIONS BELOW

The opinion of the court of appeals is reported at 681 F.3d 149 and reproduced at Pet.App.1–47. The court's earlier opinion denying petitioner standing is reported at 581 F.3d 128 and reproduced at Pet.App.48–72. This Court's decision reversing that opinion is reported at 131 S. Ct. 2355. The district court's unpublished bench ruling denying petitioner's motions to suppress and dismiss is reproduced at Pet.App.84–85.

JURISDICTION

The court of appeals issued its opinion on May 3, 2012. Pet.App.1. The petition was timely filed and was granted on January 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Necessary and Proper Clause, the Treaty Clause, and the Tenth Amendment to the United States Constitution are reproduced at S.1a–3a.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention") are reproduced at Add.19a–34a and available at http://www.opcw.org/chemical-weapons-convention.

The relevant portions of the Chemical Weapons Convention Implementation Act are codified at Title 18, section 229 of the United States Code and reproduced at Add.4a–11a.

STATEMENT OF THE CASE

This case raises fundamental questions about whether there are any limits on Congress' authority to implement an international treaty. But the underlying facts are far removed from the United States' treaty obligations or any issues of national or international importance. Instead, the case arises out of a domestic dispute over marital infidelity that took place in a small residential borough in Montgomery County, Pennsylvania. In a misguided attempt to exact revenge on an erstwhile friend for having an affair with her husband, petitioner spread toxic chemicals on door handles and other surfaces her romantic rival was likely to touch, resulting on one occasion in a minor thumb burn.

Instead of leaving this decidedly local crime to local law enforcement, federal authorities stepped in and not only charged petitioner with a federal crime, but quite astonishingly charged her with violating a federal statute that implements an international arms-control agreement designed to eradicate chemical weapons. To defend this prosecutorial decision, the government interprets this statute, which carries the kind of draconian penalties appropriate for those who traffic in chemical weapons, as containing no jurisdictional element limiting its application to a subset of poisoning cases of distinctly national or international concern. Rather, in the government's view, the statute extends to every malicious use of chemicals nationwide, with only the discretion of federal prosecutors to protect the federal-state balance.

The government's sweeping interpretation of the statute depends upon an equally sweeping theory of Congress' authority that threatens the bedrock notion that the federal government is one of limited and enumerated powers. According to the government, the ratification of a valid non-self-executing treaty frees Congress from the Constitution's liberty-protecting structural constraints and permits it to enact any legislation rationally related to the treaty. Because the government has prosecuted petitioner and ensured that she served a six-year federal sentence for inflicting a thumb burn, it has little choice but to insist on this breathtakingly broad theory and resist any effort to construe the statute to avoid obvious constitutional concerns. The question before this Court is whether this remarkable assertion of federal power can be reconciled with the Constitution, this Court's precedents, the treaty, or even the statute.

A. The Chemical Weapons Convention

The Chemical Weapons Convention is an international arms-control agreement established to combat the proliferation of weapons of mass destruction by outlawing the production, stockpiling, and use of chemical weapons. Its objective is to "achiev[e] effective progress towards general and complete disarmament …, including the prohibition and elimination of all types of weapons of mass destruction." Conv. Preamble. The Convention thus reinforces the 1924 Geneva Protocol prohibiting chemical warfare and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." Int'l

Comm. of the Red Cross Advisory Serv. on Int'l Humanitarian Law, Fact Sheet: 1993 Chemical Weapons Convention (2003), *available at* http://www.vertic.org/media/assets/nim_docs/Reference%20(general%20background%20information)/ICRC%20factsheet-CWC-English.pdf.

As is typical of treaties, especially those addressing rules of *warfare*, the Convention imposes obligations on nation-states, not individuals. Article I obligates signatory states "never under any circumstances" to "use," "develop, produce, otherwise acquire, stockpile or retain chemical weapons." Conv. Art. I(1). Articles II and IV establish an elaborate reporting and verification process, requiring signatory states to destroy any chemical weapons and establish inspection and monitoring processes to be conducted by an international organization based in The Hague, Netherlands.

In conjunction with these and other prohibitions on state action, the Convention obligates signatory states to adopt measures prohibiting individuals from engaging in activities that would violate the Convention if undertaken by a signatory state. Conv. Art. VII. But the Convention itself does not directly impose those prohibitions. Instead, the Convention is what is known as a "non-self-executing" treaty. The distinction between self-executing and non-self-executing treaties is as old as the Republic, and this Court has recently reaffirmed its importance in the constitutional structure. *Medellin v. Texas*, 552 U.S. 491, 504 (2008). As the Court explained, it has "long recognized the distinction between treaties that automatically have effect as domestic law, and those

that—while they constitute international law commitments—do not by themselves function as binding federal law." *Id.* Only when a treaty "operates of itself without the aid of any legislative provision" does it become the supreme law of the land. *Foster v. Neilson*, 27 U.S. 253, 314 (1829). By contrast, "[w]hen the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

As relevant here, the Convention falls squarely into this non-self-executing category: It does not directly create any domestic law governing individuals, but rather obligates signatory states to enact their own laws prohibiting individuals from engaging in activities that would violate the Convention if undertaken by a signatory state. The Convention does not require states to adopt these measures in any particular manner or seek to alter any nation's internal lawmaking processes. To the contrary, it expressly recognizes and accommodates the diversity of those varying processes, mandating that each signatory state "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations." Conv. Art. VII(1) (emphasis added). Those obligations include "enacting penal legislation" to ensure that no "natural and legal person[] anywhere on its territory or in any other place under its jurisdiction" shall "undertak[e] any activity prohibited to a state Party under this Convention." *Id.*

B. Ratification and Implementing Legislation

The U.S. Senate ratified the Convention in April 1997. By that time, the United States had already committed to eliminating its own chemical weapons. The Convention was thus viewed as an opportunity to "make it less likely that our Armed Forces will ever again encounter chemical weapons on the battlefield, less likely that rogue states will have access to the material needed to build chemical arms, and less likely that such arms will fall into the hands of terrorists." 143 Cong. Rec. S3309 (daily ed. Apr. 17, 1997) (statement of Sen. Reid).

At the time of ratification, Congress already had in place a federal prohibition on the use of chemical weapons by individuals, which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 521, 110 Stat. 1214, 1286–87. The prohibition was housed in the "Terrorism" chapter of Title 18 of the U.S. Code, *see* 18 U.S.C. § 2332c (1996), and cross-referenced in various other anti-terrorism statutes, including the provision making it a crime to provide material support to a terrorist, *see* 18 U.S.C. § 2339A (1996). Section 2332c criminalized the use of chemical weapons, but defined "chemical weapon" to include only a "weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals." 18 U.S.C. § 2332c(b)(2) (1996).

When the Senate ratified the Convention, Congress repealed section 2332c and enacted a new

chapter of Title 18 devoted entirely to the regulation of chemical weapons. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856, *codified at* 18 U.S.C. §§ 229 *et seq*. The operative criminal provision of that legislation makes it unlawful for any 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).

Consistent with the Convention's focus on weapons of mass destruction, the statute carries substantial penalties and unusual restrictions. *See, e.g.*, *id.* §§ 229A, 2332b(g)(5)(B)(i), 3142(f)(1)(A), 3143(b)(2), 3142(f)(1)(A). When a violation of its provisions results in "the death of another person," the statute mandates a sentence of no less than life in prison and makes the defendant eligible for the death penalty. *Id.* § 229A(a)(2). Those harsh penalties and restrictions are nearly identical to those in the repealed anti-terrorism provision the new legislation replaced. *See* 18 U.S.C. § 2332a (1996). Congress also substituted references to the repealed statute throughout the U.S. Code with references to section 229. Accordingly, under federal law, anyone who provides material support in the commission of a violation of section 229 has materially supported a crime of terrorism and can face 15 years in prison—or even life, if the death of any person results. 18 U.S.C. § 2339A. Likewise, anyone who harbors or conceals someone who has violated or is about to violate section 229 has harbored or concealed a terrorist and can face ten years in federal prison. *Id.* § 2339.

Like the Convention, the implementing legislation defines "chemical weapon" much more broadly than Congress' earlier statute as encompassing any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). The statute also defines "toxic chemical" broadly to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A). Any substance that satisfies this extraordinarily capacious description is therefore presumptively a prohibited "chemical weapon."

What at least potentially prevents the statute from sweeping so broadly as to produce absurd results is its exclusion of any toxic chemical "intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). That provision avoids the classification of every toxic chemical as a chemical weapon and thus, properly interpreted, prevents countless household cabinets from becoming potential chemical weapons caches. Under the Convention, a toxic chemical is "intended for purposes not prohibited" and, therefore, does not qualify as a "chemical weapon" when it is used for "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." Conv. Art. II(1), (9). The statute contains a similar exclusion, albeit with a slightly different formulation: A toxic chemical is not a chemical weapon if it is intended for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. § 229F(7)(A). Unless this exclusion is construed

sensibly, the statute has the potential to reach all sorts of garden-variety assault and poisoning crimes that have nothing to do with the Convention and its disarmament concerns.

C. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 42-year-old woman who, before her incarceration, lived with her husband and adopted child in Lansdale, Pennsylvania. Pet.App.110–11. Petitioner is originally from Barbados, where she was raised by her mother and remembers her father having multiple affairs and children outside of marriage. Pet.App.109. In 1995, petitioner moved to the United States, where she became close friends with Myrlinda Haynes, another Barbados immigrant who lived nearby in Norristown, Pennsylvania. Over time, petitioner came to regard Haynes as a sister. Pet.App.100, 110.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was excited for her closest friend. Pet.App.49. But that excitement vanished when petitioner discovered that her husband was the father. Pet.App.49. The double betrayal brought back painful memories of her own father's infidelities, and petitioner suffered an emotional breakdown. Pet.App.116–17. She was depressed, her hair fell out, and she endured several panic attacks. Pet.App.115–17. In the midst of this breakdown, petitioner decided to punish Haynes. Pet.App.91. She purchased some potassium dichromate (a chemical commonly used in printing photographs) from Amazon.com, and stole a bottle of

10-chloro-10-H-phenoxarsine (an arsenic-based chemical) from her employer. Pet.App.49. Petitioner knew the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. Pet.App.101. Although both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal, Pet.App.49 n.1, the undisputed evidence shows that petitioner did not intend to kill Haynes, Pet.App.101, 104.

Between November 2006 and June 2007, petitioner went to Haynes' home on several occasions and spread chemicals on her car door, mailbox, and doorknob. Pet.App.49–50. These attempted assaults were neither sophisticated nor successful. Haynes avoided the easy-to-spot chemicals (potassium dichromate is bright orange) on all but one occasion when she sustained a minor chemical burn on her thumb, which she treated by rinsing with water. Pet.App.97. That single thumb burn is the only physical injury Haynes ever sustained. Pet.App.97.

When Haynes complained to local police and the postal service, postal inspectors installed surveillance cameras in and around her home. Pet.App.50. The cameras captured petitioner opening Haynes' mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes' car. Pet.App.50.

On June 8, 2007, postal inspectors arrested petitioner. Pet.App.87. Petitioner's arrest shocked her family and friends, who considered the attempted assaults completely out of character. Pet.App.111–15. A doctor performed a mental health evaluation

and concluded that petitioner was "unable to control behavior she knew was wrongful" because she was suffering from an "intense level of anxiety and depression." Pet.App.117. In the doctor's view, petitioner was "not likely to recidivate." Pet.App.117.

D. Procedural History

While petitioner's conduct is not to be condoned, no one has ever suggested that it violates the Chemical Weapons Convention. Her actions did not involve chemical warfare, stockpiling chemical weapons, or any other activity the Convention prohibits signatory states from undertaking. This domestic dispute, arising out of marital infidelity and culminating in a thumb burn, thus would seem to be a natural candidate for local law enforcement. Petitioner's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, 18 Pa. Cons. Stat. § 2701, aggravated assault, *id.* § 2702, and harassment, *id.* § 2709. Petitioner accepted full responsibility for her actions and, under state law, likely would have faced a prison sentence of between three and 25 months.

But local law enforcement officials were not allowed to handle this local crime. Instead, federal prosecutors stepped in and decided to employ a novel, heavy-handed approach: They charged petitioner with violating, *inter alia*, the Chemical Weapons Convention Implementation Act, on the theory that her actions amounted to use of a chemical weapon. On September 5, 2007, a federal grand jury returned an indictment charging petitioner with two counts of knowingly acquiring, transferring, receiving, retaining, possessing, and using a chemical weapon,

described as "a toxic chemical not intended by defendant Bond to be used for a peaceful purpose" within the meaning of section 229F(7)(A). JA21. Petitioner was also indicted on two counts of theft of mail, in violation of 18 U.S.C. § 1708.

Petitioner moved to dismiss the section 229 charges, arguing that, as applied to her conduct, the statute exceeds Congress' enumerated powers, invades the powers reserved to the States by the Tenth Amendment, and criminalizes conduct that lacks any nexus to a legitimate federal interest. JA23. Petitioner initially argued that the statute exceeded both Congress' power under the Commerce Clause and its power under the Necessary and Proper Clause to implement a treaty, JA24–28, but the government responded by expressly disclaiming and abandoning any reliance on the Commerce Clause, JA31 ("Section 229 was not enacted under the interstate commerce authority"). Accordingly, the district court proceedings focused on the scope of Congress' power to implement treaties. The court denied petitioner's motions in November 2007, after which she entered into a conditional guilty plea that reserved her right to appeal. Pet.App.74–75, 84, 89–90. The district court sentenced petitioner to six years in prison and five years of supervised release, and ordered her to pay a $2,000 fine and $9,902.79 in restitution. Pet.App.52.

Petitioner timely appealed and, in September 2009, the court of appeals affirmed without resolving her constitutional objections. Pet.App.48–72. The court recognized that her constitutional arguments raised difficult issues and noted significant debate

over the "scope" of *Missouri v. Holland*, 252 U.S. 416 (1920). Pet.App.57. Instead of reaching the merits of petitioner's constitutional challenge, however, the court accepted the government's contention that petitioner lacked standing to raise it.

This Court granted certiorari. Abandoning its earlier argument that petitioner lacked standing, *see* Pet.App.4–5 nn.1 & 2, the government confessed error but urged the Court to adopt a new, bifurcated standing test under which an individual could raise an "enumerated-powers" claim but not an "interference-with-state-sovereignty" claim when challenging a federal law as inconsistent with the Tenth Amendment. *See* Br. for United States 13–20, *Bond v. United States*, No. 09-1227 (Dec. 3, 2010). The *amicus curiae* appointed to defend the judgment argued, by contrast, that individuals have no standing to challenge treaty-implementing legislation as beyond the scope of Congress' enumerated powers because Congress' power to implement treaties is not constrained by Article I. *See* Br. for *Amicus* 29–33, 38–42, *Bond v. United States*, No. 09-1227 (Jan. 20, 2011).

The Court rejected both the government's bifurcated test and the *amicus*' treaty power argument and concluded that petitioner had standing to raise her federalism arguments. In doing so, the Court reiterated that federalism is not simply "an exercise in setting the boundary between different institutions of government for their own integrity," but also "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or

control their actions." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The Court also explained that the principle that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government" is "intertwined" with the principle that "action that exceeds the National Government's enumerated powers undermines the sovereign interest of States." *Id.* at 2366. Accordingly, the Court concluded that petitioner was not precluded from raising either of these closely related arguments "to object that her injury results from disregard of the federal structure of our Government." *Id.* at 2366–67.

On remand, the government again shifted its position, this time attempting to resurrect the expressly disavowed argument that the statute could be defended as an exercise of Congress' Commerce Clause authority. *See* Pet.App.4 & n.1. The Third Circuit would have none of it and expressly declined to consider this "newly-discovered" argument, Pet.App.27 n.14, which the panel repeatedly noted during argument had been "affirmatively" "abandoned," JA 101. The court instead affirmed on the theory that section 229, as applied to petitioner, is a constitutional exercise of the federal power to implement treaties. Although the court "agree[d] with Bond that treaty-implementing ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism," it deemed itself bound by *Missouri v. Holland* to conclude that "because the Convention is an international agreement with a subject matter that lies at the core of the Treaty Power, … 'there can be no dispute about the validity of [a] statute' that implements" it.

Pet.App.2 (quoting *Holland*, 252 U.S. at 432). In its view, *Holland* compelled the result that "principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid." Pet.App.6–7. As the court put it, "the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture." Pet.App.17.

The court also rejected petitioner's argument that section 229 could and should be construed to avoid this constitutional question. Although the court acknowledged that the government's reading renders the statute "striking" in its "breadth" and has the potential to turn every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache," Pet.App.10 n.7, it nonetheless declined to construe the statute to avoid such absurd and unintended consequences.

Judges Rendell and Ambro each filed separate concurrences. In Judge Rendell's view, "nothing" in this Court's cases recognizing structural limits on federal power "suggests a principle of federalism that would apply to this case." Pet.App.41. Judge Ambro, by contrast, had serious reservations about the court's decision. Pet.App.45. He voiced concern that *Holland* has been interpreted as granting Congress "a blank check" where treaties are concerned, and emphasized that "[t]his acquirable police power" is antithetical to "the fundamental principle" that the powers of the federal government are few and

defined. Pet.App.45 & n.1. Judge Ambro also noted that, "if ever there were a statute that did test" the limits of Congress' power to implement treaties, "it would be Section 229," which "federalizes purely local, run-of-the-mill criminal conduct" and is "a troublesome example of the Federal Government's appetite for criminal lawmaking." Pet.App.46. Judge Ambro expressed his "hope" that this Court would "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." Pet.App.46–47.

SUMMARY OF ARGUMENT

If section 229 really extended to petitioner, then it clearly would exceed Congress' limited and enumerated powers. Although Congress' powers are considerable, they are not plenary. A general police power is antithetical to the very process of enumerating Congress' powers in Article I, section 8 of the Constitution. It is thus clear that, in the absence of any relevant treaty, Congress would lack the power to criminalize every poisoning or every malicious use of chemicals in the Nation.

The government does not appear to take issue with this bedrock principle, but suggests that the ratification of a valid non-self-executing treaty changes everything. In the government's view, if the Senate ratifies such a treaty, then Congress necessarily gains the authority to enact legislation to rationally further the treaty's objectives, without regard to the structural constraints on Congress' power. This view is not just mistaken, but dangerously so. Especially in light of the broad

subject matters addressed in modern treaties, the government's argument would allow the agreement of the President, the Senate, and a foreign nation to render the Framers' careful process of enumerating Congress' limited powers for naught.

The government attributes its theory to this Court's decision in *Missouri v. Holland*, but *Holland* does not stand for this alarming proposition. *Holland* addressed a facial challenge to legislation designed to implement a migratory bird treaty. Both the constitutional attack and this Court's reasoning focused on the validity of the treaty. Almost in passing, this Court suggested that if the treaty were valid, Congress would have the power to implement it through the Necessary and Proper Clause. The government seizes on this one line, but ignores the balance of the opinion, which considers and weighs the state and federal interests at issue. All of that would have been unnecessary if the government's reading were correct.

The government's reading of *Holland* also ignores the critical distinction between self-executing and non-self-executing treaties. The latter require subsequent implementing legislation, and it is entirely possible for the Senate to ratify a valid non-self-executing treaty that can be implemented via either valid or invalid legislation. The validity of the treaty does not guarantee the validity of actions taken to implement it. This Court has already recognized as much in the context of the Constitution's horizontal separation of powers. In *Medellin*, the Court insisted that the President's efforts to comply with a treaty comport with the

structural provisions that divide responsibility between Congress and the President. There is no reason for a different result when it comes to the structural provisions that divide responsibility between the federal government and the States.

To the extent *Holland* is to the contrary, it would need to be overruled. Such a holding would be inconsistent with a host of subsequent precedents that recognize that treaty-implementing legislation is subject to the Bill of Rights, that the Constitution's structural provisions protect individual rights just as much as the first eight amendments, and that these structural provisions are too important to be excused in the name of efficiency.

Although the constitutional issues this case presents are critical, section 229 can be interpreted to avoid them. The government would read the statute as lacking anything resembling a jurisdictional element. In its extreme view, the statute reaches every malicious use of chemicals, and only prosecutorial discretion can ensure that prosecutions have some connection to the goals of the Convention. This case confirms that prosecutorial discretion is not an adequate answer. But there is an interpretation of section 229 that ensures that it applies only to the kind of conduct the Convention addresses—namely, warlike conduct that would violate the Convention if undertaken by a signatory state. That more limited reading of the statute would also comport with Congress' view that a violation of section 229 is per se a crime of terrorism. Most important, that construction would avoid rendering section 229

unconstitutional in the vast majority of its potential applications, including this one.

The only alternative to this saving construction is to hold section 229 unconstitutional as applied to petitioner. Domestic disputes culminating in a thumb burn neither implicate the concerns of the Chemical Weapons Convention nor come within Congress' authority. Although this Court has recognized the breadth of Congress' power, it has constantly insisted that the police power was reserved to the States. That point is fundamental. It defines the kind of government the Framers created—a limited national government with enumerated powers addressed to matters of distinctly national and international concern. Consistent with that framework, Congress enjoys considerable options when implementing a valid non-self-executing treaty. But ratification of such a treaty neither confers upon Congress a police power nor guarantees the validity of federal implementing legislation. Such legislation must comport with our constitutional system, including the critical structural guarantees of federalism. If section 229 applies to petitioner, it fails that vital test.

ARGUMENT

I. The Constitution Does Not Grant Congress A Police Power, And The Ratification Of A Valid Non-Self-Executing Treaty Does Not Change That Bedrock Principle.

A. Congress Does Not Have the Power To Make Every Malicious Use of Chemicals a Federal Crime.

If section 229 really made every malicious use of chemicals a federal crime, it clearly would exceed Congress' limited and enumerated powers. Congress lacks the power to criminalize every malicious use of chemicals for the simple reason that it lacks a general police power. Such a plenary authority is antithetical to the entire enterprise of enumerating Congress' distinct powers in Article I, section 8 of the Constitution. It is thus axiomatic that our constitutional scheme "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995). "With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). Instead, the police power "belongs to the States and the States alone." *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).

The absence of a national police power is a critical element of the Constitution's liberty-preserving federalism. The basic "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States .... in part, [as] an end in itself, to ensure that States function as political entities in their own right." *Bond*, 131 S. Ct. at 2364. But equally important, "the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. Leaving the police power in the hands of state governments closer to the people secures to individuals "a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.*

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1992)); *see also Montana v. Engelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is ... the business of the States"). None of this is to deny Congress' ability to enact criminal statutes. But the

federal government may step into the States' traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern. Prohibiting assaults on ambassadors or poll workers or on federal enclaves is one thing; prohibiting assault *simpliciter* is quite another. "Were the Federal Government to take over the regulation of entire areas of traditional state concern," rather than limiting its laws to matters of distinctly federal concern, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

In keeping with that basic division of power, this Court has never accepted the argument that Congress may regulate criminal conduct with no nexus to matters of federal concern. Despite the gradual expansion of federal authority, this one constant has never changed. Indeed, the Court is typically unwilling to assume that Congress even *attempted* to "dramatically intrude[] upon traditional state criminal jurisdiction" in this impermissible manner. *United States v. Bass*, 404 U.S. 336, 350 (1971) (construing federal firearms statute not to reach every possession of a firearm); *see also Jones v. United States*, 529 U.S. 848, 855 (2000) (construing federal arson statute not to reach every building). And in the rare instances when the inference that Congress actually intended such an intrusion is unavoidable, the Court has not hesitated to hold the law unconstitutional. *See, e.g.*, *Lopez*, 514 U.S. at 567 (holding unconstitutional federal law that sought to criminalize possession of a gun in a local school

zone); *Morrison*, 529 U.S. at 617 (holding unconstitutional federal law that sought to regulate all gender-motivated crimes of violence).

There can be no serious dispute that a federal effort to criminalize every malicious use of chemicals throughout the Nation could not be reconciled with these fundamental principles. Poisonings and assaults involving harmful substances were not unknown to our founding generation. Yet it would have been unthinkable to the Framers that such matters would be anything other than a state concern. To be sure, there is some small subset of such crimes that touches on matters of federal concern. Even the Framers would recognize that poisoning the French Ambassador or a United States military officer would come within the federal ambit. And more recently, few would doubt that there is a distinct federal interest in eliminating particularly harmful chemicals from interstate commerce, or using chemicals to perpetrate acts of terrorism. But a statute that purported to federalize every malicious use of chemicals, without regard to whether that use has any nexus to a distinct federal interest, would remain a non-starter. When the government candidly conceded that its theory in *Lopez* would permit the criminalization of every assault, *see* Oral Argument Tr. 8–9, *United States v. Lopez*, No. 93-1260 (1994), the argument was effectively over. To accept any theory of federal power that would permit Congress to usurp the core criminal jurisdiction of the States "would require" this Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 567.

B. A Treaty Cannot Grant Congress the Very Police Power the Constitution Withholds.

According to the government, these basic limits on federal power are all well and good—unless and until a treaty comes into play. In its view, so long as Congress can point to a treaty that bears some rational relationship to the conduct it wants to regulate, the Constitution's structural constraints pose no limits on what it may do. A federal murder statute might be off-limits, but not if the Senate ratified a convention for the protection of life. In other words, the treaty power stands alone as a blanket exception to the rule that the powers of the federal government "are few and defined," while those of "the State Governments are numerous and indefinite." The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961). The consequences of that startling proposition are truly breathtaking. It would provide a roadmap for circumventing nearly every limitation on federal power this Court has ever recognized. Never mind that Congress lacks a police power to pass generic criminal laws. Congress could easily acquire such power through any number of human rights treaties.

The same goes for limitations on Congress' ability to abrogate state sovereignty or interfere with state legislative processes. If "federalism principles do not impose a limit" on the power to implement treaties, U.S. Br. in Opp. 23, then nothing prevents Congress from forcing States to enact and implement laws on whatever topic the President, the Senate, and a foreign country deem an appropriate subject for a treaty. *But see New York*, 505 U.S. at 149;

Printz v. United States, 521 U.S. 898 (1997); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2664 (2012) (plurality opinion). Nor would anything prevent Congress from imposing on the States restrictions and conditions designed to enforce and remedy violations of commands the Constitution does not contain. *But see City of Boerne v. Flores*, 521 U.S. 507 (1997); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Indeed, proponents of the government's sweeping vision of the treaty power promise that it offers all this and more. *See* Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1871–73 & nn.19–25 (2005) (collecting articles arguing that numerous laws held unconstitutional by this Court could be reenacted as treaty-implementing legislation).

These concerns are not hypothetical given the broad modern conception of the proper ambit of international agreements. Treaties may have been an unlikely source for pretensions of plenary federal power back in the framing era, when such agreements were largely limited to discrete topics of international intercourse between nation-states. But "[i]n recent years, the subject matter of treaties and other international agreements has expanded to encompass nearly every part of what used to be considered the exclusive domain of state law." Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735, 749–50 (2001). Accordingly, if the government's power to make and implement treaties is as all-encompassing as it insists, this Court's

painstaking efforts to articulate meaningful limits on federal power have all been for naught.

"The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion). Nothing in the treaty power, the Supremacy Clause, or any other constitutional provision "intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." *Id.* To the contrary, the Constitution's prohibitions "were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Id.* at 17.

This Court has recognized as much from its earliest days. When first confronted with whether a treaty may grant Congress power the federal government otherwise lacks, the Court readily rejected the notion that federal power "can … be enlarged under the treaty-making power." *City of New Orleans v. United States*, 35 U.S. 662, 736 (1836). Since then, the Court has reiterated that, like all other federal powers, the treaty power is subject to "those restraints which are found in [the Constitution] against the action of the government," *including* "those arising from the nature of the government itself, and of that of the states." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *see also Holden v. Joy*, 84 U.S. 211, 243 (1873) (treaty power must be exercised consistently "with the nature of our

government and the relation between the States and the United States"); *cf. Jordan v. K. Tashiro*, 278 U.S. 123, 125 (1928) (discussing "possibility of conflict between the exercise of the treaty-making power of the federal government and the reserved powers of the state"). In short, "it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid*, 354 U.S. at 17–18 (same).

C. *Missouri v. Holland* Does Not Eliminate Federalism Principles as a Constraint on the Treaty Power.

The government concedes, as it must, that the affirmative prohibitions of the Bill of Rights constrain the treaty power, but insists that this Court's decision in *Missouri v. Holland* compels a different rule when it comes to the Constitution's structural provisions. In other words, so long as Congress does not violate the first eight amendments to the Constitution, there is no end to what it may do when seeking to implement a treaty. That contention cannot be reconciled with this Court's pre-*Holland* precedents or even *Holland* itself. Nor can it be squared with this Court's more recent treaty power and federalism cases or, most critically, with the basic structure of our Constitution.

1. *Holland* does not establish the sweeping proposition the federal government attributes to it.

Holland involved a challenge to the Migratory Bird Treaty Act of 1918, a statute enacted to implement a treaty between the United States and Great Britain addressing preservation of migratory birds known to cross the border with Canada. Missouri challenged the Act on its face, arguing that any federal law regulating migratory birds worked "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment," as well as with Missouri's pecuniary interest in birds within its borders. *Holland*, 252 U.S. at 431. In doing so, Missouri focused primarily on assailing the treaty as invalid, and argued that the legislation fell along with the invalid treaty. The Court's opinion rejecting Missouri's challenge likewise focused almost exclusively on the treaty. The Court addressed the statute only as an afterthought: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.

The government would read this single sentence as establishing a definitive rule of law: Any legislation rationally implementing a valid treaty is a valid exercise of the Necessary and Proper Clause. But this springing-police-power reading of *Holland* not only conflicts with bedrock constitutional principles; it cannot even be squared with the balance of the opinion. *See Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308, 317

(2005) ("an opinion is to be read as a whole"). When the Court turned to the predicate question of whether "the treaty is valid," it acknowledged that the treaty did "not contravene any prohibitory words to be found in the Constitution," but nonetheless went on to consider whether the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Holland*, 252 U.S. at 433–34. The Court did not answer that question with a categorical "no." Rather, the Court considered the relative national and state interests, and it concluded that the "national interest of very nearly the first magnitude" trumped what it viewed as a minimal interest in birds "only transitorily within the State and ha[ving] no permanent habitat therein." *Id*. at 435. Critically, all of that analysis would have been largely beside the point if federalism principles were simply irrelevant when the federal government acts pursuant to the treaty power.

Holland is therefore entirely consistent with the basic principle that Congress' authority depends on the existence of a nexus to a matter of national or international importance. Nothing in *Holland* suggests, let alone compels, that a statute prohibiting the taking of *any* bird—whether migratory or not—would be equally constitutional. Nonetheless, a treaty addressing only migratory birds would be no less valid if implemented through such overinclusive, but hardly irrational, legislation. To be sure, in *Holland*, the Court focused on the validity of the treaty itself, rather than the implementing legislation, but that just mirrored Missouri's litigation strategy, which in turn reflected the tight nexus between the treaty and the legislation. By

focusing on *migratory* birds, both the treaty and the implementing legislation essentially provided their own jurisdictional elements. But it does not follow that any legislation that rationally implements a valid treaty is equally valid, even if it reflects a blatant "disregard of the federal structure of our Government." *Bond*, 131 S. Ct. at 2366–67. That is simply not a question that the *Holland* Court had to confront.[1]

The government's broader reading of *Holland* is flatly inconsistent with the Court's assurance that it was merely applying "established rules to the present case." *Holland*, 252 U.S. at 435. The Court did not purport to overturn earlier decisions holding that the treaty power is subject to those restraints "arising from the nature of the government itself, and of that of the states." *Geofroy*, 133 U.S. at 267. The government's broad reading is also difficult to reconcile with the fact that *Holland* was a 7-2 decision joined by Justice McReynolds, who was hardly known for his expansive conception of federal power. The notion that the Court *sub silentio* overruled cases like *Geofroy* and created a springing-police-power wherein Congress' plenary powers are expanded with each additional valid treaty is simply implausible.

---

[1] Relatedly, it is significant that Missouri's challenge to the statute was a facial one. The Court thus did not consider, let alone foreclose, the argument that the statute might impermissibly intrude on state sovereignty in *some but not all* applications.

2. The federal government's reading of *Holland* ignores critical differences between self-executing and non-self-executing treaties.

The government's theory that any valid treaty necessarily expands Congress' plenary power is also difficult to reconcile with the critical distinction between self-executing and non-self-executing treaties, which the Court recently reaffirmed in *Medellin*. In the context of a self-executing treaty, the validity of the treaty itself may well be the proper focus of the judicial inquiry, since the self-executing treaty, if valid, will be the supreme law of the land without any further action by Congress. But non-self-executing treaties are different.

The Senate may ratify a valid non-self-executing treaty with the understanding that state and local governments will ensure that the United States is in compliance with its international treaty obligations. Or the Senate may ratify a non-self-executing treaty with the understanding that existing federal statutes or state laws are sufficient. Indeed, the President and Senate may enter into a treaty on a non-self-executing basis precisely because they are wary of the treaty's federalism implications, and prefer to preserve a role for the States in complying with international obligations that touch upon local matters. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 419–23 (2000). That is not a deficiency in the design of the treaty that renders the treaty itself invalid. It is an appropriate recognition that "[t]he allocation of powers in our federal system

preserves the integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364.

Any inference that the validity of a non-self-executing treaty necessarily renders any rational implementing legislation valid, without regard to the basic structural guarantees and limitations of our Constitution, is therefore unfaithful both to the Constitution and to the very reason some treaties are non-self-executing. This Court recognized as much in *Medellin* when it came to the horizontal separation of powers among the branches of the federal government. The Vienna Convention on Consular Relations is a perfect example of a non-self-executing treaty that depends on state and local laws and authorities for compliance. When local officials in Texas failed to provide consular notification in circumstances that created a breach of our treaty obligations, the President attempted to direct state officials to re-examine the case without obtaining any legislation from Congress. *See Medellin*, 552 U.S. at 503. Without questioning the validity of the underlying treaty or the fact that the United States was in breach of its international obligations, this Court rejected the President's action as inconsistent with the structure of our Constitution. *See id.* at 525 ("The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.").

There is no reason for a different result when it comes to the structural provisions that separate powers vertically between the States and the federal

government. Those vertical structural protections are every bit as vital to our basic constitutional structure. Indeed, the first time this case was before it, this Court invoked horizontal separation-of-powers cases to underscore the liberty-protecting nature of all the structural provisions of the Constitution, whether horizontal or vertical. *Bond*, 131 S. Ct. at 2365. Just as the President has multiple options to implement a valid non-self-executing treaty, but is not empowered to take any action that brings the United States into compliance without regard to the proper division of authority between Congress and the President, there are many options for the United States as a whole to comply with a valid non-self-executing treaty without abandoning bedrock principles of federalism. Simply recognizing that a non-self-executing treaty is valid begins the relevant constitutional analysis of any implementing legislation, but it does not end it.

3. If *Holland* does eliminate federalism as a check on the treaty power, it should be overruled.

In all events, if *Holland* really does establish the remarkable proposition that Congress' power to implement treaties is immune from the Constitution's structural constraints, it cannot be reconciled with subsequent developments in this Court's jurisprudence and should be overruled. *Reid v. Covert* explicitly rejected the notion that an "agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. The government would confine *Reid*

to the affirmative restrictions on government power included in the Bill of Rights. But that distinction makes no sense in light of the critical liberty-protecting nature of the Constitution's structural provisions. Indeed, any effort to distinguish between "individual rights" and the Constitution's structural provisions cannot be reconciled with the earlier decision in this case or a host of other precedents.

The government's purported distinction rests on the mistaken belief "that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring). In fact, far from being second-class citizens, the structural provisions are among the most important and liberty-protecting provisions in our founding document. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364; *see also Morrison*, 529 U.S. at 616 n.7 ("the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"). That is why "the Framers considered *structural* protections of freedom the most important ones," and why "they alone were embodied in the original Constitution and not left to later amendment." *NFIB*, 132 S. Ct. at 2676–77 (joint dissent) (emphasis added); *see also id.* at 2577–78 (Roberts, C.J.) ("the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government").

This Court has therefore repeatedly rejected the notion that the first eight amendments to the Bill of Rights are the only limits on the federal powers the Constitution enumerates. The statutory provisions addressed in cases such as *Lopez*, *New York*, *Printz*, *Morrison*, and *NFIB* were unconstitutional because they were "inconsistent with the federal structure of our Government." *New York*, 505 U.S. at 177; *see also, e.g.*, *Lopez*, 514 U.S. at 567 (rejecting theory of federal power that "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"); *Printz*, 521 U.S. at 935 (rejecting theory of federal power as "fundamentally incompatible with our constitutional system of dual sovereignty"). As these and other cases make clear, the cardinal canon that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government" informs the scope of *all* federal powers. *Bond*, 131 S. Ct. at 2364. There is no principled basis for treating the power to implement treaties any differently.

Indeed, if anything, the Constitution's structural constraints should apply with *more* force when determining the contours of Congress' power to implement treaties. This Court has long recognized that "the power is nowhere in positive terms conferred upon [C]ongress to make laws to carry the stipulations of treaties into effect." *Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842). Congress must derive that power from one of its enumerated powers. To be sure, a valid non-self-executing treaty may alter the scope of what legislation is necessary and proper, just as valid commerce power legislation

might allow Congress to enact a record-keeping requirement under the Necessary and Proper Clause that it would otherwise lack the authority to impose. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring). But that does not remotely mean that the Necessary and Proper Clause grants Congress carte blanche to implement any valid non-self-executing treaty. To the contrary, the Necessary and Proper Clause does not empower Congress to enact laws that "undermine the structure of government established by the Constitution." *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.); *see also Printz*, 521 U.S. at 923–24 (a law that "violates the principle of state sovereignty reflected in the various constitutional provisions … is not a 'La[w] … *proper* for carrying into Execution'" that power).

Legislation prohibiting the taking of any bird—migratory or not—might be a rational (albeit overinclusive) means of implementing a migratory bird treaty, and it might be a perfectly fine means for a co-signatory with a different constitutional system to implement the treaty. But it would not be "proper" legislation under our Constitution. It would be both extraordinary and utterly inconsistent with this whole line of post-*Holland* precedent if a power that concededly cannot be used to circumvent the prohibitions in the first eight amendments nonetheless could be employed to obliterate the most basic structural constraints in the unamended Constitution, the importance of which the Ninth and Tenth Amendments only underscored.

In fact, the Solicitor General previously appeared to recognize as much. In *Golan v. Holder*, the Court

was asked to consider whether, in order to bring the United States into compliance with certain treaties, Congress could provide copyright protection for certain works. Notwithstanding arguments by *amici* that Congress could invoke the treaty power and the Necessary and Proper Clause to enact the challenged statute, the Solicitor General relied solely on the Copyright Clause. *See* Br. for United States, *Golan v. Holder*, No. 10-545 (Aug. 3, 2011). And in response to this Court's questions, the Solicitor General "completely agree[d]" with the principle that "a treaty [cannot] expand the powers of the Federal Government." Oral Argument Tr. 31:21–32:10, *Golan v. Holder*, No. 10-545 (2011).

The Solicitor General was right then and is wrong now. A federal power to implement treaties unconstrained by the Constitution's structural protections of liberty is incompatible with our founding document. In this context as in all others, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for" the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). This Court recognized as much when it vindicated petitioner's right "to object that her injury results from disregard of the federal structure of our Government." *Bond*, 131 S. Ct. at 2366–67.

In the process, the Court refused to accept the efforts of the government and the Court-appointed *amicus* to limit standing to certain kinds of structural claims or, alternatively, to treat the treaty

power as categorically different from other constitutional powers. The Court wisely rejected those arguments then and should do the same now. Some principles—such as the notions that ours is a limited federal government and that individuals have standing to insist that those limits be honored—are too important to admit of exceptions. A valid non-self-executing treaty, like any valid legislative agenda, can be implemented either constitutionally or in a manner that is not proper in light of our most basic constitutional structure. It is not at all clear that *Holland* is to the contrary. But if *Holland* really stands for the proposition that any legislation that rationally implements a valid non-self-executing treaty is perforce constitutional, then *Holland* is incompatible with more recent precedents and the Constitution, and it should be overruled.

D. As in Other Contexts, the Presence or Absence of a Jurisdictional Element Informs the Constitutionality of Treaty-Implementing Legislation.

Because the federal government does not have plenary authority to implement any valid treaty, legislation designed to implement a non-self-executing treaty is subject to the same basic constraints and rules of construction as other federal legislation. Particularly given the breadth of the power to enter into treaties, absent meaningful limits on the power to implement them, nothing would stop Congress from invoking treaties to override large swathes of state and local law, including family law, garden-variety criminal law, and even the sensitive decision whether to retain the death penalty. *See*

Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 400–09 (1998). That kind of plenary power would vastly outstrip Congress' enumerated powers and violate the principle, "deeply ingrained in our constitutional history," "that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States." *Morrison*, 529 U.S. at 618 n.8 (quoting *New York*, 505 U.S. at 155).

When faced with other broad assertions of near-plenary power, this Court has emphasized that the best way for Congress to prevent federal legislation from exceeding the scope of federal power is by including a "jurisdictional element which would ensure, through case-by-case inquiry," that the conduct it seeks to regulate bears a meaningful nexus to the distinctly federal interest it seeks to advance. *Lopez*, 514 U.S. at 561. That kind of jurisdictional element not only provides a ready means of confirming that each application of a statute is within the proper confines of federal power, but also assures courts that Congress "has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349. In that respect, jurisdictional elements help prevent courts from needlessly confronting constitutional questions Congress may have intended to avoid. Conversely, by including jurisdictional elements that limit statutes to contexts that clearly implicate a national or international interest, Congress can convert what would otherwise be difficult constitutional questions for the courts into straightforward cases. Moreover, the very process of

articulating a jurisdictional element helps remind Congress to pause and consider the federalism implications of its actions before adopting laws that push the bounds of federal power.

In recognition of the critical role jurisdictional elements play when it comes to cabining congressional statutes to matters of genuinely national or international concern, this Court has placed particular emphasis on the absence of jurisdictional elements when holding federal statutes unconstitutional. *See, e.g.*, *Lopez*, 514 U.S. at 561 ("§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"); *Morrison*, 529 U.S. at 613 ("§ 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"). Moreover, where Congress has included a jurisdictional element, this Court has often focused on the language of the jurisdictional element and construed it to provide a *meaningful* nexus to the federal interest. *See, e.g.*, *Jones*, 529 U.S. at 855 (interpreting federal arson statute that reached buildings "used" in interstate commerce as requiring "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce"). Thus, by omitting a jurisdictional element, Congress deprives courts of a ready opportunity to apply a narrowing construction to language that expressly addresses the statute's scope.

The same principles developed to cabin the potentially expansive commerce power should apply with full force when considering the constitutionality of treaty-implementing legislation. The best way to ensure that such laws stay within the bounds of federal power is to include a jurisdictional element requiring that the conduct a statute reaches bear a meaningful nexus both to the treaty Congress seeks to implement and to the national interest the treaty seeks to advance. Of course, the nature of the treaty may inform the nature of the jurisdictional element. Legislation implementing an international commercial treaty may include a jurisdictional element that looks very much like the classic jurisdictional element under Commerce Clause legislation, only with a requirement that an item have moved in international commerce. In other cases, the subject of the treaty and resulting implementing legislation may effectively provide its own jurisdictional element. Legislation affecting only international borders or international adoptions will be self-limiting.

But given the broad ambit of modern treaties, this will not always be the case. And particularly when Congress invokes a treaty to regulate the domestic conduct of individuals within our borders, the mere ability to conceive of a rational relationship between a statute and a treaty is manifestly insufficient to "ensure, through case-by-case inquiry," that each application of the statute advances the same distinctly national interest as the treaty it purports to implement. *Lopez*, 514 U.S. at 561. Nor, as this case amply demonstrates, is prosecutorial

discretion an adequate substitute for such a jurisdictional element.

II. Section 229 Need Not And Should Not Be Construed To Reach Petitioner's Conduct.

The government does not appear to contend that Congress possesses a general police power or could ordinarily criminalize every malicious poisoning in the Nation. Nonetheless, in the government's view, because Congress enacted section 229 to implement the Chemical Weapons Convention, the ordinary rules do not apply. Indeed, the government resists any effort to narrow section 229 to circumstances that, unlike this case, implicate the distinct national and international concerns addressed by the Convention. But as demonstrated, the normal rules do apply even when Congress acts to implement a valid non-self-executing treaty, and those rules clearly suggest a narrowing construction that could save section 229 from invalidation. The alternative to that saving construction is not, as the government suggests, new plenary power for Congress, but the invalidation of section 229 as applied.

A. Settled Canons of Statutory Construction Counsel Against Reading Section 229 To Apply to Petitioner's Conduct.

It is a "cardinal principle" of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf*

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that" courts should not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* To pass muster in the constitutional avoidance context, an alternative construction need not be the most obvious one; instead, "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

Constitutional avoidance principles apply with all the more force when determining whether a statute should be construed to "alter the usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Because the Constitution reserves the police power to the States, courts "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction," or to authorize "a substantial extension of federal police resources." *Bass*, 404 U.S. at 349, 350. Accordingly, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349); *see also Gregory*, 501 U.S. at 461. The familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" also compels a similar clear statement rule, especially when federalism interests are at stake.

Cleveland v. United States, 531 U.S. 12, 25 (2000). When a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate," before the Court "choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Jones*, 529 U.S. at 858.

There can be no serious dispute that the constitutional question here is grave, as it cuts to the very heart of the principle that the powers of our federal government are few and enumerated. Nor can there be any serious dispute that the government's sweeping interpretation would render section 229 a dramatic intrusion on "the integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364. The statute presumptively defines "chemical weapon" 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). If, as the government insists, section 229 makes every substance that satisfies this exceptionally broad definition a "chemical weapon" whenever used with malicious intent, then the statute turns every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Pet.App.10 n.7. As Justice Alito memorably remarked at oral argument, the government's reading would render vinegar a chemical weapon when deployed to injure a neighbor's goldfish. Oral Argument Tr. 29:15–30:9, *Bond v. United States*, No. 09-1227 (2011).

And the statute would not stop with federalizing the use of "chemical weapons" so defined. It would also make it a federal crime to "own" or "possess" common chemicals with malicious intent, 18 U.S.C. § 229(a)(1), something the Convention itself does not require, *see* Conv. Art. I. Federal possessory crimes are rare and are typically reserved for exceedingly dangerous substances or materials, and/or include an explicit jurisdictional element. *See, e.g.*, 18 U.S.C. § 175(a) (biological weapons); *id.* § 831 (nuclear material); *id.* § 842(n)(1) (certain plastic explosives); *id.* § 2252(a)(4)(B) (child pornography produced with materials shipped in interstate commerce); 16 U.S.C. § 668(a) (bald and golden eagles).[2] Here, by contrast, the government's reading could make it a federal crime to possess bleach or insect repellant while harboring a bad intent. And anyone who aided the malicious use or possession of bleach would be liable not for aiding and abetting a state-law crime, but for material support of terrorism, which carries a potential 15-year term. 18 U.S.C. § 2339A. Finally, the government's view would make every poisoning or assault involving a harmful substance a candidate for the federal death penalty when it results in the loss of human life, thereby overriding the States' traditional prerogative to determine whether to permit the death penalty for all but a narrow category of crimes with an obvious federal nexus.

---

[2] Some of these statutes are in need of narrowing constructions of their own. If the government applies the same overbroad approach to section 175(a), which implements the Biological Weapons Convention, then someone with a head cold who maliciously spits on another has deployed a biological weapon.

This case vividly illustrates the severe intrusion on core state prerogatives that results. Petitioner was prosecuted for seeking to exact revenge on a romantic rival by spreading small amounts of legally available substances on surfaces of property her rival might touch. Had this quintessentially local crime been left to state law enforcement, petitioner likely would have faced a prison sentence of, at most, 25 months. Instead, she was sentenced to six years in federal prison for violating a statute that purports to implement a treaty to eradicate chemical weapons. The federal government did not prosecute petitioner on the theory that her actions harmed or even had the potential to harm any distinctly federal interest—whether within or without the scope of the Chemical Weapons Convention. Indeed, no one has ever suggested that this case amounts to anything more than a local, domestic dispute. It is difficult to conceive of a federal prosecution that more "dramatically intrudes upon traditional state criminal jurisdiction." *Bass*, 404 U.S. at 350.

B. Congress Enacted Section 229 To Target the Deployment of Chemical Weapons by Terrorists, Not To Upset the Federal-State Balance.

Nothing in section 229 provides anything close to the requisite "clear and manifest" statement that Congress intended to revolutionize the federal-state balance in this manner. *Gregory*, 501 U.S. at 461. The statute contains no indication that Congress "in fact faced, and intended to bring into issue," *Bass*, 404 U.S. at 349, the constitutional implications of

federalizing all manner of poisoning and assault crimes throughout the Nation.

This indication is wholly lacking for the straightforward reason that Congress had no such intent. Rather, it intended to implement the Convention's direction to criminalize actions that would violate the Convention if undertaken by nation-states. Needless to say, nation-states do not poison romantic rivals. But individuals can use chemical weapons in the warlike manner that threatens widespread injury and would squarely implicate the Convention if so used by a nation-state—namely, to commit acts of terrorism. And Congress clearly intended section 229 to reach acts of terrorism, not every malicious use of chemicals.

That is true not just in the vague sense that Congress considered the statute a useful tool in the federal government's arsenal against terrorist activities. In Congress' view, a violation of section 229 is a crime of terrorism. Congress' treatment of the statute in other provisions of the U.S. Code leaves no room for doubt about that. Most obviously, section 229 is one of the very few underlying offenses listed in the federal statutes that prohibit "harboring or concealing terrorists" and "providing material support to terrorists." 18 U.S.C. §§ 2339, 2339A. There is no requirement in these statutes that the underlying section 229 offense satisfy the definition of terrorism set forth in 18 U.S.C. § 2331; the material support statutes are triggered automatically any time an individual provides material support to or harbors or conceals someone who has violated or intends to violate section 229. Congress thus

apparently considered *every* violation of section 229 a per se crime of terrorism.

The statutory history of section 229 reinforces that conclusion. As noted above, section 229 was not Congress' first effort to prohibit the use of chemical weapons. Congress enacted a similar prohibition two years earlier. *See* 18 U.S.C. § 2332c (1996). That earlier provision, which defined a chemical weapon as "any weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals" and contained harsh penalties very similar to those found in section 229, was housed exactly where one might expect: in the "Terrorism" chapter of Title 18. When Congress enacted section 229, it repealed section 2332c and replaced references to section 2332c in the terrorism laws with references to section 229. In doing so, Congress made plain its understanding that section 229 was directed at the kind of widespread dissemination of chemical weapons that would violate the Convention if undertaken by a nation-state, not mine-run poisonings and thumb burns.

Congress' treatment of section 229 in other contexts confirms the same focus on targeting widespread dissemination of chemical weapons, not disrupting the federal-state balance. For instance, section 229 is cross-referenced in the statute that prohibits acts of terrorism that transcend national boundaries, 18 U.S.C. § 2332b, and is one of only three laws for which "[t]he Secretary of Defense, upon the request of the Attorney General, may

provide assistance … during an emergency situation involving a weapon of mass destruction" (the other two being biological weapons and weapons of mass destruction statutes). 10 U.S.C. § 382(a); *see also* 18 U.S.C. § 229E (permitting Attorney General to request Secretary of Defense's assistance in enforcing section 229 in "an emergency situation involving a chemical weapon"). Congress also defined "weapon of mass destruction" to include "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors." *Id.* § 2332a(c)(2).

As this case vividly illustrates, the government's sweeping construction of the statute therefore produces patently absurd results. No one thinks that petitioner's conduct implicated the concerns of the Convention. The notions that our co-signatories were carefully watching to ensure that petitioner was brought to justice and that otherwise the United States would have shirked its obligations under the Convention are nothing short of absurd. It is equally implausible to characterize petitioner's conduct as an act of terrorism. Yet, under the government's theory, had petitioner enlisted the aid of a friend in her misguided scheme, that friend could have been convicted of providing material support to a terrorist and sentenced to 15 years in prison. *See id.*

To be sure, if Congress really enacted a statute that rendered every malicious use of chemicals nationwide not just a federal offense but a crime of terrorism, this Court would have no choice but to hold the statute unconstitutional. But here there is

an available construction that avoids constitutional difficulties and comports with Congress' intent to reach conduct that implicates the Convention and merits the label "terrorism." As is often the case, Congress could have written a statute that better captured its intent, but given the manifest constitutional difficulties with the government's reading of section 229, the question is not what is the best reading of the statute, but whether a saving construction is fairly available. As demonstrated next, section 229 can be interpreted to cast a much narrower net than it would under the government's boundless interpretation.

C. The Statute's "Peaceful Purposes" Provision Must Be Construed Sensibly To Effect Congress' Intent.

When faced with a statute that, read broadly, would "effect a significant change in the sensitive relation between federal and state criminal jurisdiction" that Congress did not contemplate, this Court has not hesitated to adopt reasonable limiting constructions to avoid both unintended consequences and difficult constitutional questions that otherwise would result. *Bass*, 404 U.S. at 350; *see also, e.g.*, *Jones*, 529 U.S. at 850 (construing arson statute not to "render the 'traditionally local criminal conduct' in which" defendant had engaged "a matter for federal enforcement"). Section 229 is readily susceptible of a construction that achieves both objectives.

The key to giving section 229 a sensible scope lies in its definitional provisions. The statute presumptively defines a "chemical weapon" as a "toxic chemical," which it in turn broadly defines as

"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). Importantly, however, a substance within the broad class of "toxic chemicals" is deemed a "chemical weapon" only when "intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). And the statute defines "purposes not prohibited by this chapter" as, *inter alia*, "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A).

The best—indeed, the *only*—way to harmonize section 229 with Congress' manifest intent is to interpret the term "peaceful purpose" as confining the statute's application to non-warlike activities. In other words, the statute should be construed to reach only activities undertaken for the purposes Congress has identified as sufficient to turn an ordinary crime into the kind of warlike, terrorist conduct in which a nation-state could engage, and that the Convention prohibits. That interpretation of "peaceful purposes" avoids consequences Congress could not conceivably have intended and prevents the statute from exceeding the scope of the Convention it was enacted to implement.

"Peaceful purpose" is a not a phrase frequently found in the U.S. Code. In fact, it appears only in a handful of provisions, most of which have one thing in common: They deal with actions of the United States and its relations with other nations in the realm of resources and scientific advancements with the potential to be used to perpetrate acts of war.

See, e.g., 22 U.S.C. §§ 3201, 3221, 3242 & 42 U.S.C. §§ 2153b, 2164, 2295 (establishing policies regarding use and exchange with other nations of nuclear material for "peaceful purposes"); 51 U.S.C. §§ 20102, 70901 (establishing policies regarding activities in space for "peaceful purposes"); 50 U.S.C. § 1520a (permitting Secretary of Defense to test or experiment with chemical and biological agents for a "peaceful purpose"). In that common foreign-relations context, the term is used not to distinguish between malicious and peaceful conduct, but to draw a more general distinction between conduct that is warlike and conduct that is not.

The same focus on differentiating between the warlike and non-warlike conduct of nation-states underlies the "peaceful purpose" provision of section 229F(7). Like most provisions of the Act, section 229F is patterned after a provision of the Convention itself (albeit with a few significant alterations). Its terms are thus best understood by reference to how they are used in the Convention, which is to govern the conduct of *nation-states*, not individuals. The treaty obligation Congress sought to implement underscores this focus on the conduct of nation-states: The Convention requires the United States not to enact particular laws targeting the conduct of individuals, but to prohibit individuals within its jurisdiction from "undertaking any activity *prohibited to a State Party* under th[e] Convention." Conv. Art. VIII(1)(a) (emphasis added). This provision reflects the obvious reality that the Convention was directed at chemical weapons and warfare; it was not a global convention to adopt

uniform punishments for poisonings or eliminate all assaults involving chemicals.

Indeed, it is clear on the face of Article II(9), the provision from which section 229 is derived, that its terms were crafted to govern the conduct of nation-states, not individuals. Article II(9) declares among the "purposes not prohibited by the Convention" the use of toxic chemicals for the kinds of thing a nation-state would typically do, such as "military" or "law enforcement" activities. Because Congress took the term "peaceful purposes" directly from Article II(9), the term is therefore best interpreted by reference to what it means for a nation-state to use toxic chemicals for "peaceful purposes." In that context, the most natural reading of "peaceful purposes" is the traditional one: non-warlike. *See Shorter Oxford English Dictionary* 2128–29 (5th ed. 2002) (defining "peace" or "peaceful" as "freedom from … war or hostilities"); *The American Heritage College Dictionary* 1005 (3d ed. 1997) (same). Accordingly, section 229F(7) is best understood as preventing individuals from engaging in the kinds of warlike activities that the Convention prohibits a signatory state from undertaking.[3]

---

[3] That understanding of "peaceful purposes" as focused on the warlike conduct of nation-states is also consistent with the term's use in other international agreements. *See, e.g.*, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IV, Jan. 27, 1967, 18 U.S.T. 2410, http://www.state.gov/t/isn/5181.htm ("The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes."); Antarctic Treaty art. I, § 1, Dec. 1, 1959, 12 U.S.T. 794, http://www.nsf.gov/od/opp/antarct/

While one might object that construing "peaceful purposes" as "non-warlike" creates difficult questions about what conduct section 229 prohibits, related provisions of the U.S. Code help to avoid any ambiguity. Congress has focused quite specifically on what motivations render the conduct of individuals more akin to warlike actions of nation-states. And Congress identified those purposes explicitly in its statutory definition of terrorism: An otherwise ordinary crime becomes an act of terrorism when intended "to intimidate or coerce a civilian population," "to influence the policy of a government by intimidation or coercion," or "to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331. As that definition makes clear, not every violent or malicious crime is sensibly construed as an act of terrorism. A crime of terrorism instead must involve the sort of warlike conduct or motivations traditionally considered the prerogative of nation-states.

One might also object that using Congress' definition of terrorism to inform the meaning of "peaceful purposes" in section 229(F) is inconsistent with Congress' decision to treat section 229 as a per se crime of terrorism and to replace former 18 U.S.C. § 2332c with section 229. But while it is clear that

---

anttrty.jsp ("Antarctica shall be used for peaceful purposes only."); Agreement Concerning Cooperation on the Civil International Space Station art 14, § 1, Jan. 29, 1998, ftp://ftp.hq.nasa.gov/pub/pao/reports/1998/IGA.html ("The Space Station … shall remain a civil station, and its operation and utilization shall be for peaceful purposes, in accordance with international law.").

Congress intended to supplant 18 U.S.C. § 2332c with a provision that more closely resembled the approach and language of the Convention, there is absolutely no indication that Congress intended to radically expand the prohibition to capture every malicious use of chemicals, including those, like petitioner's, that bear no resemblance to a crime of terrorism. Petitioner's suggested construction is true to Congress' intent and avoids grave constitutional difficulties. And the government's alternative is no alternative at all. The government would read the broad terms for all they are worth and the term "peaceful purposes" narrowly, with the result being that every malicious use of chemicals—even vinegar deployed against a neighbor's goldfish—becomes a federal crime, and every overt act in furtherance constitutes material support of terrorism.

In other words, the fundamental problem with the government's reading of section 229 is that it deprives the statute of anything remotely resembling a "jurisdictional element which would ensure, through case-by-base inquiry," some connection to a distinctly federal interest. *Lopez*, 514 U.S. at 561. Despite Congress' evident intent to reach only conduct that would violate the Convention if undertaken by nation-states and would justify treating section 229 as a per se crime of terrorism, the government would read it as reaching all manner of poisonings and assaults. As noted, this Court has recognized the usefulness of jurisdictional elements as ensuring that a statute applies only where Congress intended and the Constitution permits. And the Court has not hesitated to strike down statutes that reached too broadly in the absence of a

jurisdictional element. Unlike the government's sweeping reading of the statute, petitioner's saving construction locates a jurisdictional element in section 229(F)'s reference to "peaceful purposes." With that jurisdictional element, section 229 is clearly constitutional. Without it, the statute is just as clearly unconstitutional.

That understanding also renders the statute far more compatible with the treaty it was enacted to implement. The Convention treats chemical weapons as equivalent to "weapons of mass destruction" and refers on multiple occasions to the use of various chemicals "as a method of warfare." Conv. Preamble, Art. I. It contains provisions requiring the "destruction" and "coercive verification" of chemical weapons, and obligates the United States to open its borders to international inspectors to ensure compliance with its terms. *See, e.g.*, Conv. Art. I(2), Art. III, Conv. Verification Annex Part XI. These provisions would make no sense if common household chemicals became "chemical weapons" whenever used with malicious intent. Indeed, it trivializes the concept of chemical weapons and the important work of the Convention to conflate a domestic dispute that happens to involve harmful chemicals with the use of chemical weapons of mass destruction to coerce a civilian population or government.

In short, Congress certainly understands the difference between regulating the use of chemical weapons to perpetrate acts of terrorism and regulating every malicious use of harmful substances in the Nation. Section 229 reflects Congress' attempt to do the former, and leave the latter where it has

always been: in the hands of the States. Petitioner's actions may have been malicious, but they were not warlike, and they are not sensibly covered by a statute designed to implement an international obligation to prohibit individuals from engaging in the kind of warlike conduct in which a nation-state could engage. This Court should not lightly assume that Congress intended to equate exacting revenge on a romantic rival with stockpiling chemical weapons to use against a foreign nation or a civilian population when it approached the delicate task of translating the Convention's prohibitions on nation-states into meaningful prohibitions for individuals.

III. If The Statute Cannot Be Construed To Avoid The Question, It Is Unconstitutional As Applied To Petitioner.

If section 229 in fact sweeps as broadly as the government insists, then it is unconstitutional as applied to petitioner. While the federal government certainly has the power to criminalize many misuses of chemicals, it lacks the power to criminalize every malicious use of chemicals. Only a government with police power could reach that far. The ratification of the Chemical Weapons Convention did not and cannot change that basic reality. The Convention may empower Congress to enact some legislation that would not be necessary or proper without it, but the agreement of the Senate, the President, and a foreign nation is not enough to grant Congress the police power. To the extent section 229 cannot be construed so as not to reach a domestic dispute that culminated in a thumb burn, it is plainly unconstitutional. If section 229 really extends that

far, it is not justified by the Necessary and Proper Clause or any other grant of congressional authority. It is not necessary because the Convention does not require or even contemplate it, and it is not proper because a federal police power is antithetical to our basic constitutional structure.

The government can bring petitioner's conduct within the ambit of section 229 only by depriving the statute of any semblance of a jurisdictional element that would limit the statute to conduct that implicates the Convention and is within Congress' power to reach. But in doing so, the government renders the statute so wildly "out of proportion to" the Convention "that it cannot be understood as" a meaningful, let alone constitutional, effort to implement it. *Boerne*, 521 U.S. at 532. The Convention obligates the United States to prohibit "natural and legal persons … from undertaking any activity prohibited to a State Party under this Convention." Conv. Art. VII(1). The government has never suggested that petitioner's conduct implicated this obligation. To the best of petitioner's knowledge, the United States has seen no need to report this incident to other signatory states, to establish a plan for destroying the substances petitioner used, or to open our borders to international inspectors to make sure no comparable incidents occur again. *See, e.g.*, Conv. Arts. I(2), IV, IX.

That is because no one could seriously contend that the use of harmful chemicals to exact revenge on a romantic rival is the kind of activity that would violate the Convention if undertaken by a signatory state. Indeed, the very idea is non-sensical. Widely

disseminating chemicals to induce fear in a civilian population is something both a signatory state and a terrorist could do. Poisoning romantic rivals is the exclusive province of individuals, and punishing such misconduct should be the province of the States. The Convention and its signatories are indifferent to whether petitioner is answerable for her misconduct.

Moreover, even if the Convention were not wholly indifferent to petitioner's misconduct, it is expressly indifferent to whether it is addressed by state or federal authorities. The Convention states that each signatory "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations under th[e] Convention." Conv. Art. VII(1). If the Convention really did require signature states to ban every malicious use of harmful chemicals, it still would not obligate Congress to act, let alone to do so inconsistently with our "constitutional processes." Pennsylvania has not decriminalized the malicious use of chemicals. *See, e.g.*, 18 Pa. Cons. Stat. § 2701 (prohibiting simple assault); *id.* § 2702 (prohibiting aggravated assault); *id.* § 2709 (prohibiting harassment). Nothing in the Convention obligates Congress to layer federal laws on top of existing state ones. Indeed, nothing in the Convention obligates *Congress* to do anything at all. In keeping with the settled norm that "[a] federal state may leave implementation" of a treaty "to its constituent units," Restatement (Third) of Foreign Relations Law § 321 cmt. b (2012), the Convention is agnostic as to whether the United States implements these obligations through federal or state law.

The government's current insistence that the Convention empowers Congress to intrude on the States' core criminal jurisdiction thus flies in the face of the President's and the Senate's effort to negotiate and ratify a non-self-executing treaty that is respectful of our federalist system and the differing constitutional processes of other nations. Section 229 might be perfectly rational, albeit substantially overbroad, implementing legislation for a nation without a federalist structure. But the implementation of a non-self-executing treaty, especially one that expressly directs signatories to implement the treaty in conformity with their own varied systems, is no excuse for short cuts that do not respect the structural limitations imposed by our Constitution. *See, e.g.*, *Medellin*, 552 U.S. at 525–26.

None of this leaves Congress bereft of power to implement valid treaties. Congress' power is not plenary, but especially when it comes to more traditional topics of international agreements, it is formidable. Congress possesses a variety of enumerated powers through which it may implement the Convention's requirements. *See, e.g.*, U.S. Const. art. I, § 8, cl. 10 (power "[t]o define and punish … Offenses against the Law of Nations"), cl. 14 (power "[t]o make Rules for the Government and Regulation of the land and naval Forces"), cl. 3 (power "[t]o regulate Commerce with foreign Nations, and among the several States"). But to the extent this or any other treaty might obligate the United States internationally to reach conduct that falls outside of Congress' regulatory sphere, the answer is not to expand Congress' power beyond the Framers' design to fill the gap. Rather, the answer is to assume that

the President and the Senate chose to leave the federal-state balance intact and allow a combination of federal and state law to ensure that the United States can fulfill its international obligations.

Because the Convention includes a direction to implement consistent with, not in derogation of, each signatory state's constitutional processes, the government is left to argue that, in our constitutional system, a valid non-self-executing treaty grants Congress a plenary power to regulate all conduct that bears a rational relationship to the treaty. For all the reasons already explained, that contention is fundamentally incompatible with the Constitution and this Court's precedents. *Missouri v. Holland* does not establish that proposition, but if it did, it could not be reconciled with more recent decisions that respect our basic constitutional structure. Neither any clause of the Constitution alone nor all of them in combination grants Congress that kind of police power. And the last place such plenary power lies inchoate, waiting to be unleashed by a ratified treaty, is the Necessary and Proper Clause. An unchecked power to implement treaties would amount to exactly the sort of "great substantive and independent power" that the Necessary and Proper Clause cannot supply. *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819); *see also NFIB*, 132 S. Ct. at 2591–92 (Roberts, C.J.).

The Constitution provides a mechanism for its amendment, U.S. Const. art. V, and the treaty power is not it. In an era where treaties extend far beyond the traditional notions of intercourse between nation-states and cover nearly every exercise of government

power imaginable, the treaty power the government envisions would "obliterat[e] the Framers' carefully crafted balance of power between the States and the National Government." *Morrison*, 529 U.S. at 620. At bottom, a treaty simply cannot invest Congress with the very police power the Constitution withholds. To hold otherwise would be "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 567.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

ASHLEY C. PARRISH
ADAM M. CONRAD
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

ROBERT E. GOLDMAN
ROBERT E. GOLDMAN LLC
P.O. Box 239
Fountainville, PA 18923
(215) 348-2605

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 8, 2013

STATUTORY APPENDIX

TABLE OF CONTENTS

U.S. Const. art. I, § 8, cl. 18 .... 1a
U.S. Const. art. II, § 2, cl. 2 .... 2a
U.S. Const. amend. X 3a
18 U.S.C. § 229 .... 4a
18 U.S.C. § 229A 6a
18 U.S.C. § 229F 8a
18 U.S.C. § 2331 .... 12a
18 U.S.C. § 2332c (1996) 14a
18 U.S.C. § 2339 .... 16a
18 U.S.C. § 2339A 17a
Excerpts from the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 19a
Preamble 19a
Article I 21a
Article II 22a
Article IV 28a
Article VII 33a

U.S. Const. art. I, § 8, cl. 18
Necessary & Proper Clause

The Congress shall have Power … 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.

U.S. Const. art. II, § 2, cl. 2
Treaty Clause

[The President] 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.

U.S. Const. amend. X

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.

18 U.S.C. § 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.

18 U.S.C. § 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.

18 U.S.C. § 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 70502(b) of title 46, United States Code.

18 U.S.C. § 2331
Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term “person” means any individual or entity capable of holding a legal or beneficial interest in property;

(4) the term “act of war” means any act occurring in the course of—

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin; and

(5) the term “domestic terrorism” means activities that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2332c (1996)

(a) Prohibited acts.-

(1) Offense.-A person shall be punished under paragraph (2) if that person, without lawful authority, uses, or attempts or conspires to use, a chemical weapon against-

(A) a national of the United States while such national is outside of the United States;

(B) any person within the United States; or

(C) 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 of the United States.

(2) Penalties.-A person who violates paragraph (1)-

(A) shall be imprisoned for any term of years or for life; or

(B) if death results from that violation, shall be punished by death or imprisoned for any term of years or for life.

(b) Definitions.-As used in this section-

(1) the term "national of the United States" has the same meaning as in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term "chemical weapon" means any weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of

toxic or poisonous chemicals or precursors of toxic or poisonous chemicals.

18 U.S.C. § 2339
Harboring or concealing terrorists

(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

(b) A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

18 U.S.C. § 2339A
Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment,

facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

Excerpts from the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

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),

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 of 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 another 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 the 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 per cent 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 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 instruments, 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 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 the 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.

* * *