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LOST IN TRANSLATION: THE ACCIDENTAL ORIGINS OF *BOND V. UNITED STATES*

*Kevin L. Cope**

INTRODUCTION

One of the unusual features of cases about the constitutionality of federal statutes is that they are nearly always foreseeable. Even before the bill's introduction in Congress, lawmakers are often aware that they are inviting a federal lawsuit. Anticipating a legal challenge, legislators and their staffs attempt to predict the courts' views of the statute and adapt the bill accordingly.¹ Generally speaking, the bigger the bill's potential constitutional impact, the more foreseeable the resulting case. By this logic, jurists should have seen the constitutional issues in *Bond v. United States*² from a mile away. In reality, they were foreseen by virtually no one.

Bond addresses the constitutionality of a high-profile act of Congress, the Chemical Weapons Convention Implementation Act of 1998 (hereinafter the "Act" or the "Implementation Act").³ The Act domesticizes the Chemical Weapons Convention ("CWC"), a global treaty concluded in 1993, which the United States joined four years later.⁴ The CWC is expressly aimed at stopping the development, stockpiling, and deployment of chemical weapons of mass destruction. The Act's application in *Bond* tests the limits of Congress's power to implement treaties that encroach on traditional state prerogatives. The specific question before the Court is whether the Necessary

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1. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. § 18001), *invalidated in part by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Detainee Treatment Act of 2005, 42 U.S.C. §§ 2000dd-2000dd-1 (2006), *invalidated in part by* Boumediene v. Bush, 553 U.S. 723 (2008).

2. *Bond v. United States*, No. 12-158 (S. Ct. argued Nov. 5, 2013).

3. Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229 (1998).

4. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 112 Stat. 2681-856, 1974 U.N.T.S. 45 [hereinafter CWC].

and Proper Clause of the U.S. Constitution and *Missouri v. Holland* allow Congress to penalize “local” conduct not within any of its enumerated powers—and in fact quintessentially within the states’ police powers—when it is implementing a valid treaty.⁵

Both parties and numerous amici now seem to believe that the case could transform key parts of federalism doctrine and/or the United States’ ability to make treaty commitments.⁶ Yet despite the plethora of legal expertise in Congress and the executive branch, no one seemed aware of these issues until Bond’s attorneys raised them before a federal district court in 2007. Given *Bond*’s grand, disarmament-treaty origins, that oversight will probably trouble anyone interested in the growing role of international law⁷ in the U.S. federal legal system.

Much has been written about how *Bond* should be decided and how its outcome could shape constitutional law and U.S. foreign relations. This Essay instead looks backward, exploring the strange roots of *Bond* and what those origins say about the process by which the United States converts treaties into federal law. The Essay suggests that the reason that *Bond*—and its implications for treaties and federalism— took so many by surprise lies in the incentives inherent in the arcane art of translating international law into domestic law. In that sense, *Bond* is a cautionary tale for future treaty-implementation efforts.

I. *The Background of Bond: The Chemical Weapons Convention*

The prosecution that triggered the case began in 2007, nine years after Congress implemented the CWC by passing the Implementation Act. A 42-year-old suburban Philadelphia woman named Carol Anne Bond rubbed two abrasive chemicals (one of which she took from her workplace, the other

5. Before the district court, the government disavowed reliance on the Commerce Clause. In the Third Circuit on remand from the Supreme Court, however, the government raised a Commerce Clause argument, although the court declined to consider it. *See* *United States v. Bond*, 681 F.3d 149, 162 n.14 (3d Cir. 2012) (declining to address government’s “newly-discovered” argument in light of the court’s holding under the treaty power and Necessary and Proper Clause).

6. *See, e.g.*, Brief for Profs. David M. Golove, et al. as Amici Curiae in Support of Respondent at 4, *Bond*, (No. 12-158) (“[T]he Nation’s ability to make treaties would be severely compromised if the President were unable to assure treaty partners that the national government has the power to enforce its promises.”).

7. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 397 (1998) (“Because treaties now regulate matters that countries traditionally have considered internal, there is an increasing likelihood of overlap, and conflict, with domestic law.”).

she ordered on Amazon.com) on the mailbox and car door of her friend Myrlinda Haynes. Bond had recently learned that Haynes was pregnant and that Bond's husband was the father. On one occasion, some chemicals rubbed off on Haynes's hand and she suffered a minor thumb burn. When Haynes told the police, local officials declined to pursue the matter, believing the substance to be some form of cocaine.

The whole incident might have ended there, but because a mailbox was involved, eventually so, too, was the U.S. Postal Service. To the surprise of almost everyone, federal prosecutors in Philadelphia stepped in and charged Bond under the Chemical Weapons Convention Implementation Act. The charged offense carried a maximum sentence of life in federal prison. Anyone who might have "harbored" Bond with knowledge of her actions faced a potential ten-year term.

Those bizarre events directly triggered the *Bond* prosecution, but the case's real origins trace back fourteen years earlier to 1993, when the CWC was adopted. According to the CWC's preamble, its purpose is to achieve "the prohibition and elimination of all types of weapons of mass destruction" and, "for the sake of all mankind," to effect "the complete and effective prohibition of the development, . . . stockpiling, . . . transfer and use of chemical weapons."

In implementing the CWC, Congress and the State Department appeared to be singularly focused on global security. In explaining the CWC's purpose to the Senate Committee on Foreign Relations, the director of the U.S. Arms Control and Disarmament Agency began by noting that "[s]topping the proliferation of weapons of mass destruction is at the very top of President Clinton's foreign policy agenda." The director characterized the CWC as "both a disarmament and a nonproliferation Treaty," which "establishes an unprecedented global norm against chemical weapons" that would eventually help to "eliminate this serious threat to our country and to world peace."⁸ Secretary of State Christopher testified that the Convention "promises to eliminate a scourge [i.e., chemical weapons] that has hung over the world for almost 80 years."⁹

Those statements may characterize the CWC's purpose, but, as *Bond* has proved, they may not reflect its actual effect on U.S. law. Despite this focus on global security and weapons of mass destruction, the text of both the CWC and the Act arguably sweep far more broadly—and locally. The CWC requires each state party to stop the prohibited use of chemical weapons within its jurisdiction. Those prohibitions mean that a state and its subjects

8. *Chemical Weapons Convention: Hearings Before the S. Comm. on Foreign Relations*, 103d Cong. 11 (1994) (statement of Hon. John D. Holum, Director, U.S. Arms Control and Disarmament Agency).

9. *Id.* (statement of Warren Christopher, Secretary of State).

may not “use,” “develop, produce, otherwise acquire, stockpile or retain chemical weapons.” “Chemical weapons” are defined in part as “[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention.” And “toxic chemical” means “[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” Purposes “not prohibited” include “[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes.” It seems clear that the treaty drafters envisioned that state parties would prohibit the use of all toxic chemicals and their precursors (unless they are used for purposes “not prohibited”).¹⁰ Nonetheless, there is no evidence that the drafters were concerned with *Bond*-like uses, that is, minor, non-politically-motivated assaults with otherwise legal chemicals that are harmful only when used off label. Thus, although there is little reason to believe that the CWC drafters intended it, the CWC’s language arguably requires state parties to criminalize all non-“peaceful” chemical uses not just of traditional chemical weapons and potential weapons, but of many household chemicals as well.

II. The Chemical Weapons Convention’s U.S. Implementation

The United States may have unknowingly succeeded in creating just such a criminal regime. The Act copies most of the CWC’s key provisions verbatim. In essence, any chemical that can potentially cause any “permanent harm” and is used for anything other than a “peaceful purpose” is a “chemical weapon.” It is a violation of the Act knowingly to, among other things, possess that “weapon,” threaten to use it, or actually use it. This formulation led Justice Alito to suggest that “pouring a bottle of vinegar in [a] friend’s goldfish bowl” might be punishable under the Act.¹¹ The Third Circuit noted that the Act’s breadth was “striking,” “turn[ing] each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache.”¹²

10. See Brief of Amici Curiae Chemical Weapons Convention Negotiators and Experts in Support of Respondent at 8, *Bond*, (No. 12-158) (stating that the negotiators considered a broad prohibition “necessary to avoid proliferation of chemical weapons to those who might use them improperly and to prevent the development, manufacture or stockpiling of chemical weapons under the guise of commercial activity”).

11. Transcript of Oral Argument at 29, *Bond*, (No. 09-1227) (S. Ct. Feb. 22, 2011) (Alito, J.), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1227.pdf.

12. *United States v. Bond*, 681 F.3d 149, 154 n.7 (3d Cir. 2012).

The government has not distanced itself from that interpretation; in fact, it now appears to have embraced it. Before lower federal courts and the Supreme Court, Justice Department attorneys argued not only that the U.S. Constitution gives it the authority to prosecute Bond but that international law and foreign-relations considerations also effectively demand that power. The government insisted that if the United States could not prosecute the likes of Bond under the Act because “local” cases were outside the Act’s domain, it “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.”

During the CWC’s ratification and its implementation, these grave concerns about the law’s effective scope apparently concerned no one—not in the Justice Department, the State Department, or in Congress. People regularly use chemicals to injure. But neither the congressional debates nor the testimony by State Department officials and other experts suggested that the Act could be used for purposes other than preventing chemical warfare and terrorism, much less prosecutions of routine assaults.¹³ In fact, Congress ostensibly envisioned that only the most egregious criminal acts would violate the CWC’s implementing legislation. As the Senate committee that recommended consenting to ratification noted, the then-proposed penalties for “knowingly engag[ing] in prohibited [chemical weapons]-related activities”—even those falling short of “actual use”—included life in prison.¹⁴

Moreover, the legal concepts that would become central to *Bond*—the scope of the Necessary and Proper Clause and the correct reading of *Missouri v. Holland*—were never raised publicly, either by legal expert committee witnesses, by members of Congress, or by executive officials.¹⁵ The single congressional hearing dedicated to the Act’s constitutionality focused on unrelated issues: the propriety of allowing an international treaty compliance officer to exercise the authority of a U.S. officer and how mandatory inspections of private property would implicate the Fourth

13. See, e.g., *Chemical Weapons Implementing Legislation: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. (1997); *Constitutional Implications of the Chemical Weapons Convention: Hearing Before the S. Comm. on Armed Services*, 104th Cong. (1996).

14. S. EXEC. REP NO. 104-33, at 210 (1996) (report of the Senate Committee on Foreign Relations).

15. Of course, it is possible that participants in the implementation process noted privately that the Act’s comprehensive language could theoretically lead to routine, *Bond*-like prosecutions, i.e., those involving no federal or international interests. They may have assumed, however, that judicious prosecutorial discretion would confine prosecutions under the Act to those implicating the instruments’ stated focuses: weapons of mass destruction, arms control, terrorism, and other issues relevant to national or global security. In that case, they may have focused their political capital on higher priority constitutional, foreign-policy, and security issues.

Amendment.¹⁶ If anyone had closely read the Act's language and anticipated that it would cause *Bond*-like prosecutions, surely some states' rights-minded member of Congress would have sounded the alarm and asked an executive official whether the CWC or the Act might be used to displace state-law criminal regimes. No one so much as hinted at that possibility.

III. An International-to-Domestic-Law Mistranslation

The Supreme Court's decision in *Bond* could significantly curtail the scope of Congress's foreign-relations power or expand its power to regulate local conduct. As to the foreign-relations effect, the government and others have argued that were the country's ability to implement some treaties limited by domestic constitutional constraints, these constraints could undermine the credibility of its international agreements and frustrate the president's ability to make such commitments in the first place.

As to the scope of congressional power, a decision for the government on broad grounds could open the door to additional federal regulation in areas (some of which the states may be regulating adequately) that lie outside Congress's enumerated powers. With *Bond*, the United States already complied with large portions of the treaty through its state criminal regimes: no one has suggested that Pennsylvania or any other state has a generally dysfunctional criminal system as to chemical batteries (even if local officials misjudged this case). The Act—unlike the statute in *Holland*—seeks to regulate an area of traditional state expertise that the states are eager to handle themselves.¹⁷ If Congress can legislate in these areas, it arguably pushes the line established in *Holland* back a bit further.

One explanation for why no one involved in the CWC or the Act anticipated these issues lies in the incentives facing nation-states implementing treaties. Not surprisingly, the treaty's foreign drafters were not experts on U.S. federalism. By contrast, State Department lawyers and many congressional staff are. But, perhaps erring on the side of caution, Congress

16. *Chemical Weapons Convention: Hearings Before the S. Comm. on Foreign Relations*, 103d Cong. (1994) (statement of John Yoo).

17. A critical but often overlooked element of the *Holland* decision is that the federal Migratory Bird Treaty Act was probably the only way for the United States to comply with the treaty. Missouri resisted the entire purpose of the treaty, and it zealously defended the unfettered right of its citizens to hunt the birds. That opposition was probably a key reason that the statute was deemed constitutional; in the face of Missouri's defiance, the statute was "necessary" to accomplish the federal objective. Given Pennsylvania's functional criminal-legal regime and the state's general willingness to prosecute assaults (albeit not in this case), the same cannot be said about the Act's application in *Bond*.

chose to copy the CWC's key language largely verbatim, with no public mention of those words' consequences for federalism.

This phenomenon might be described as a "teach-to-the-test" effect. U.S. public school teachers are incentivized to "translate" as closely as possible the state-approved curriculum into their class lesson plans. A teacher who does so is likely to see her students' scores rise, which will improve her personal evaluations. If the standard curriculum turns out to be pedagogically deficient, her costs are few: the bureaucracy, not the teacher, is blamed. She is unlikely to realize many substantive benefits from a more creative approach. Conversely, if she strays from the standard material and her students perform poorly, she's likely to be held responsible.

A similar effect may be at work when Congress implements international agreements like the CWC. Congressional drafters have little to gain by developing creative approaches to fulfill those agreements. If they play it safe and simply import the CWC's language, they can rest assured knowing they have covered all their international-law bases. Any negative domestic consequences can be blamed on the treaty itself, on other members of Congress for not inserting reservations (although the CWC itself prohibits them), or on the president for signing the treaty in the first place. These incentives should tend to produce literal translations from the international law to the domestic law.

In most other cases, Congress is attentive to the federalism implications of multilateral treaties: consider the roadblocks faced by the International Covenant on Civil and Political Rights, the WTO Agreement on Government Procurement, and the Convention on the Rights of the Child. These treaties all require state parties to prohibit behaviors that are often within the traditional purview of U.S. states, e.g., child neglect, criminal punishment, and state-government procurement. Each treaty lingered for years or was stymied altogether, largely because of federalism concerns.¹⁸

The CWC is unusual in this respect. To the extent that it threatens current federalism norms, it has proved a wolf in sheep's clothing. Like these treaties, the CWC requires its members to prohibit certain conduct by its citizens. But that conduct is qualitatively different because the CWC purports to address a prototypical national and international concern: the development and stockpiling of weapons of war. The CWC is ostensibly aimed at states and terrorists, with the outward goal of promoting international peace and security. That outward objective may have distracted lawmakers implementing the CWC from its elements that, like similar elements in controversial human rights treaties, can reach into domestic and

18. See Robert Anderson IV, "Ascertained in a Different Way": *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 237 (2001).

local affairs and that have nothing to do with international peace and security.

CONCLUSION

Whatever *Bond's* outcome, the Act's congressional drafters may have accidentally laid the groundwork for a watershed in federal–state relations and, perhaps, in U.S. foreign relations. If this case, with these several important implications, has taken its creators by surprise, why does its strange origin matter to anyone besides Carol Bond? It matters because the case underscores the dangers of poorly translating international law into domestic law, particularly given the complexities of federalism. Congress's attempt to minimize “translation errors” by copying pertinent phrases verbatim may dot all the “i's” and cross all the “t's,” but it can compromise the spirit, or true purpose, of the international law. This verbatim translation can distort the effect of the statute when courts—which usually look first to statutes' plain language—interpret the law. As with crude language-translation software, the overarching purpose of the language is lost to literalism.

In the realm of treaty interpretation, this process can produce unforeseen, unintended consequences. Here, the overly literal translation of international law has created a law that turns many kitchen cupboards into “potential chemical weapons cache[s].” The result is predictable: a criminal regime that punishes routine, misdemeanor batterers as if they were terrorists and illegal-arms dealers, a consequence unlikely to find much support regardless of political or legal ideology. Given the expanding scope of issues subject to multilateral treaties in recent years,¹⁹ these unintended domestic effects might well become increasingly commonplace, especially where they come packaged as international security or trade conventions.

That result is hardly inevitable. For instance, the CWC, like many other treaties, acknowledges that each state party shall implement its obligations under the Convention “in accordance with its constitutional processes.”²⁰ Had Congress foreseen that federal prosecutors would use the Act to pursue people like Carol Bond, it might have found other ways, “in accordance with [U.S.] constitutional processes,” to fulfill its obligation to

19. See Bradley, *supra* note 7, at 397; Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1869–70 (2005) (arguing that affording Congress a broad treaty-implementation power is troubling, especially given the “explosion of the United States's commitments under international law”).

20. CWC art. VII, Jan. 13, 1993, 112 Stat. 2681–856, 1974 U.N.T.S. 45.

prohibit nonpeaceful chemical uses. For instance, Congress could have simply created a multitiered sentencing scheme, in which minor assaults were recognized and punished as such. Alternatively, Congress could have relied on existing U.S. state criminal regimes to cover nonpeaceful uses of chemicals (as in *Bond*) that have nothing to do with international peace, terrorism, or weapons of mass destruction. For example, prior to the Act, the Antiterrorism and Effective Death Penalty Act of 1996 prohibited the use of chemical weapons. But it defined “chemical weapon” more narrowly, as “a weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals.” That definition, in conjunction with the existing state schemes, would also have fulfilled the pertinent U.S. obligations under the CWC.

If it acknowledges the lessons of the CWC and *Bond*, a future Congress might look for alternative, more creative ways to implement U.S. treaties. From an international-law standpoint, those alternatives would certainly be bolder, perhaps even riskier. But by depriving the Supreme Court of the chance to reshape foreign-relations federalism in ways that could hamstring the other branches, the alternatives are more likely to serve the political and foreign-affairs interests of Congress and the president.

That the issues raised in *Bond* surprised Congress and so many others demonstrates the challenges of converting international law into domestic law in a federal system. Above all, *Bond*'s history shows how the implementation process can force lawmakers into the tricky task of navigating between two ills: straying too far from a convention's sweeping directives, which risks breaching international law, and producing uncritical literal translations of those directives, which risks importing a domestic regime poorly suited for a domestic system.