CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

Supreme Court Grants Certiorari in Case Implicating Missouri v. Holland

In January 2013, the U.S. Supreme Court granted certiorari in *Bond v. United States*,[1] a case implicating the extent of congressional power to enact legislation to implement a treaty of the United States.[2] The Court relisted the case for consideration in conference seven times before deciding to grant certiorari. The questions presented (taken from Bond's petition for certiorari) may suggest some justices' readiness to reexamine the Court's landmark 1920 decision in *Missouri v. Holland*.[3]

> 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*?[4]

Carol Anne Bond, a microbiologist, placed toxic chemicals—stolen from her employer as well as others purchased over the Internet—on surfaces that her husband's pregnant lover was expected to touch. The victim suffered a minor burn. Bond entered a conditional guilty plea to federal charges and was sentenced to six years under the penal provision of the Chemical Weapons Convention Implementation Act of 1998,[5] which implements the 1993 Chemical Weapons Convention.[6] Both in district court and in the U.S. Court of Appeals for the Third Circuit, Bond unsuccessfully challenged the statute's application in her case as exceeding the powers of Congress, contrary to the Tenth Amendment of the U.S. Constitution.[7] The Third Circuit affirmed the lower court's decision that Bond lacked standing to challenge her conviction on this basis.[8]

In 2011, the Supreme Court unanimously reversed and remanded, ruling that Bond could raise her Tenth Amendment challenge.[9] On remand, the Third Circuit unanimously affirmed her conviction, rejecting her Tenth Amendment claim as precluded by *Missouri v. Holland*.

[1] Bond v. United States, 133 S.Ct. 978 (2013); *see* Robert Barnes, *Supreme Court to Revisit Case of Spurned Pa. Wife*, WASH. POST, Jan. 19, 2013, at A3.

[2] John R. Crook, Contemporary Practice of the United States, 105 AJIL 775, 782 (2011); Ronald J. Bettauer, *Supreme Court May Consider How Broadly the "Necessary and Proper" Clause of the Constitution Authorizes Legislation to Implement Treaties*, ASIL INSIGHTS (Mar. 11, 2013), *at* http://www.asil.org/pdfs/insights/insight130311.pdf.

[3] Missouri v. Holland, 252 U.S. 416 (1920).

[4] *At* http://www.supremecourt.gov/qp/12-00158qp.pdf.

[5] 18 U.S.C. §229 et seq.

[6] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21 (1993), 32 ILM 800 (1993).

[7] The Tenth Amendment provides: "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."

[8] United States v. Bond, 581 F.3d 128 (3d Cir. 2009).

[9] Bond v. United States, 131 S.Ct. 2355 (2011); *see* Crook, *supra* note 2, at 782.

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While evidently concerned at what it saw as "increasingly broad conceptions of the Treaty Power's scope"[10] (citing, as illustrations, the Convention on the Rights of the Child and other multilateral human rights conventions[11]), the Third Circuit decided that "[w]hatever the Treaty Power's proper bounds may be, however, we are confident that the Convention we are dealing with here falls comfortably within them."[12] The court then concluded that, given *Missouri v. Holland*'s statement that "'there can be no dispute about the validity of [a] statute' that implements a valid treaty,"[13] it was bound to affirm Bond's conviction.

> In her merits argument, Bond urges us to set aside as inapplicable the landmark decision *Missouri v. Holland*, 252 U.S. 416 (1920), which is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress's ability to legislate in furtherance of the Treaty Power in Article II, §2 of the Constitution. Cognizant of the widening scope of issues taken up in international agreements, as well as the renewed vigor with which principles of federalism have been employed by the Supreme Court in scrutinizing assertions of federal authority, we agree with Bond that treaty-implementing legislation ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism. However, because the Convention is an international agreement with a subject matter that lies at the core of the Treaty Power and because *Holland* instructs that "there can be no dispute about the validity of [a] statute" that implements a valid treaty, 252 U.S. at 432, we will affirm Bond's conviction.[14]

In a passage echoing past debates about the Bricker Amendment,[15] the Third Circuit invited the Supreme Court to address the application of federalism principles to treaties going beyond what it viewed as treaties' "traditionally understood subject matter."[16]

> Before the outer limits of the treaty power are reached, . . . it may be that federalism does have some effect on a treaty's constitutionality. While it is not our prerogative to ignore *Holland*'s rejection of federalism limitations upon the Treaty Power, the Supreme Court could clarify whether principles of federalism have any role in assessing an exercise of the Treaty Power that goes beyond the traditionally understood subject matter for treaties.[17]

Judge Kent Jordan wrote for the unanimous panel. Judges Marjorie Rendell and Thomas Ambro wrote separate concurring opinions. Rendell denied the relevance of federalism issues to the case.[18] Ambro urged the Supreme Court to take up the case.

[10] United States v. Bond, 681 F.3d 149, 158 (3d Cir. 2012).

[11] *Id.* at 161 n.12.

[12] *Id*. at 161.

[13] *Id.* at 151 (quoting Missouri v. Holland, 252 U.S. 416, 432 (1920)).

[14] *Id*.

[15] The Bricker Amendment is the name given to a series of constitutional amendments proposed in the 1950s. Their objective was to limit the scope of the treaty power, notably with respect to the Genocide Convention and human rights treaties, which some conservatives saw as a threat to U.S. liberties and institutions, including, for some, the Jim Crow laws. *See* John B. Whitton & J. Edward Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AJIL 23 (1954); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AJIL 341 (1995).

[16] *Bond*, 681 F.3d at 165.

[17] *Id*.

[18] "Congress passed the Act, which is constitutionally sound legislation, to implement the Convention, a constitutionally sound treaty. Ms. Bond's appeal generally to federalism, rather than to a workable principle that would limit the federal government's authority to apply the Act to her, is to no avail." *Id.* at 169 (Rendell, J., concurring).

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I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in *Missouri v. Holland* that "[i]f [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).

Absent that undertaking, a blank check exists for the Federal Government to enact any laws that are rationally related to a valid treaty and that do not transgress affirmative constitutional restrictions, like the First Amendment. This acquirable police power, however, can run counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are "few and defined" while the States retain powers that are "numerous and indefinite." The Federalist No. 45 (James Madison).[19]

Presidential Signing Statement Disputes Provisions of National Defense Authorization Act

In early January 2013, President Barack Obama approved H.R. 4310, the National Defense Authorization Act for Fiscal Year 2013; earlier versions of the legislation included provisions that drew a White House veto threat.[1] The president issued a signing statement questioning the constitutionality of provisions limiting transfers of detainees from the U.S. detention facility at Guantánamo Bay, Cuba, and at Parwan Prison in Afghanistan and examining other provisions affecting military and foreign affairs.[2] An excerpt follows:

> Today I have signed into law H.R. 4310, the "National Defense Authorization Act for Fiscal Year 2013." I have approved this annual defense authorization legislation, as I have in previous years, because it authorizes essential support for service members and their families, renews vital national security programs, and helps ensure that the United States will continue to have the strongest military in the world.
>
> Even though I support the vast majority of the provisions contained in this Act, which is comprised of hundreds of sections spanning more than 680 pages of text, I do not agree with them all. Our Constitution does not afford the President the opportunity to approve or reject statutory sections one by one. I am empowered either to sign the bill, or reject it, as a whole. In this case, though I continue to oppose certain sections of the Act, the need to renew critical defense authorities and funding was too great to ignore.
>
> . . . .
>
> Several provisions in the bill . . . raise constitutional concerns. Section 1025 places limits on the military's authority to transfer third country nationals currently held at the detention facility in Parwan, Afghanistan. That facility is located within the territory of a foreign sovereign in the midst of an armed conflict. Decisions regarding the disposition of detainees captured on foreign battlefields have traditionally been based upon the judgment of experienced military commanders and national security professionals without unwarranted interference by Members of Congress. Section 1025 threatens to upend that tradition, and could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities. Under certain circumstances, the section could violate constitutional separation of

[19] *Id.* at 169–70 (Ambro, J., concurring) (footnote omitted).

[1] Steve Vogel, *Job Cuts, Detainee Provision Draw Threat to Veto Defense Budget Bill*, WASH. POST, Nov. 30, 2012, at A16.

[2] Charlie Savage, *Obama Disputes Detainee Limits in Defense Bill*, N.Y. TIMES, Jan. 4, 2013, at A1.

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