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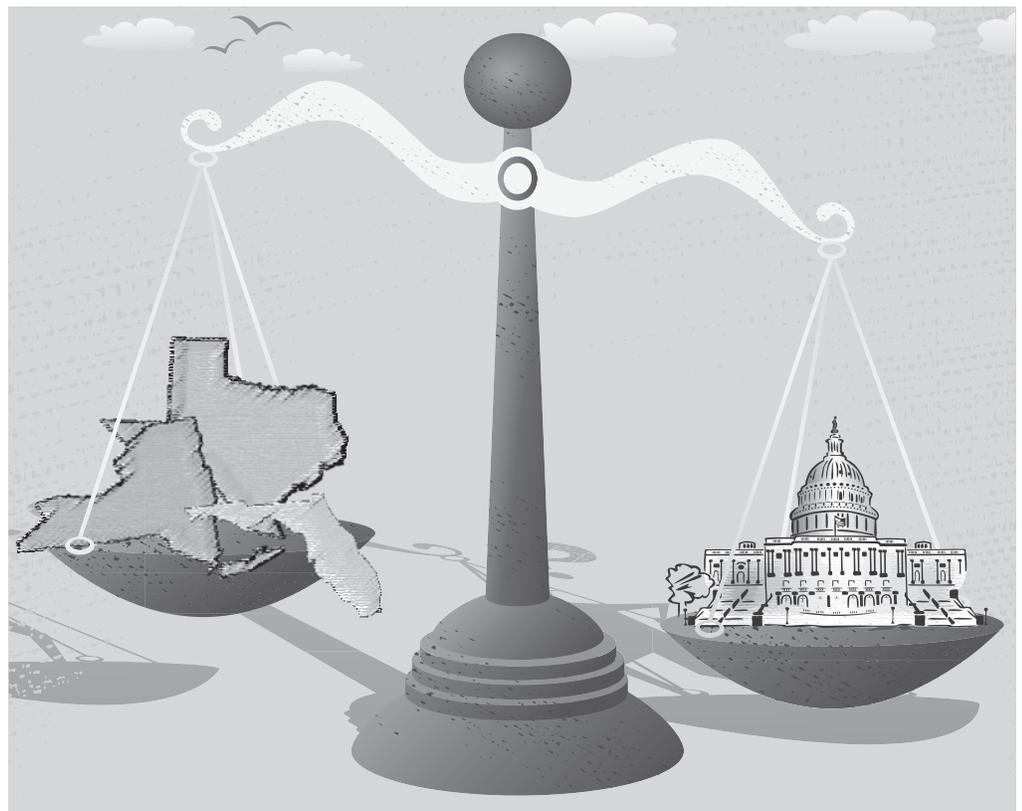
## 'Bond': Defining the Limits Of Federal Police Power

BY DAVID L. HALL  
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*This is the very ecstasy of love,  
Whose violent property foredoes itself,  
And leads the will to desperate undertakings.*  
William Shakespeare, Hamlet, II.i.99-101.

On June 2, 2014, the U.S. Supreme Court issued its opinion in *Bond v. United States*,<sup>1</sup> a case addressing a fundamental question of federalism: When it comes to federal prosecutions, when does the government go too far?

The case arose inauspiciously in a small town in Pennsylvania and followed a winding road over seven years to the Supreme Court—twice. The case's mundane origin—at the epicenter of a love triangle dominated by a betrayed wife—belied its significance. Carol Anne Bond caused a minor injury to Myrlinda Haynes—formerly her best friend and subsequently Bond's husband's pregnant lover—with a compound of toxic chemicals. Federal prosecutors charged her with a federal crime based on the Convention on Chemical Weapons, which bans the use and proliferation of chemical weapons. The court in *Bond* found that in making this ill-advised charging decision, federal prosecutors in the Eastern District of Pennsylvania violated the constitutional boundary separating state and federal police powers. The question now is to what extent *Bond* will form the basis for



future challenges of federal charges involving crimes traditionally left to the states.

In 2006, Carol Anne Bond learned that her best friend, Myrlinda Haynes, was pregnant. She was happy to hear it until she learned that the father was her husband of 14 years.<sup>2</sup> Bond vowed revenge. Using an arsenic-based compound she stole from the chemical manufacturing company where she worked and a chemical she ordered from Amazon.com, Bond mixed a compound that she hoped would give Haynes a bad rash. (The parties agreed Bond did not intend to

kill Haynes.) She tried to use the compound about two dozen times mostly without success, ultimately managing to cause a minor burn on Haynes' thumb by putting the mixture on the handle of Haynes' car door. After that injury, Haynes asked the local police for help. They told her to wash her car.<sup>3</sup>

When Bond returned, this time putting the mixture on Haynes' mailbox, Haynes told her mail carrier, who advised the U.S. Postal Service. Postal inspectors put the mailbox under video surveillance and recorded Bond stealing a letter and applying the chemical

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mixture again on Haynes' car.

In a move the Supreme Court generously called "surprising,"<sup>4</sup> federal prosecutors charged Bond with two counts of possessing and using a chemical weapon,<sup>5</sup> in violation of the Chemical Weapons Convention Implementation Act.<sup>6</sup> That Act, as its name suggests, implements the 1997 Chemical Weapons Convention, which seeks to "verify the destruction of chemical weapons worldwide as well as ensure the non-proliferation of these weapons and the toxic chemicals used in their manufacture."<sup>7</sup> The Convention targets chemical weapons like sarin gas, mustard gas, and chlorine gas, and its framework has been used to destroy stockpiles of chemical weapons in places like Syria and Iraq.<sup>8</sup> Bond's defense attorney said he was "flabbergasted" when he learned federal prosecutors intended to charge Bond under the implementing act of this Convention.<sup>9</sup> He wasn't the only one.

Bond entered a guilty plea, reserving her right to appeal, and was sentenced to a six-year term of incarceration. She appealed on the ground that her conviction violated the 10th Amendment because the federal prosecution usurped police power reserved to the states. The Third Circuit denied her appeal on standing grounds, agreeing with the government that Bond was not the proper party to safeguard a state's police powers from federal usurpation.<sup>10</sup> The Supreme Court granted certiorari and reversed the Third Circuit's ruling on standing, holding that a private party injured by the federal government's violation of the 10th Amendment does indeed have standing.<sup>11</sup> On remand, the Third Circuit addressed Bond's appeal on the merits and affirmed her conviction but noted that "Bond's prosecution seems a questionable exercise of prosecutorial discretion."<sup>12</sup> The Supreme Court again granted certiorari and unanimously reversed the Third Circuit. Chief Justice John Roberts wrote the majority opinion. Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito wrote separate concurring opinions.

The majority found that the application to Bond of the Chemical Weapons Implementation Act violated fundamental principles of federalism. Chief Justice Roberts wrote that under the U.S. Constitution, the federal government's powers are limited; in general, the police powers are reserved to the states, and the federal government may exercise only those powers specifically granted to it. Applying these principles to the Chemical Weapons

Implementation Act, the majority in *Bond* found that the Act did not expressly authorize federal intrusion into a routine assault case, which is squarely within the realm of criminal matters traditionally left to the states.

Specifically, the majority held that the Chemical Weapons Implementation Act was ambiguous in that it did not make clear whether Congress intended the statutory term "chemical weapon" to include the mixture used by Bond to inflict a minor injury on Haynes. As a result of this ambiguity, the majority read the Act narrowly, finding that Congress intended the Act to apply to the use of chemicals as weapons of war, such as poisoning a public water supply. Therefore, the majority declined to read the Act to cover every harmful activity involving chemicals; to hold otherwise would mean:

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'Bond' does not lay down a bright line boundary separating federal and state police powers. Even in the limited context of the Chemical Weapons Convention Implementation Act, it is not entirely clear where to draw this line.

Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar.<sup>13</sup>

Stating that it was "reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish,"<sup>14</sup> the majority found the Act did not extend to Bond's crime. Under the government's view, the court found, virtually any poisoning case could be prosecuted by the federal government. Noting that the Commonwealth of Pennsylvania was fully capable of prosecuting Bond, the majority seemed mystified by the prosecutors' "zeal to prosecute Bond" and their decision to "displace the public policy of the Commonwealth of Pennsylvania ... that Bond does not belong in prison for a chemical weapons offense."<sup>15</sup>

Although the court did not reach the question of whether the Chemical Weapons Implementation Act itself violated the 10th Amendment, the majority opinion in *Bond* is a strong affirmation of the principle that federal and state police powers are far from coterminous, notwithstanding the many areas where both federal and state authorities exercise overlapping jurisdiction. The number of federal prosecutions today is twice that of 25 years ago.<sup>16</sup> One commentator has estimated that the number of federal crimes has grown from dozens in the 20th century to about 4,500 today.<sup>17</sup> The sheer scale of the federal criminal enforcement footprint suggests the likelihood of federal encroachment on state police powers.

And yet, *Bond* does not lay down a bright line boundary separating federal and state police powers. Even in the limited context of the Chemical Weapons Convention Implementation Act, it is not entirely clear where to draw this line. The court in *Bond* made reference to the case of Hessem Ghane, a chemist living in Missouri, who stole potassium cyanide from the college where he worked for the purpose, he said, of committing suicide. Ghane had a history of mental health issues, including multiple interactions with the Missouri mental health system. Approximately three years after stealing the potassium cyanide, he called a suicide crisis hotline and was taken by police to a hospital for treatment. There, he told an employee of the hospital about the potassium cyanide, and his treating physician contacted the police. Federal prosecutors then charged him with violating the Chemical Weapons Convention Implementation Act. Ghane was convicted after a jury trial and sentenced to 97 months incarceration.<sup>18</sup> The court in *Bond* mentioned Ghane's case without reconciling it, except to note that Ghane "possessed enough potassium cyanide to kill 450 people."<sup>19</sup> This is certainly a fact that distinguishes Ghane's case from Bond's, but it is far from clear that Ghane's case differs materially from Bond's with regard to congressional intent; it would be surprising to learn that Congress intended the statutory term "chemical weapon" to include potassium cyanide possessed for the purpose of committing suicide.

Of course, *Bond* was not the first occasion on which the Supreme Court has identified limitations on federal law enforcement authority. In *Bailey v. United States*,<sup>20</sup> for example, the court found overbroad the federal

government's construction of 18 U.S.C. §924(c)(1), a federal statute prohibiting the use or carrying of a firearm during a drug trafficking crime. *Bailey* was a consolidated appeal involving two defendants: one had a gun in the trunk of his car while transporting cocaine; the other had a gun in a locked trunk in her closet while selling drugs from her home. Although the court did not expressly address the distinction between federal and state police authority, it narrowly read §924(c)(1), holding in a unanimous opinion that the statute did not apply to the defendants' conduct because "use" under the statute means "active employment"—not mere possession.<sup>21</sup>

Likewise, in 2000, the court narrowly read a federal arson statute prohibiting damaging or destroying "by means of fire or an explosive, any ... property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," finding it did not reach the actions of a defendant who tossed a Molotov cocktail through the window of his cousin's home but did not injure anyone. That opinion, *Jones v. United States*,<sup>22</sup> foreshadowed *Bond* in holding that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes ... [and that to read the statute at issue as] encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime."<sup>23</sup>

On a different basis, but in a similar vein, the court in *United States v. Lopez*<sup>24</sup> struck down the Gun-Free School Zones Act, which prohibited the possession of firearms in a school zone. That case addressed what seemed to be a purely local offense—a teenager who brought a handgun and five rounds of ammunition to his high school. Texas authorities initially charged him with possessing a firearm on school property, but federal prosecutors then stepped in and charged him with violating the Gun-Free School Zones Act.<sup>25</sup> The court in *Lopez* found that Congress did not have the power under the Commerce Clause to regulate this kind of local criminal activity and warned against allowing the federal government to exercise a "general police power of the sort retained by the States," drawing a "distinction between what is truly national and what is truly local."<sup>26</sup>

Following *Lopez*, the court extended this line of reasoning in *United States v. Morrison*,<sup>27</sup> where it struck down the federal Violence

Against Women Act on similar grounds. While *Morrison* did not involve police powers but a federal civil remedy, the court did find a limit to federal authority under the Commerce Clause. In *Morrison*, the court addressed a federal statute which enabled sexual assault victims to sue their assailants in federal court. The plaintiff in *Morrison* sued two men she alleged had raped her at Virginia Tech. The court found that this statute—42 U.S.C. §13981—was unconstitutional because Congress did not have the authority under the Commerce Clause to create the cause of action. The court's reasoning rested in part on the distinction between state and federal crimes: "[W]e can think of no better example of the police power," wrote Chief Justice William Rehnquist for the majority, "which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."<sup>28</sup>

However, in *Gonzales v. Raich*,<sup>29</sup> the court upheld a federal statute that penalized what appeared to be entirely local criminal activity by two seriously ill California residents growing marijuana for personal use. The court found that under the Commerce Clause, Congress had the power to criminalize the use of medical marijuana, even when it was grown and used locally. The court devoted a considerable portion of its majority opinion to distinguishing *Lopez* and *Morrison*. Although *Lopez* and *Morrison* both involved local criminal activity, the court reasoned, regulating the growth and sale of marijuana was economic in nature. As a result, Congress did have the authority to regulate the marijuana use at issue in *Gonzales v. Raich*. The majority found that even if the marijuana was cultivated for personal use, it still could affect the interstate drug market.<sup>30</sup>

In the wake of *Gonzales v. Raich*, a number of scholars contended that the court was out of the business of policing the line between state and federal powers—including the distinction between local and federal crimes: "Gonzales v. Raich: Has New Federalism Gone Up in Smoke?,"<sup>31</sup> "*Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs,"<sup>32</sup> and "Was *Gonzales v. Raich* the Death Knell of Federalism?"<sup>33</sup>

Then came *Bond*, a decision that suggests a possible means to challenge a federal criminal prosecution when the government's reach exceeds its grasp. Might

*Bond* provide a basis for federal defendants successfully to bring 10th Amendment challenges to federal criminal charges on the ground that the federal government has exceeded its constitutional authority?

*Bond* was decided on its admittedly extreme facts. Thus, in the run of the mill case, where Congress has acted within its constitutional authority in unambiguously granting power to the federal executive, it is unlikely *Bond* will serve as the basis for dismissal. Still, *Bond* does suggest that when federal prosecutors base a criminal prosecution on a novel theory, they might be too clever by half, thereby violating the 10th Amendment. *Bond* makes clear that the more broadly the government construes the statutory basis for its authority, the more vulnerable its actions are to 10th Amendment attack. Such challenges would appear most promising in cases where federal prosecutors—such as the prosecutors involved in *Bond*—seek to use a sledgehammer to crack a nut.

Defendants are already seeking to employ *Bond* to defend against federal charges—with mixed results. One defendant relied on *Bond* in an unsuccessful motion to dismiss an indictment charging illegal gambling and money laundering in the Northern District of Texas.<sup>34</sup> A defendant in Florida also unsuccessfully challenged his conviction and sentence for conspiracy to distribute methamphetamine based on *Bond*'s 10th Amendment analysis.<sup>35</sup> The district court in that case relied on *Gonzales v. Raich*, and found that nothing in *Bond* called its holding into question.<sup>36</sup>

A defendant in the Western District of Arkansas was more successful.<sup>37</sup> There, K. Vaughn Knight, an attorney, was convicted at trial of multiple counts relating to bankruptcy fraud arising out of his representation of a client in a number of financial transactions prior to instituting a bankruptcy proceeding. In one of the counts, Knight was charged under the theory that he had—"in contemplation of [bankruptcy], or with intent to defeat the provisions of [the bankruptcy statute]"—assisted his client in the knowing and fraudulent transfer or concealment of "his property or the property of such other person or corporation."<sup>38</sup> Knight was convicted at trial and subsequently moved for a judgment of acquittal on this count.

The district court found the government had presented evidence that Knight's actions were fraudulent under a theory of aiding

and abetting, but focused on the question of whether Knight's actions in assisting his client could be considered "in contemplation of bankruptcy." The government contended that "contemplation of bankruptcy" should be construed broadly to include the fact that Knight knew his client was thinking about filing for bankruptcy (even if the client was not certain at the time that he would file for bankruptcy). Knight argued that this reading of the statute was too broad, and the court agreed, finding that "[a] person does not act 'in contemplation of' bankruptcy by virtue of the fact that he has a conversation about bankruptcy and then sometime later transfers or conceals property."<sup>39</sup> The court relied in part on *Bond* in reaching its conclusion, stating that "encompassing general fraud crimes that take place after a simple discussion of bankruptcy [] would intrude on the police powers of the state to prosecute general fraud crimes."<sup>40</sup> The district court granted Knight's motion for judgment of acquittal on one count, and also granted him a new trial on the remaining counts.<sup>41</sup>

Currently before the Supreme Court is the matter of *Yates v. United States*,<sup>42</sup> which seeks to answer the question of whether a commercial fisherman who disposed of undersized fish can be prosecuted under the "anti-shredding" provision of the Sarbanes-Oxley Act of 2002.<sup>43</sup> A National Marine Fisheries Services officer inspected John Yates' fishing vessel containing 3,000 fish and found 72 red grouper under the minimum length provided for in federal regulations. The 72 fish were segregated in a crate, and Yates was told they would be seized upon his return to port. Yates threw the fish overboard. He should not have done so, and could have lost his fishing license and been fined under the Magnuson-Stevens Fishery Conservation and Management Act.<sup>44</sup> But instead he was prosecuted criminally under Sarbanes-Oxley. The question before the court in *Yates* is whether the dumping of undersized fish falls within the Sarbanes-Oxley prohibition against the destruction of "any ... tangible object" with the intent to impede a federal investigation. Yates has cited *Bond* in support of his argument that the term "tangible object" should be interpreted narrowly to include only tangible objects designed to retain information. A group of 18 law professors, filing as amici curiae, contend that the government's overly broad reading of the statute is part of a pattern of federal "overcriminalization," citing

*Bond* for the proposition that criminal statutes should be strictly construed.<sup>45</sup> Similarly, the National Association of Criminal Defense Lawyers has argued that as in *Bond*, if the statute at issue in *Yates* "was drafted to include red grouper, then the overbreadth of the statute alone creates constitutional concerns."<sup>46</sup>

Of course, the unanswered question after *Bond* is, why did prosecutors institute the prosecution in the first place? The decision is mystifying in light of the facts of the case, involving a fact pattern commonly observed in state prosecutions, and clearly unrelated to national security. There is no suggestion that the case was anything but a domestic assault, at worst. The government's decision to employ federal resources to address this local crime is never explained because the issue before the court in *Bond* was not the poor judgment of the prosecutors but the limits of federal power. And in the end, it was not the federal prosecutors who paid for this abuse of prosecutorial discretion but Bond herself who served six years of incarceration for a crime she did not commit. Prosecutors cannot be reminded too often of the admonition of Justice George Sutherland:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>47</sup>



1. 134 S. Ct. 2077 (2014).  
 2. *United States v. Bond*, 581 F.3d 128, 131-32 (3d Cir. 2009), rev'd, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011); Jeremy Roebuck, "U.S. Supreme Court: Not Terrorism, Just a Love Triangle," *The Philadelphia Inquirer* (June 4, 2004), [http://articles.philly.com/2014-06-04/news/50304534\\_1\\_clifford-bond-myrlinda-haynes-chemical-weapon](http://articles.philly.com/2014-06-04/news/50304534_1_clifford-bond-myrlinda-haynes-chemical-weapon).  
 3. Roebuck, supra note 2.  
 4. *Bond*, 134 S. Ct. at 2087.  
 5. Prosecutors also charged her with mail theft in violation of 18 U.S.C. §1708. *Bond*, 134 S. Ct. at 2087.  
 6. 18 U.S.C. §229 et seq.  
 7. Organisation for the Prohibition of Chemical Weapons,

"Brief History of the Treaty" (last accessed June 22, 2014), <http://www.opcw.org/news-publications/publications/history-of-the-chemical-weapons-convention/>.

8. Id.; see also Organisation for the Prohibition of Chemical Weapons, Demilitarisation (last accessed June 25, 2014), <http://www.opcw.org/our-work/demilitarisation/>.

9. See Roebuck, supra note 2.  
 10. *Bond*, 581 F.3d at 137.  
 11. *Bond*, 131 S. Ct. at 2365.  
 12. *United States v. Bond*, 681 F.3d 149, 165 (3d Cir. 2012), rev'd, 134 S. Ct. 2077.  
 13. *Bond*, 134 S. Ct. at 2091.

14. Id.  
 15. *Bond*, 134 S. Ct. at 2093 (internal punctuation omitted). The concurring opinions agreed that the prosecution of Bond was not authorized by law, but would have decided the issue on constitutional grounds, rather than on the narrower grounds of the majority opinion.

16. Rachel E. Barkow, "Federalism and Criminal Law: What the Feds Can Learn From the States," 109 Mich. L. Rev. 519, 523 (2011).

17. Gary Fields & John Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," *Wall St. J.*, July 23, 2011, <http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654>.

18. Theo Emery, "Suicide by Chemical Weapon," *The New Yorker*, June 10, 2014, <http://www.newyorker.com/online/blogs/elements/2014/06/suicide-by-chemical-weapon.html>.

19. *Bond*, 134 S. Ct. at 2092.

20. 516 U.S. 137 (1995).

21. Id. at 150-51. After *Bailey*, Congress amended the statute to address the court's ruling "in what was colloquially known as the Bailey Fix Act." *Abbott v. United States*, 131 S. Ct. 18, 25 (2010) (quotation omitted).

22. 529 U.S. 848 (2000).

23. Id. at 858 (quotation omitted).

24. 514 U.S. 549 (1995).

25. Id. at 551.

26. Id. 567-68.

27. 529 U.S. 598 (2000).

28. 529 U.S. at 618.

29. 545 U.S. 1 (2005).

30. 545 U.S. at 23-33.

31. Laura W. Harper, "*Gonzales v. Raich*: Has New Federalism Gone Up in Smoke?," 57 Mercer L. Rev. 1309 (2006).

32. Ilya Somin, "*Gonzales v. Raich*: Federalism As A Casualty of the War on Drugs," 15 Cornell J.L. & Pub. Pol'y 507 (2006).

33. Brandon J. Stoker, "Was *Gonzales v. Raich* the Death Knell of Federalism? Assessing Meaningful Limits on Federal Intra-state Regulation in Light of *U.S. v. Nascimento*," 23 BYU J. Pub. L. 317 (2009).

34. *United States v. Castillo*, No. 14-0017, 2014 WL 2766540, at \*5 (N.D. Tex. June 18, 2014).

35. *Soto v. United States*, No. 11-1124, 2014 WL 2993800 (M.D. Fla. July 3, 2014).

36. Id. at \*5.

37. *United States v. Knight*, No. 50035, 2014 WL 2584814 (W.D. Ark. June 10, 2014).

38. 18 U.S.C. §152.

39. 2014 WL 2584814, at \*27.

40. Id.

41. Id.

42. *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013), cert. granted in part, 134 S. Ct. 1935 (U.S. April 28, 2014) (No. 13-7451). See generally Brent Kendall, "Can Feds Use Sarbanes-Oxley to Hook a Fisherman?," *Wall St. J.*, April 28, 2014, <http://blogs.wsj.com/law/2014/04/28/can-feds-use-sarbanes-oxley-to-hook-a-fisherman-supreme-court-to-decide/>; Lawrence Hurley, "Top U.S. Court to Hear White-Collar Case of Fish Thrown Overboard," *Reuters*, April 28, 2014, <http://www.reuters.com/article/2014/04/28/us-usa-court-crime-idUSBREA3R0VL20140428>.

43. 18 U.S.C. §1519.

44. 16 U.S.C. §§1857(1)(A), 1858(a) and (g).

45. Brief for Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner at 20-21, *Yates v. United States*, No. 13-7451 (2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/No-13-7451-tsacEighteenCriminalLawProfessors.pdf>.

46. Brief of the National Association of Criminal Defense Lawyers and the American Fuel & Petrochemical Manufacturers as Amici Curiae in Support of Petitioner John Yates at 12, No. 13-7451 (2014), [http://www.americanbar.org/content/dam/aba/publications/supreme COURT\\_BriefsV4/13-7451\\_pet\\_amcu\\_nacdl-et-al.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme COURT_BriefsV4/13-7451_pet_amcu_nacdl-et-al.authcheckdam.pdf).

47. *Berger v. United States*, 295 U.S. 78, 88 (1935).