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Supreme Court May Consider How Broadly the “Necessary and Proper” Clause of the Constitution Authorizes Legislation to Implement Treaties

By Ronald J. Bettauer



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Introduction

On January 18, 2013, the U.S. Supreme Court (Supreme Court) granted certiorari in *Bond v. United States*. The Court set the questions presented as:

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*?^[1]

The *Bond* case thus raises the possibility that the Court will revisit the pivotal proposition decided in Justice Holmes' 1920 opinion in *Missouri v. Holland*: “by Article 2, Section 2, [of the U.S. Constitution] the power to make treaties is delegated expressly, and by Article 6 [of the Constitution] treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the

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powers of the Government.” The Court said that while other explicitly “prohibitory words” in the Constitution limit both the treaty power and the necessary and proper clause, the Tenth Amendment, which provides that “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,” does not reserve to the states the expressly delegated power to enact legislation “necessary and proper” to implement a treaty.[2]

Background

Missouri v. Holland arose after earlier legislation to regulate the killing of migratory birds within the United States had been held beyond the legislative powers of Congress by the U.S. federal district courts for the Eastern District of Arkansas and for Kansas in 1914 and 1915, respectively. In 1916 the United States and the United Kingdom concluded a treaty that stated that the migratory birds “were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection.” The treaty provided for closed seasons and other protections for migratory birds flying between Canada and the United States and called for legislative implementing measures. To this end, the 1918 Migratory Bird Treaty Act was enacted and gave the Secretary of Agriculture regulatory authority. The State of Missouri then sued to prevent a game warden of the United States from enforcing the Act and regulations, arguing that these unconstitutionally interfered with the rights reserved to the states under the Tenth Amendment.[3]

The Court found the treaty valid and upheld the implementing legislation, noting the possibility that there may be situations that “an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”[4]

This does not free Congress from all limits in implementing treaties, since an act that conflicts with other explicit language in the Constitution is not permissible.

Over time, this position became highly controversial, although *Missouri v. Holland* has never been overruled and has continued to be cited by courts as good law.

In 1953, for example, section 2 of Senate Joint Resolution 1 (the revised Bricker Amendment) would have provided: “A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.” The printed hearing on the resolution came to 1267 pages, with strong views expressed on each side. This proposal was reported out of the Senate Judiciary Committee by a vote of nine in favor to five against, but was not enacted. At the American Bar Association annual meeting in 1953, Secretary of State John Foster Dulles said that, if adopted, the amendment would limit severely the treaty-making power and curtail the authority of the president to conduct international business.[5]

There has been, and continues to be, vigorous debate in the legal literature about the proper scope of the “necessary and proper” clause as applied to the treaty power and about whether *Missouri v. Holland* was correctly decided.[6] Some argue that the framers specifically desired to provide the federal government flexible authority to enforce treaties in the states, pointing to the language of the treaty power and necessary and proper clause, while others argue for limits to federal authority to implement treaties based on the principles implied by the Tenth Amendment.

The Bond Case

After Carol Anne Bond discovered that her friend Myrlinda Haynes had become pregnant as

a result of an affair with Bond's husband, Bond made twenty-four attempts to poison Haynes with toxic chemicals. Twenty of these attacks were made with 10-chlorophenoxarsine and four with potassium dichromate, both of which are chemicals that can be lethal in small amounts. These attacks were carried out by placing the chemicals on Haynes' house door knob and on Haynes' car door handles. Haynes noticed the powders and informed the local police, but after ascertaining they were not cocaine the police did nothing. After Haynes noticed the powder on her mailbox, postal inspectors set up video surveillance and captured Bond stealing Haynes' mail and placing powder inside Haynes' car muffler. It was discovered that Bond, who had a degree in microbiology, had stolen chemicals from her employer.[7]

A grand jury in the Eastern District of Pennsylvania charged Bond with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), a criminal statute implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention. (The grand jury also charged Bond with two counts of mail theft, in violation of 18 U.S.C. § 1708.) The Chemical Weapons Convention is a multilateral treaty with 188 parties, including the United States, designed in part, according to its preamble, to achieve the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons.[8] Article VII of the Convention requires each state party to the convention to enact penal legislation prohibiting natural and legal persons under its jurisdiction from undertaking any activity prohibited by the Convention. In accordance with this mandate, the United States enacted implementing legislation, codified in section 229 of title 18 of the U.S. Code. This section makes it unlawful for any person to possess, use or threaten to use a "chemical weapon." Section 229F of title 18 includes in the definition of "chemical weapon" a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter" and lists the purposes which are not prohibited: peaceful purposes, protective purposes, unrelated military purposes and law enforcement purposes. Bond's possession and use of the chemicals were eventually held by the Third Circuit Court of Appeals (Third Circuit Court) to fall outside all of these excepted categories.[9]

Bond pleaded guilty to the charges, reserving her right to appeal, and was sentenced to six years in prison and five years of supervised release, and a fine and restitution. She appealed. Bond argued to the Third Circuit Court that the Chemical Weapons Convention was aimed at combatting rogue states and terrorist organizations and that the implementing statute, by covering ordinary domestic crime without showing a compelling federal interest, usurped the powers reserved to the states.[10] The Third Circuit Court discussed this federalism issue, noting that the issue appeared to be one of first impression for that court and that there was a significant scholarly debate over whether *Missouri v. Holland* had been correctly decided, but concluded "that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties" and affirmed the conviction without deciding the federalism issue.[11]

The Supreme Court granted Bond certiorari.[12] Bond argued that she had standing to raise her Tenth Amendment claim, asserting that "[i]n recent decades... the rampant federalization of traditional state and local crimes has upended the federal-state balance." [13] The United States supported Bond's position that she had standing to raise the Tenth Amendment claim, but noted that the government had explained that section 229 had been enacted under the treaty power and the necessary and proper clause and that "[i]t is well settled that, if Congress has exercised a power delegated to it in the Constitution, it is not intruding upon powers reserved to the States." [14] The Court, in an opinion by Justice Kennedy, reversed the Third Circuit, finding that "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so

too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism.”[15]

When the case returned to the Third Circuit, the *Missouri v. Holland* issue was squarely presented, and the court dealt with it extensively.[16] The appeals court found that the treaty was valid and the implementing statute rationally related:

In sum, *Holland* teaches that, when there is a valid treaty, Congress has authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question. (“[A]s Justice Holmes pointed out [in *Holland*], treaties made pursuant to [the Treaty Power] can authorize Congress to deal with “matters” with which otherwise “Congress could not deal.”)

But the Third Circuit Court noted the vigorous debate on the issue of federalism and stated “[i]f there is nuance there that has escaped us, it is for the Supreme Court to elucidate.”[17]

As noted in the Introduction, the Supreme Court granted certiorari for a second time in the case on January 18, 2013. In the factual paragraph leading into its statement of the two questions presented, the Court says that the Third Circuit had “grave misgivings” about its decision and characterizes the Third Circuit’s holding that Bond’s 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” as a “startling result.”[18]

Implications

The Supreme Court’s characterization of the 2012 Third Circuit holding and the statement of questions presented are slanted because they are taken from directly from Bond’s brief[19] (this is not unusual and is not considered to give any indication of the Supreme Court’s position). In fact, the Third Circuit recognized that the validity of a statute implementing a treaty is subject to the limits imposed by Constitutional language. It held that the issue of powers reserved to the states under implementing legislation rationally related to a valid treaty does not arise because the treaty and the necessary and proper clauses explicitly delegate powers. As the U.S. brief opposing the grant of certiorari states, “[t]he [Third Circuit] court held that the Act did not go beyond the Convention in any relevant sense; instead, the treaty and the statute ‘are coextensive at least on the question of ‘use,’ which is the only point relevant to [petitioner’s] as-applied challenge.” The U.S. brief also noted that the Third Circuit had rejected petitioner’s argument that Section 229 “covers a range of activity not actually banned by the Convention” and that the statute “cannot be sustained by the Necessary and Proper Clause’ for that reason.”[20] While the language of the “question presented” statement thus exhibits a clear skepticism about *Missouri v. Holland*, the executive branch has argued in support of the rule in *Missouri v. Holland*. [21]

It is important to recognize that an increasing number of subjects have become matters of international concern and have become the subject matter of treaties. This is particularly true in the fields such as terrorism, private international law, and human rights.

The relevance of *Missouri v. Holland* is evident in the field of terrorism. The Second and Eleventh Circuits have applied the rule in *Missouri v. Holland* to uphold a statute in circumstances similar to the *Bond* case.[22] In those cases, the Hostage Taking Act, 18 U.S.C. §1203, which implements the International Convention against the Taking of Hostages,[23] is challenged. The implementing legislation, which was virtually identical to the terms of the treaty, was challenged as impermissibly violating the principles of federalism in the Tenth Amendment and invading the authority of the states to prosecute

domestic, non-political abductions. These circuits rejected these challenges, however, finding that the statute was authorized by the treaty power and the necessary and proper clause.

Despite the fact that the courts have consistently followed *Missouri v. Holland*, the unwillingness of successive administrations and of some members of Congress to proceed with implementing legislation under that approach has dampened the ability of the United States to proceed with treaties of significant benefit to U.S. citizens and threatens to undermine U.S. leadership in important international areas.

An example in the field of private international law is the Convention Providing a Uniform Law on the Form of an International Will, a convention adopted in Washington in 1973 and signed by the United States the same year, but which has only a dozen parties.^[24] This convention would simplify inheritance by establishing formal requirements for an international will and providing that all parties would recognize such a will as valid. This would mean that a U.S. citizen could make a will in the United States or in another state party meeting the requirements of the convention that covered property located in multiple countries, and the will would be recognized as valid in each state party. While recognizing that federal implementation pursuant to the rule in *Missouri v. Holland* was an option, the Uniform Law Commission adopted an International Wills Act in 1977; however, only 13 U.S. states, the District of Columbia and the Virgin Islands have enacted it.^[25] Given the utility of the Convention, the U.S. legal community has convinced the Uniform Law Commission to make a new push for adoption of its uniform act, but federal legislation could be a quicker path to uniform implementation of the convention and allow the United States to proceed with ratification sooner.

An example in the field of human rights can be found in the proposed implementation of the Convention on Rights of Persons with Disabilities.^[26] This convention was adopted in 2006, has 128 parties at present, and was signed by the United States in 2009.^[27] The treaty was sent to the Senate for advice and consent to ratification in 2012,^[28] reported out of the Senate Committee on Foreign Relations by a vote of 13-6,^[29] but failed to achieve advice and consent when put to a vote in the full Senate.^[30] While the Senate Foreign Relations Committee report indicated that the treaty was not self-executing, both it and the executive branch transmittal documents described at length how existing federal legislation implements the obligations in the treaty. Yet the executive branch transmittal documents indicated that certain of the treaty provisions cover matters traditionally governed by state law and proposed a vague “federalism reservation”^[31] that goes beyond preventing conflicts with explicit constitutional prohibitions (which are dealt with in other proposed reservations and understandings). New proposed federal legislation to implement the treaty based on the necessary and proper clause, under the *Missouri v. Holland* rule, could have afforded the possibility of implementing the obligations in the convention to the full extent permitted by the Constitution (assuming that that would be desirable as a matter of policy). It can only be supposed that the current ideological debate on federalism resulted in a decision to take a more reticent approach to implementation.

Conclusion

The *Bond* case will be vigorously argued before the Supreme Court and many *amici* briefs will be filed. The outcome could have a deep and lasting impact on the ability of the United States to negotiate and adhere to treaties of importance to its citizens in the modern world.

It should be a matter of concern to U.S. lawyers that overturning or limiting the rule in *Missouri v. Holland* based on ideological disagreement concerning federalism will limit the flexibility of the United States in implementing treaties and could prevent the United States

from timely adherence to treaties even in cases where there is consensus that the treaty in question is beneficial and that the United States should join it and implement it.

The Supreme Court's second question raises the possibility of construing 18 U.S.C. §229 not to cover Bond's actions and thus avoiding the *Missouri v. Holland* question. Bond argued for such a construction. While the Third Circuit convincingly held that the statutory provision is clear and that this position has no merit, one cannot of course predict what the outcome will be.

About the Author:

Ronald J. Bettauer, an ASIL member, is a visiting scholar at George Washington University Law School and a former Deputy Legal Adviser at the U.S. Department of State.

Endnotes:

[1] *Bond v. United States*, 681 F.3d 149 (3d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3092 (U.S. Jan. 18, 2013) (No. 12-158), *available at* <http://www.supremecourt.gov/qp/12-00158qp.pdf>.

[2] *Missouri v. Holland*, 252 U.S. 416, 430, 433 (1920).

[3] *Id.* at 431-32.

[4] *Id.* at 433.

[5] For the text of the amendment and relevant further information, see American Bar Association, 1953 Annual Report of the American Bar Association, including the Proceedings of the Seventy-Sixth Annual Meeting (1953).

[6] See the discussion and authorities cited in *United States v. Bond*, 681 F.3d 149, 157-8 (3d Cir. 2012).

[7] The facts are set out in Brief for Appellee United States of Nov. 13, 2008, 2008 WL 5260329 (C.A.3 2008); see also *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009).

[8] See <http://www.opcw.org/chemical-weapons-convention/> for the text and status of participation in Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention).

[9] *Bond*, 681 F.3d at 153-55.

[10] Defendant/Appellant's Brief On Appeal at 7, *United States v. Bond*, 2008 WL 4298839 (C.A.3 2008) (No. 08-2677). Bond did not explain precisely which state power was usurped, given that the state continued to remain free to prosecute Bond under state law.

[11] *United States v. Bond*, 581 F.3d 128, 134-35, 137, 141-42 (3d Cir. 2009).

[12] *Bond v. United States*, 131 S.Ct. 455 (2010).

[13] Brief for Petitioner at 33, *Bond v. United States*, 2010 WL 4973133 (3d Cir. 2010) (No. 09-1227).

[14] Brief for the United States Supporting Petitioner at 20, *Bond v. United States*, 2010 WL 4954355 (3d Cir. 2010) (No. 09-1227).

[15] *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011).

[16] It has been argued in the alternative that the implementing statute in *Bond* is authorized under the Commerce Clause. Brief for the United State in Opposition to Certiorari at 13-18, 2012 WL 4790404 (U.S. 2012) (No. 12-158). However, the 2012 Third Circuit decision noted that the United States had specifically disclaimed any commerce clause argument in the district court, but it changed position and made that argument. *Bond v. United States*, 681 F.3d 149, 151 n. 1 (3d Cir. 2012). The Circuit stated that "[b]ecause we conclude that the Act is valid under the Necessary and Proper Clause, we express no opinion as to the merits of the Government's newly-discovered Commerce Clause argument." *Id.* at 162 n. 14.

[17] *United States v. Bond*, 681 F.3d 149, 157, 165 (3d Cir. 2012) (citations and footnote omitted).

[18] Bond v. United States, 681 F.3d 149 (3d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3092 (U.S. Jan. 18, 2013) (No. 12-158), *available at* <http://www.supremecourt.gov/qp/12-00158qp.pdf>.

[19] See Petition for Writ of Certiorari at i-ii, Bond v. United States, 2012 WL 3158880 (U.S. 2012) (No. 12-158).

[20] Brief for the United States in Opposition to Certiorari at 10, Bond v. United States, 2012 WL 4790404 (U.S. 2012) (No. 12-158) (citation omitted).

[21] *Id.* at 13 (“...the court below correctly applied *Missouri v. Holland* to uphold Section 229. No other court of appeals has considered that issue, and the circuits have reached no conflicting results in the interpretation of *Holland* in other contexts.”).

[22] United States v. Lue, 134 F.3d 79 (2d Cir. 1998); United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001).

[23] 1979 International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081 (1985), 1316 U.N.T.S. 205.

[24] For text and status, see Convention providing a Uniform Law on the Form of an International Will, <http://www.unidroit.org/english/conventions/1973wills/main.htm> (last visited Mar. 5, 2013).

[25] See Uniform Law Commission, International Wills Act, <http://www.uniformlaws.org/Act.aspx?title=International%20Wills%20Act> (last visited Mar. 5, 2013).

[26] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

[27] See United Nations, Convention on the Rights of Persons with Disabilities, <http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20iv/iv-15.en.pdf> (last visited Mar. 5, 2013).

[28] S. Treaty Doc. No. 112-7 (2012), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf>.

[29] S. Exec. Rept. No. 112-6 (2012), *available at* <http://www.foreign.senate.gov/download/?id=3AC78EBA-11DA-432D-B121-F2A31B4685F7>.

[30] The vote was sixty-one in favor, thirty-eight against. See 158 Cong. Rec. No. 154 (2012), *available at* <http://www.gpo.gov/fdsys/pkg/CREC-2012-12-04/pdf/CREC-2012-12-04.pdf>.

[31] S. Treaty Doc. No. 112-7, at 15 (2012), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf> (“This Convention shall be implemented by the Federal Government of the United States of America to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the obligations of the United States of America under the Convention are limited to the Federal Government’s taking measures appropriate to the Federal system, which may include enforcement action against state and local actions that are inconsistent with the Constitution, the Americans with Disabilities Act, or other Federal laws, with the ultimate objective of fully implementing the Convention.”). The Secretary of State’s report says “[s]ome state and local standards are less vigorous than the convention would require” and lists some examples of areas in which U.S. implementation of the convention’s obligations would be deficient absent the reservation. *Id.* The same reservation was recommended by the Senate Foreign Relations Committee. S. Exec. Rept. No. 112-6 (2012), *available at* <http://www.foreign.senate.gov/download/?id=3AC78EBA-11DA-432D-B121-F2A31B4685F7>.