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Bond v. United States: Federalism's Limits on the Treaty Power

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Abstract

Americans are taught from a young age that our government is one of limited powers. Congress cannot simply pass any law that it wishes: The Constitution prescribes limits on its lawmaking powers. Or does it? In Bond v. United States*, the Supreme Court of the United States will consider whether exercise of the Treaty Power can increase Congress's legislative powers. In other words, may Congress, through treaties, reach ends that are otherwise outside its constitutional authority? If the Court answers that question in the affirmative, the authority of the federal government could be limitless.*

The provisions of the Constitution do not want for exercise in the courts through litigation, so when a hugely important clause in the Constitution appears before the Supreme Court of the United States after nearly a century of neglect, the public should take notice. For example, in 2008, the Supreme Court decided *District of Columbia v. Heller*,[1] holding that the Second Amendment protects an individual's right to keep and bear arms. Many Americans were surprised to learn that the individual right announced in *Heller* was not already the established law of the land.

Just as astonishing is the case of *Bond v. United States*,[2] which the Supreme Court is set to decide during its current term. *Bond* is the first Supreme Court case involving the scope of the Treaty Power in 93 years. It presents the Court with an opportunity to answer a critical question about our federal government of limited powers: whether the Treaty Power[3] can be used to increase Congress's legislative powers.

This paper, in its entirety, can be found at **http://report.heritage.org/lm106**

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Key Points

- The federal government is one of limited powers found in the text of the Constitution.
- Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."
- *Bond v. United States* is the first major Treaty Power case in 93 years and could decide whether the Treaty Power fits within our constitutional government or whether the Treaty Power is limitless.
- The President and the Senate should approve only treaties that comport with our government of limited, enumerated powers.

That question is of immense practical importance. For example, the latest draft of the United Nations' proposed arms control treaty includes language that might limit the rights of individuals to own guns.[4] Presuming that this treaty requires the United States government to take action that the Second Amendment would otherwise prohibit or that is otherwise beyond the enumerated powers of Congress, can the United States ratify the treaty? And if it can ratify the treaty, can it pass enabling statutes to implement the treaty even if those statutes are identical to the one struck down in *United States v. Lopez* as exceeding Congress's power to regulate interstate commerce?[5]

Americans might be surprised to learn that these critical questions have not been definitively answered by the Supreme Court, and that is why *Bond v. United States* is such a critical case. If the Treaty Power can expand the legislative powers of Congress without limit, our system of limited government is at risk.

A Scenario "Right Out of a Soap Opera"

The Supreme Court granted certiorari in *Bond v. United States* for the second time on January 18, 2013.[6] The first time the Court heard the case was in 2011, when it held that individuals, not just states, can challenge statutes that potentially violate the Tenth Amendment by intruding on powers reserved to the states or to the people.[7] Having decided that the case can proceed, the Court this time will address the merits of the Treaty Power claims.

The facts of *Bond* truly are, in the words of some commentators, "right out of a soap opera."[8]

> [Carol Anne] Bond was excited when her closest friend, Myrlinda Haynes, announced that she was pregnant. Bond's excitement turned to rage when she learned that her husband, Clifford Bond, was the child's father. She vowed revenge.
>
> Planning to poison Haynes, Bond (a trained microbiologist) stole a quantity of 10-chloro-10H-phenoxarsine from her employer, the chemical manufacturer Rohm and Haas, and ordered over the Internet a vial of potassium dichromate. These chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact.
>
> Bond attempted to poison Haynes with the chemicals at least 24 times over the course of several months. She would often spread them on Hayne's home doorknob, car door handles, and mailbox....[9]

Postal inspectors investigated, and Bond was eventually charged with two counts of possessing and using a chemical weapon in violation of 18 U.S.C. § 229(a)(1) and two counts of mail theft.

Section 229(a)(1) is the penalty provision of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA),[10] which was enacted to implement the Chemical Weapons Convention (CWC).[11] The United States signed the CWC on January 13, 1993, and it entered into force on April 29, 1997. In relevant part, the treaty obliges the United States to "[p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity

1. 554 U.S. 570 (2008).
2. 681 F.3d 149 (3rd Cir. 2012), *cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158).
3. U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....").
4. Ted R. Bromund, Ph.D., *The Arms Trade Treaty: Reactions to the Final Draft*, The Foundry, Mar. 28, 2013, *available at* http://blog.heritage.org/2013/03/28/the-arms-trade-treaty-reactions-to-the-final-draft/.
5. 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as beyond the Article I, Section 8 powers of Congress).
6. 681 F.3d 149 (3rd Cir. 2012), *cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158).
7. 564 U.S. ___ (2011).
8. Nicholas Quinn Rosenkranz, Ilya Shapiro, & Trevor Burrus, *Bond v. United States*, Cato Institute, Aug. 31, 2012, *available at* http://www.cato.org/publications/legal-briefs/bond-v-united-states-1.
9. Bond v. United States, 581 F.3d 128, 131–32 (3rd Cir. 2009).
10. 22 U.S.C. § 6701.
11. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity."

Importantly, the government does not defend the CWCIA as a valid exercise of Congress's powers enumerated in Article 1 of the Constitution. Rather, the government argues that it is supported by the Treaty Power and the Necessary and Proper Clause.[12] As a result, the validity of Bond's prosecution hinges critically on whether Congress may enact legislation pursuant to a treaty (presumably valid) that it would not otherwise be able to enact pursuant to its enumerated powers.

Bond's Two Trips to the Supreme Court

At trial in the Eastern District of Pennsylvania, Bond moved to dismiss her chemical weapons charges as exceeding Congress's enumerated powers and violating the Tenth Amendment. The trial court disagreed, and Bond pleaded guilty, reserving the right to appeal that issue. The United States Court of Appeals for the Third Circuit affirmed the trial court's decision, holding that Bond lacked standing to challenge the CWCIA under the Tenth Amendment.[13]

The Supreme Court, however, reversed that decision in a unanimous opinion by Justice Anthony Kennedy. It held that a criminal defendant indicted under a federal statute has standing to challenge that statute as interfering with states' rights under the Tenth Amendment.[14] The Court noted that the validity of the CWCIA "turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power" but expressed no view on that matter.

On remand, the Third Circuit addressed the Treaty Power issue, relying on a brief 1920 decision of the Supreme Court to hold that a treaty may provide an independent basis for congressional action:

> In *Missouri v. Holland,*[15] the Supreme Court declared that, if a treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." ... Implicit in that statement is the premise that principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid.[16]

Implementing legislation, the Third Circuit explained, need only be "rationally related" to a valid treaty. But whether a treaty was even valid was, the court admitted, a question "beyond [its] ken."[17]

To the Third Circuit, then, the only judicial inquiry into the validity of treaties relates to the formal advise-and-consent strictures of Article II, not to federalism or other subject-matter concerns. Aside from undefined "I know it when I see it" statements about "core" treaty matters, the Third Circuit opened the door to unlimited federal power through exercise of the Treaty Power.

The Third Circuit's decision therefore raises serious constitutional concerns regarding vertical separation of powers—that is, federalism. To take an extreme example, as a matter of Congress's enumerated powers, it is beyond debate that Congress lacks the authority to enact a federal statute to abolish state legislatures. Yet, in theory, the President and the Senate could ratify a treaty that requires just that. The validity of the treaty would be "beyond [the] ken" of the judicial branch, according to the Third Circuit, and legislation to implement it would be per se valid, according to the Third Circuit's interpretation of *Missouri v. Holland.*

Such an approach seems plainly wrong. Following this logic, in Justice Scalia's memorable words, Congress could obtain powers that it lacks under the

12. U.S. Const. art. I, § 8, cl. 18. While not the question presented before the Supreme Court, in theory the Court could, in a manner similar to the majority in *NFIB v. Sebelius*, 567 U.S. ___ (2012), ask for additional briefing on its own to decide whether the CWCIA is a valid exercise of some other enumerated power of Congress and so avoid answering the Treaty Power question.
13. Bond v. United States, 581 F.3d 128 (3rd Cir. 2009).
14. Bond v. United States, 131 S. Ct. 2355 (2011) ("The principles of limited national powers and state sovereignty are intertwined.... [A]ction that exceeds the National Government's enumerated powers undermines the sovereign interests of States.").
15. 252 U.S. 416 (1920). This case is the leading Treaty Power case and is discussed below.
16. Bond v. United States, 681 F.3d 149, 153 (3rd Cir. 2011).
17. *Id.* at 164 n.18.

Constitution "by simply obtaining the agreement of the Senate, the President, and Zimbabwe."[18]

On January 18, 2013, the Supreme Court granted certiorari to clarify the scope of the Treaty Power.

Two Types of Treaties

Critical to understanding the Treaty Power is understanding how treaties work under domestic law. Many bilateral treaties that the United States signs are "self-executing." When the United States enters into these treaties, such as extradition agreements, the treaty takes immediate legislative effect. For example, when President George W. Bush signed an extradition treaty with Peru on July 26, 2001, it became U.S. law immediately after the Senate ratified it on November 14, 2002.[19] The mere act of agreeing to the treaty created rights and duties in U.S. domestic law.

By contrast, a number of the most controversial treaties are "non-self-executing," including international human rights treaties and the Chemical Weapons Convention. These treaties are usually multilateral and bind States Parties to "undertake" certain legislative commitments in the near future: Non-self-executing treaties do not have immediate legislative effect. For example, President George H. W. Bush signed the CWC on January 13, 1993, and it was ratified by the Senate on April 24, 1997. But the treaty only obligated the United States to "adopt the necessary measures" without specifying what those measures were; filling in the specifics required legislation.[20] Thus, the CWC itself created no rights or duties in U.S. domestic law and was simply a *promise* that the U.S. government would take future action to implement it.[21]

Accordingly, to maintain our government as one of limited powers, there must be limits to either or both of (1) the President and Senate's authority to ratify self-executing treaties and (2) Congress's authority to pass legislation implementing non-self-executing treaties. Limitations are necessary so that Congress cannot increase its own power and so that the President and Senate cannot "simply use a self-executing treaty to implement the same obligations."[22] Yet some academics have argued that the only limitations on the traditionally plenary authority of the President and Senate to implement treaties are not subject-matter or structural limitations, but only the "individual rights" provisions of the Constitution, such as the Bill of Rights.[23] In their view, the structural features of the Constitution can be circumvented through creative treaty-making.

One possible limitation to the Treaty Power is suggested by the British example. At the time of the Founding, British treaties were *all* non-self-executing.[24] Returning to this traditional presumption could retain the plenary authority of the President and the Senate to enter agreements with foreign powers while respecting the Constitution, including its separation of powers, by requiring that treaties be implemented pursuant to the enumerated powers of Congress.

The Text of the Treaty Power

As with all constitutional interpretation, defining the scope of the Treaty Power begins with the text of the Constitution. Article II, Section 2, Clause 2 provides: "[The President] shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...."

Treaties are mentioned once more in the Supremacy Clause of the Constitution in Article VI:

18. Oral argument, Golan v. Holder, 565 U.S. ___ (2012).
19. Extradition Treaty, U.S.–Peru, July 26, 2001, 2001 U.S.T. LEXIS 94.
20. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800 .
21. Such treaties may create *international* commitments, however. *See* Medellin v. Texas, 552 U.S. 491 (2008) (holding that an international law commitment in itself does not create binding federal law and that "[t]o read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law"). Such commitments might even include the promise that the American government pursue a constitutional amendment.
22. *See* Julian Ku, *Will Bond v. United States Matter?*, Opinio Juris, Jan. 19, 2013, *available at* http://www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/; *see also* Rick Pildes, *Does Congress Have the Power to Enforce Treaties? Part II*, Volokh Conspiracy, Jan. 16, 2013, *available at* http://www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/.
23. *See* Nick Rosenkranz, *Final Post of the Treaty Debate*, Volokh Conspiracy, Feb. 3, 2013, *available at* http://www.volokh.com/2013/02/03/final-post-of-the-treaty-debate/ (citing Reid v. Covert, 354 U.S. 1 (1957)).
24. *See* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2158 (1999).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The text does not answer the question as to whether treaties can expand the powers of Congress. If the answer to that question is affirmative, then such treaties are made "under the Authority of the United States" and are therefore the supreme law of the land. Conversely, if treaties cannot expand Congress's powers, then such treaties are *not* made "under the Authority of the United States" and are therefore *not* the supreme law of the land.

Another potential source of congressional authority is the Necessary and Proper Clause, which gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This also is no answer to the question of the scope of the Treaty Power, because it too presumes the existence of other powers rather than specifying their scope. Moreover, the Necessary and Proper Clause is no independent source of congressional authority, as both Alexander Hamilton and James Madison recognized.[25] And in 2012, holding that the Necessary and Proper Clause could not provide constitutional justification for the individual mandate in the Patient Protection and Affordable Care Act ("Obamacare"), Chief Justice John Roberts noted in *NFIB v. Sebelius*: "[Supreme Court cases] upholding laws under [the Necessary and Proper Clause] involve[] authority derivative of, and in service to, a granted power...."

Unfortunately, then, the bare text of the Constitution provides scant evidence as to the precise contours of the Treaty Power.

Uninformative Precedents

The leading Supreme Court case on point is similarly uninformative. As noted, the last major decision of the Supreme Court of the United States applying the Treaty Power came down almost a century ago. *Missouri v. Holland*[26] concerned the Migratory Bird Treaty Act of 1918 (MBTA), which was passed pursuant to a treaty negotiated with Great Britain. Previously, the Supreme Court had held that regulation of the hunting of migratory birds was beyond the enumerated powers of Congress; consequently, the MBTA was passed pursuant only to the treaty.[27] Writing for the Court, Justice Oliver Wendell Holmes, Jr., in what Professor Nicholas Rosenkranz describes as "just a single conclusory sentence," held that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[28]

The opacity of the opinion and the conclusory nature of this single sentence have spawned countless law review articles and books attempting to determine rational limits to the Treaty Power that comport with our government of limited powers.

Later, in the 1957 case of *Reid v. Covert*,[29] the Supreme Court suggested the opposite of its conclusion in *Holland*. The case concerned two habeas corpus petitions. Mrs. Covert had killed her husband at an airbase in Great Britain, and Mrs. Smith had killed her husband at an Army base in Japan. The United States had entered into an executive agreement with Great Britain, on July 27, 1942. Pursuant

25. The Federalist No. 33 ("[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if [the Necessary and Proper Clause] were entirely obliterated."); The Federalist No. 44 ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.").

26. 252 U.S. 416 (1920).

27. In fact, there is some evidence that the treaty with Britain was negotiated precisely to expand the legislative powers of Congress in response to federal district court decisions holding that regulating the hunting of migratory birds was beyond the power of the federal Congress. *See* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 254–55 (2013). *See also* United States v. Shaver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915); United States v. Shaw (D.S.D., Apr. 18, 1914) (unpublished and unreported).

28. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

29. 354 U.S. 1 (1957).

to this agreement, the United States was allegedly obliged to subject these women, though they were civilians, to court-martial. In the ordinary course of affairs, that would be constitutionally defective, the Court explained, because it would violate Article III and the Fifth and Sixth Amendments. Consequently, the only available justification for the courts-martial was the Treaty Power. But the Court explained that it had "regularly and uniformly recognized the supremacy of the Constitution over a treaty":

> There is nothing in this language [of the Treaty Clause] which intimates that treaties and laws enacted pursuant to [treaties] do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result.... It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government, and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Critically, *Reid* involves constitutional prohibitions on the Treaty Power of the Executive and the Senate. *Reid* does not answer the question whether, absent a specific prohibition, the legislative powers of Congress may be expanded by a treaty.[30]

Conclusion: Federalism Is an Individual Right

The principles of *Reid* are sound. There is no basis, however, for an interpretation of the Treaty Power that recognizes the limits of the Bill of Rights but excludes the Tenth Amendment, which is equally concerned with Americans' individual freedoms. The Court made that point clear quite recently, in Justice Kennedy's unanimous *Bond* opinion:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Such a profound understanding that the structural limits of federalism are normative—that they secure the liberties of the individual—suggests that *Reid v. Covert* is not, in fact, distinguishable from *Bond v. United States*. In *Reid*, the Treaty Power of the President and the Senate was limited by individual rights of citizens secured in the Bill of Rights—specifically, the Fifth and Sixth Amendments. In *Bond*, the Treaty Power is limited by individual rights of citizens secured by the Bill of Rights as well—specifically, the Tenth Amendment.

Whatever the scope of the Treaty Power, three fundamental principles must be borne in mind by Congress, the President, and the Courts.

First, the authority to negotiate and enter into treaties is a constitutional prerogative of the executive branch, made "by and with Advice and Consent of the Senate."

Second, even if constitutional, the President and Congress should not enter into treaties that violate traditional American rights, including the individual rights of federalism and the separation of powers.

Third, the American government has the final interpretive authority over its treaty obligations. No American court should simply defer to the interpretations of foreign courts, lawmakers, or treaty bodies. As the Supreme Court held in *Medellín v. Texas*, "not all international law obligations automatically constitute binding federal law."

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30. Of course, this theoretical gap might be bridged if the executive were prohibited by separation of powers principles from promising congressional action beyond the enumerated powers of Congress.