



By Richard Lazarus

## The Reach of Non-Environmental Law

Environmental lawyers do not spend a lot of time worrying about whether the Telecommunications Act of 1996 restricts local authority over wireless facility siting. And they devote even less time mulling over the constitutionality of the federal government's secret surveillance of foreign nationals. But whatever time they might spend on the first two topics is still likely far greater still than time spent debating whether Carol Anne Bond committed a federal crime when, stating that she would "make your life a living hell," she smeared a poisonous dust on the mailbox, car door handles, and doorknob of her pregnant friend Mrylinda Haynes after learning that Bond's husband was the father of Haynes's baby.

A review of the Supreme Court's current docket, however, suggests, these are the cases most worthy of the environmental bar's attention. Put aside the three obvious Clean Water Act cases, *Los Angeles County Flood Control District v. NRDC*, *Decker v. Northwest Environmental Defense Center*, and *Georgia-Pacific v. Northwest Environmental Defense Center*. Then do the same to the three Fifth Amendment takings cases, *Arkansas Fish & Game Assn v. U.S.*, *Koontz v. St. Johns River Water Management District*, and *Horne v. Department of Agriculture*. They may all establish significant precedent, but that precedent will most certainly pale in comparison to that established in

the "non-environmental" cases of *City of Arlington v. Federal Communications Commission*, *Clapper v. Amnesty International*, and *Bond v. United States*

*City of Arlington v. FCC*, argued in January, concerns local governmental wireless facility siting authority and presents the issue whether a federal agency is entitled to so-called *Chevron* deference in determining the scope of its own jurisdiction. *Chevron*, of course, refers to the Supreme Court's 1984 ruling in *Chevron U.S.A. v. NRDC*, when the Court announced that, absent a statute's plain meaning, the courts should defer to a reasonable statutory interpretation advanced by the federal agency charged by Congress with the statute's administration. While the Court has since defined more precisely the kinds of agency decisionmaking entitled to such deference, *Chevron* continues to dominate federal environmental litigation and there is no more significant issue raised in such litigation than the jurisdictional reach of federal environmental statutes. For that reason, what the Court says about *Chevron* in the *City of Arlington* case may well be momentous for environmental lawyers.

*Clapper v. Amnesty International*, argued last October, concerns the constitutionality of the federal government's secret surveillance program and presents a threshold question whether journalists, lawyers, and human rights organizations concerned about the government's incidentally listening in on their conversations possess Article III standing to bring the case. Central to the Court's consideration of that issue are a host of environmental standing cases, most important, *Friends of the Earth v. Laidlaw*, decided in 2000. After a series of Court rulings had prompted lower courts to raise potentially insurmountable Article III hurdles to environmental citizen suits, *Friends of the Earth* restored standing to environmental plaintiffs, by making clear that a plaintiff's reasonable concerns about the effects of

pollution could satisfy Article III requirements. But for that same reason, what the Court says in *Clapper*, where the plaintiffs are relying heavily on that plaintiff-friendly language in *Friends of the Earth*, could be portentous for environmental citizen plaintiffs as well.

Finally, the Court's review of Carol Ann Bond's criminal conviction in *Bond v. United States* also clearly warrants the careful attention of environmental lawyers. Bond was convicted of violating the Chemical Weapons Convention Implementation Act of 1998, but challenges the constitutionality of that federal law on the ground that it exceeds Congress's power under the Commerce Clause. The federal government defends by relying, among other grounds, on the argument that Congress's treaty power provides it with authority to enact laws that exceed Commerce Clause authority when necessary and appropriate to meet international treaty obligations.

The government's primary support is the Supreme Court's 1920 decision in *Missouri v. Holland*, upholding the constitutionality of the Migratory Bird Treaty Act of 1918, as a permissible exercise of Congress's treaty power. Since the mid-1990s, when a series of Supreme Court rulings cast a cloud on what had previously been expansive and settled

notions in defining the jurisdictional reach of federal environmental laws, federal government lawyers and environmentalists have been debating whether *Missouri* and international environmental treaties might provide an alternative constitutional basis for congressional authority. In *Bond*, the Court may decide.

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