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Foreign Affairs

Treaties

On the heels of the world watching whether Congress would consent to the President's request to make limited military strikes in Syria for its use of chemical weapons, a legislative decision stayed in light of Syria's agreement to destroy all its chemical weapons and join the Chemical Weapons Convention treaty, the U.S. Supreme Court's October 2013 Term docket includes *Bond v. United States*, a case that confronts whether Congress is empowered to enact federal criminal laws prohibiting American citizens from using chemical weapons, where Congress lacks such power in absence of the treaty. The case pits federalism principles against the empowerment of the United States' diplomats to negotiate treaties that require foreign governments to adhere to domestic obligations, including human rights.

Can the United States Enforce Domestic Adherence to Chemical Weapons Treaties?



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The world's discussion about the use of chemical weapons in Syria reached the halls of Congress in recent weeks, with a vote to authorize military strikes now delayed indefinitely at the President's re-

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quest in light of the American-Russian accord pursuant to which the Syrian Assad regime will destroy all its chemical weapons and Syria will finally join the Chemical Weapons Convention.

The Congressional debate raised constitutional and legal issues, including whether the President already has the authority to order the strikes notwithstanding his petition to Congress for authorization and whether the United States may and should unilaterally pursue compliance with treaties or their principles outside the international tribunals designed to enforce them. The dialogue between the Executive and Legislative Branches on these issues has largely been paused as a consequence of the stay of the authorization vote.

Bond v. United States

The Judicial Branch has not intervened in the debate about Syria, but sitting on the U.S. Supreme Court's docket this fall is a case concerning whether Congress has the power to enact federal criminal laws to implement the Chemical Weapons Convention treaty by prohibiting the domestic possession and use of chemical

weapons *inside* the United States, including by American citizens. The case is *Bond v. United States*, 681 F.3d 149 (3d Cir. 2011), *cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158) (“*Bond II*”). Its resolution may require interpretations of constitutional terrain not visited by the Court for almost a century, and its outcome has created an unsettling level of uncertainty in certain quarters.

The predominant constitutional law question at issue is whether the grant of limited, enumerated legislative powers to Congress set forth in Article I, Section 8 of the Constitution (such as the powers to tax, establish post offices, and regulate interstate commerce), which are the traditional source of Congressional power and have served as the stage for the Court’s federalism rebirth in recent decades, is supplemented by a power to enact legislation to implement and execute a treaty made by the President, *where Congress otherwise lacks the power to enact such legislation absent the treaty*. That last part is the root of the discord, and its resolution is a high-stakes event for two competing philosophical camps: those who fear anything beyond a limited federal government with cabined legislative powers and those who embrace the empowerment of the United States as a world leader across broad subject matter spectrums, including those traditionally of local province in America.

The underlying fact pattern of *Bond II* is itself somewhat of a dramatic script. Pennsylvania resident Carol Bond—an employee of a chemical company who sought revenge against a romantic rival—concocted a harmful chemical agent and planted it on her victim’s home door knob, car door handle, and mailbox.

The mailbox was her downfall. After local law enforcement failed to pursue the case with meaningful vigor, the victim enlisted U.S. postal inspectors who staged a successful sting operation to catch Bond in the act.

The U.S. Attorney’s office then prosecuted Bond for possessing and using a chemical weapon in violation of a federal criminal statute enacted by Congress pursuant to our nation’s obligation as a signatory to the 1993 Chemical Weapons Convention—yes, *that* Chemical Weapons Convention. The treaty requires nation signatories to implement domestic laws prohibiting the criminal use of toxic chemicals. According to treaty negotiators who filed an amicus brief in *Bond II*, reaching both State and non-State actors was necessary to achieve the treaty’s goal of universal prohibition.

Bond asserts that the States through adoption of the Constitution did not cede to Congress the power to enact a criminal statute that reaches local criminal activity, as the general police power was reserved to the States.

Bond pled guilty to all charges (including mail theft), but reserved her right to appeal the constitutionality of the federal chemical weapons statute (which carried a 5-year mandatory sentence) on the theory that its enact-

ment was outside Congress’s enumerated legislative powers. In short, she asserts that the States through adoption of the Constitution did not cede to Congress the power to enact a criminal statute that reaches local criminal activity, as the general police power was reserved to the States.

After first holding in 2011 that Bond had standing to challenge the constitutionality of the federal law even though she is not a State, the Supreme Court is now reviewing a Third Circuit Court of Appeals opinion that the statute is constitutional as an application of the Necessary and Proper Clause (“The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States”), following an exercise of the Treaty Power (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”).

In so holding, the Third Circuit relied on a 1920 Supreme Court opinion, *Missouri v. Holland*, 252 U.S. 416 (1920), reading that case as establishing that “Congress may, under the Necessary and Proper Clause, legislate to implement a valid treaty, regardless whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state’s traditional powers.” That is, as long as the implementing legislation bears a rational relationship to a valid treaty, *Holland* instructs that it is “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.”

The Third Circuit concluded that because the Chemical Weapons Convention “falls comfortably within the Treaty Power’s traditional subject matter limitation,” the implementing federal criminal statute is “within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power.”

Defining Limited Federal Government

Under that interpretation, Congress has the power to enact legislation that it otherwise has no power to enact, as long as the treaty-implementing legislation is rationally related to the treaty and does not violate an express prohibition in the Constitution (such as the prohibition against abridging the freedom of the press).

As demonstrated by the legal briefs submitted to the Supreme Court in *Bond II*, this interpretation seriously concerns those whose political or judicial philosophies are married to the core principles of federalism in defining the boundaries of a limited federal government. As argued by Bond’s counsel, the “truly breathtaking” consequence of interpreting a combination of the Treaty Power and the Necessary and Proper Clause as authorizing such vast Congressional power “would provide a roadmap for circumventing nearly every limitation on federal power [the] Court has ever recognized.”

The boundary of such legislative power would mirror that of the Treaty Power—which, as John Jay explained in *The Federalist* No. 64, encompasses anything concerning “war, peace and commerce.” In today’s global world of international law and commerce, that canvas is undeniably much broader than in 1789. For example, the subject matter of international compacts (some-

times driven by United States interests and leadership) can include human rights that touch education and family law, which are subjects traditionally within the governing authority of the States.

As the Third Circuit acknowledged, the continued viability of *Missouri v. Holland* effectively means that “nothing [is] off-limits in a world where, more and more, international treaties govern a virtually unlimited range of subjects and intrude deeply on internal concerns,” which “runs a significant risk of disrupting the delicate balance between state and federal authority.” That delicate balance is protected through *federalism*, the trumpet of the limited government camp and which has received renewed attention from the Court over the last two decades.

In *Bond II*, the Court’s jurisprudential resuscitation of that structural pillar must be reconciled with what some assert the Framers intended through the combination of the Treaty Power and the Necessary and Proper Clause.

In what may feel like a boomerang to those who resurfaced federalism partially through the originalism methodology of constitutional interpretation, those embracing *Missouri v. Holland* argue that the origin of the Constitution itself compels the affirmation of the 1920 opinion. They explain that a primary dissatisfaction with the Articles of Confederation that led to the Constitutional Convention in the first instance was the individual States’ disruption of international affairs. Foreign countries did not receive American diplomats as equals as they could not effectively negotiate because each State had, in effect, veto power over a treaty under the Articles of Confederation, which diffused the international ambitions and necessities of our young nation.

As one amicus explained, Justice Story described the States’ control over the treaty power as contributing to “the prostration, and utter imbecility of the confederation.” *Missouri v. Holland* defenders posit that the Constitution aimed to and, in fact did, eliminate this problem by ceding all—not some, but *all*—of the States’ sovereign power over foreign affairs to the federal government. Indeed, in addition to the Treaty Power being assigned to the President, the Constitution states: “No State shall enter into any Treaty, Alliance, or Confederation.”

“[W]ill the Supreme Court hold that the federal government that negotiates the treaties upon which it is contemplating military action, on the other hand lacks the authority to enforce that same treaty inside the United States through implementing legislation?”

To protect the States against a runaway President, as one amicus argued, “[t]he Framers gave the power to consent to treaties to the Senate precisely because they considered the Senate—in which each State is equally represented—uniquely suited to defend the interests of the States.”

The Solicitor General and amici opposing Bond fortify their description of the intent of the Framers with historical examples such as 19th Century laws enacted regarding such state subjects as the local rights of aliens, extradition, intestate succession and property taxes. They walk the Court through the failed attempt by defenders of racial segregation during the 1950s to narrow the Treaty Power (via the Bricker Amendments) out of fear that United Nations human rights declarations would be used to control and regulate local matters.

According to one amicus brief, the Bricker Amendments were rejected because, among other things, they “would have crippled the Nation’s ability to conduct foreign policy.”

Bond and her amici supporters seeking to distinguish *Missouri v. Holland* or have it overruled altogether, point to the Supreme Court’s 1957 plurality opinion in *Reid v. Covert*, 354 U.S. 1 (1957), stating 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.” They argue that the Third Circuit’s opinion endorses expanded Congressional power in violation of federalism.

Opponents counter that *Reid* stands for the proposition that a treaty does not permit what the Constitution expressly forbids, such as infringement of individual rights like those provided under the Fifth and Sixth Amendments (which were at issue in *Reid*). That interpretation does carry some logical support in that sovereigns—for example, States—are indeed vested with the authority to make any and all laws *except those prohibited* (depending on one’s theory of government, either prohibited as natural law or as expressed in a constitution). If all sovereign treaty-making power was forfeited by the States to the federal government via the Constitution, it stands to reason that the federal government has been vested with the entirety of such authority.

Bond supporters respond that the Court has made clear (even in *Bond I*) that liberty is secured not only through individual rights but also by the federalism that is the structure of the Constitution and our dual-sovereignty system of government. That is, the efficacy of the American experiment rests on the balance of power not only horizontally (Executive-Judicial-Legislative) but vertically (Federal-State-Local).

Bond supporters argue that the Treaty Power cannot infringe the federalism structure of the Constitution, any more than it can confer legislative power on the President or grant that office a line-item veto. They question the proposition that the President can, through a mere promise to a foreign leader, empower Congress to do something “it lacked the power to do the day before.”

The Solicitor General responds that requiring a case-by-case analysis of whether local conduct is regulated “would hamstring U.S. treaty negotiators and undermine global confidence in the United States as a reliable treaty partner, to the detriment of the foreign policy and national security of the United States.” Concomitantly, interpreting the provisions at issue to allow the President to negotiate only the illusory promise of a recommendation to fifty State legislatures would return the country to the predicament under the Articles of Confederation: “Those provisions cannot now sensibly be

read to require the very same chaotic practice of mandatory State treaty-implementation they were intended to end.” Such framework, the Solicitor General’s supporters argue, “would severely hobble the ability of the United States to exert diplomatic power and influence in order to secure uniform global implementation and compliance” with treaties like the Chemical Weapons Convention.

Limitations on Treaty Power

In a moment in history reveling in global commerce, multinational corporations, the United Nations and similar international organizations, and ever-expanding attempts at diplomatic solutions to human-rights challenges, where the United States occupies a position of leadership and may have an important interest in obtaining its foreign counterparts’ adoption of domestic legislative measures, the Supreme Court may be about to offer important guidance on the limits of the Treaty Power to the extent Congressional implementing legislation is implicated.

On the heels of an Executive and Legislative Branch debate about the use of military force by the United States to put weight behind international treaties and their underlying provisions, will the Supreme Court hold that the federal government that negotiates the treaties upon which it is contemplating military action, on the other hand lacks the authority to enforce that same treaty inside the United States through implementing legislation?

Alternatively, will the Court interpret the Treaty Power and Necessary and Proper Clause to mean that

the federal government may, simply by finding a willing contractual partner in the form of a foreign nation, disrupt the federalism structure that formed the very dual-sovereignty compromise upon which the nation was formed at the founding?

Whether one views the government formed through the Constitution as one of limited government as a political theory (i.e. we were designing *all* governmental power to be limited), one of a limited government as a constitutional theory (i.e. we were designing the *federal* governmental power to be limited), or one of divided responsibilities where the federal government possesses all the power to lead the world, the Court is approaching a crossroads. If it enters the intersection, the stakes are potentially extremely high, as perhaps demonstrated by both sides supplying alternative arguments (some previously consciously abandoned) as a transparent pitch that the Court decline to issue an unfavorable answer to the question it presumably granted certiorari to resolve.

Bond II may not proceed with the anticipation of the Court’s more popular cases, but the case could prove to be a transformative constitutional event in American history, which depending on the opinion, some would perceive as a trembling disruption of the American federal system of government, while others would view as a neutering of the ability of the United States to effectively negotiate with foreign entities for the good of the country and the world.

[Oral argument in *Bond II* is scheduled for Nov. 5, 2013.]