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Bond v. United States

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BOND V. UNITED STATES

Supreme Court Holds Chemical Weapons Convention Implementation Act Inapplicable to Jilted Wife's Attempt to Injure Husband's Lover

*Dean M. Nickles**

I. CASE FACTS AND PROCEDURE

Petitioner Carol Bond was a microbiologist from Pennsylvania. Mrs. Bond's husband had been having an affair with her friend, Myrlinda Haynes, who became pregnant by Mr. Bond in 2006. After learning the details of the affair, Mrs. Bond attempted sought revenge against Ms. Haynes. She ordered one chemical (potassium dichromate) over the Internet, stole a second chemical from her workplace, and over the course of eight months, Mrs. Bond on numerous occasions went to Ms. Haynes' home and spread the chemicals in locations with which Ms. Haynes was likely to come into contact, including her mailbox. Due to the visible nature of the chemicals, all but one of Mrs. Bond's attempts were unsuccessful, and Ms. Haynes suffered only a minor chemical burn in the successful attempt. It is undisputed that Mrs. Bond did not intend to kill Ms. Haynes, but was simply attempting to give her an uncomfortable rash. While the local authorities did not respond to Ms. Haynes's requests for assistance, the post office responded to the alleged tampering with Ms. Haynes' mailbox and placed surveillance cameras. These cameras recorded Mrs. Bond stealing an envelope and placing chemicals in the muffler of Ms. Haynes's car.[1]

Federal prosecutors charged Mrs. Bond with two counts of mail theft, as well as two counts of possessing and using a chemical weapon in

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1 Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

violation of 18 U.S.C. § 229(a), the Chemical Weapons Convention Implementation Act. Mrs. Bond filed a motion to dismiss the chemical weapons counts on the grounds that they exceeded Congress' powers and violated the Tenth Amendment; the district court denied the motion.[2] The district court accepted Mrs. Bond's conditional guilty plea, sentenced her to six years imprisonment, and ordered her to pay a $2,000 fine and $9,902.79 in restitution.[3] Mrs. Bond then appealed to the Court of Appeals for the Third Circuit on Tenth Amendment grounds, and the court of appeals agreed with the government that she lacked standing to bring this challenge. When the Supreme Court granted certiorari in 2011, however, the government confessed error, stating that it had changed its position, and the case was reversed and remanded to the Third Circuit. On remand, the Third Circuit rejected Mrs. Bond's arguments that her conduct was not among the "warlike" activities Congress designed the statute to prohibit and that section 229 exceeded Congress' powers.[4] At no stage in this case did the government attempt to use the Commerce Clause as justification for the statute.[5] The Supreme Court again granted certiorari in 2014.[6]

II. HOLDING OF THE CASE

Chief Justice Roberts, writing for the majority, held that section 229 did not cover Mrs. Bond's conduct in this case.[7] The Chief Justice begins by discussing the federal nature of the U.S. government, the general principle that the states "have broad authority to enact legislation for the public good—often called a 'police power,'"[8] and that usually the national government cannot legislate in this area. Although the government often uses the Commerce Clause to defend its power to legislate in this area, the government could not make that argument here.[9] Despite the parties spending significant time over constitutional questions surrounding the Necessary and Proper Clause and the treaty power, the majority found itself able to resolve the case on other grounds.[10]

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2 *Id.*

3 *Id.* at 2086.

4 *Id.*

5 *Id.* at 2087.

6 *Id.* at 2086.

7 *Id.* at 2093.

8 *Id.* at 2086 (citing United States v. Lopez, 514 U.S. 549, 567 (1995)).

9 *Id.* at 2087 (stating that "the Court of Appeals held that the Government had explicitly disavowed that argument before the District Court").

10 *Id.* (asserting "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case'" (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

Taking into consideration several factors, the Court ultimately decided that Congress did not provide a clear enough statement evidencing its intent to regulate purely local conduct. The Court explained that interpreting the statute to include Mrs. Bond's conduct would be a "'dramatic[] intru[sion] upon traditional state criminal jurisdiction.'"[11] The Court found that, here, "ambiguity derives from the improbably broad reach of the [statutory definition of] 'chemical weapon,'" and thus, absent a "clear indication"[12] that Congress meant to reach local crimes, the statute cannot be read to do so. The Court additionally argued that the reach of the statute is not as broad as it may at first appear, because despite the definition of "chemical weapon" within the statute, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition."[13] Compounded by the presence of other prosecutorial options[14] and the federalism concern that the more expansive reading would intrude upon a traditional state police power,[15] the Court required a clear statement that Congress meant to regulate this purely local conduct before reading the statute to reach the conduct here.[16]

III. ANALYSIS

It is important to begin with the plain text of the statute. Section 229(f)(1)(A) defines a "chemical weapon" as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."[17] A "toxic chemical," for purposes of the statute, is

> any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.[18]

Section 229(a) provides that it is "unlawful for any person knowingly to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[19] Given the straightforward nature of this language, Justice

11 *Id.* at 2088 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).
12 *Id.* at 2090.
13 *Id.* at 2091.
14 *Id.* at 2092.
15 *Id.* at 2091–92.
16 *Id.* at 2093.
17 18 U.S.C. § 229F(1)(A) (2012).
18 *Id.* § 229F(8)(A).
19 *Id.* § 229(a)(1).

Scalia's assertion that "[t]he meaning of the Act is plain"[20] appears to be the more persuasive argument. Looking at the facts of the case, though, the chemicals Mrs. Bond used did inflict a chemical burn on Ms. Haynes, and thus clearly seem to meet the statutory definition of "toxic chemicals." In turn, this means they satisfy the definition of a "chemical weapon" under the statute. It would seem, then, that Mrs. Bond knowingly used the "chemical weapon" on the property of Ms. Haynes, for a purpose not protected under section 229F and therefore in violation of section 229(a).[21]

Given that the language of the statute appears to be clear, it is odd the Court found it to be ambiguous. The Court's determination that the ordinary meaning of "chemical weapon" would not cover Mrs. Bond's conduct may very well be true, but as Justice Scalia states, "[this is] beside the point, since the Act supplies its own definition of 'chemical weapon,' which unquestionably does bring Bond's action within the statutory prohibition . . . . [T]he ordinary meaning of [chemical weapon] is irrelevant, because the statute's own definition . . . is utterly clear."[22] Justice Scalia quotes *Stenberg v. Carhart* for the proposition that "'[w]hen a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*.'"[23] With the clarity of the statutory definitions, the majority's clear statement requirement seems to suggest that even when Congress clearly states the definition of the conduct it intends to reach, something more is needed. It would now seem advisable for Congress in the future to make clarifying statements about the scope of any statutory announcement, given the Court's concern for the "improbably broad reach of the key statutory definition."[24] Prior to this case, however, it did not seem to be necessary to do so to satisfy the clear statement rule.[25]

Had the Court concluded that the statute, as written, reached Mrs. Bond's conduct, the next step would have been to analyze whether the Act, as applied to her conduct, was constitutional. The Court did not discuss this question, since the majority resolved the case via the clear statement rule. The concurrences, however, did discuss this issue. Justice Scalia

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20 *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring).

21 18 U.S.C. §§ 229F(7)(A)–(C) lists the purposes not prohibited by the statute, including peaceful, protective, military, and law enforcement purposes.

22 *Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring).

23 *Id.* (quoting Stenberg v. Carhart, 530 U.S. 914, 942 (2000)). The Court in *Carhart* also quoted several other cases which stand for the same principle. *See* Meese v. Keene, 481 U.S. 465, 484–85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."); Colautti v. Franklin, 439 U.S. 379, 392–93 n.10 (1979) ("As a rule, 'a definition which declares what a term 'means' . . . excludes any meaning that is not stated.'" (quoting 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp. 1978)).

24 *Bond*, 134 S. Ct. at 2090 (Scalia, J., concurring).

25 *See id.* at 2096.

disagrees with the government's proposition that the Necessary and Proper Clause,[26] combined with the President's Article II power to make treaties,[27] gives power to Congress to enact laws to execute treaties.[28] Although Justice Scalia's point that the Constitution does not distinguish between self-executing and non-self-executing treaties is true,[29] this was the result of neither an oversight nor conscious decision by the Framers.[30] At the time of the drafting, treaties would have been understood to be self-executing, and there was thus no need to distinguish between the two.[31] The difference "was introduced into U.S. jurisprudence by the Supreme Court in *Foster v. Neilson* . . . . [The Court] said only that treaties that 'operate of themselves' are applicable by the courts without legislative implementation. The Court's qualification is the source of the distinction between self-executing and non-self-executing treaties."[32] With that in mind, it seems at least plausible that the original combination, with only one type of treaty in mind, naturally led to Congress having the power to pass laws necessary and proper to carry into execution the power to make treaties which would have the force of law. There was no need to provide a clearer distinction between making and carrying out the treaty, as making a treaty would have included carrying out its obligations.

The Necessary and Proper Clause and treaty-making power, however, should also be sufficient on their own, barring other constitutional constraints, to permit Congress to pass laws carrying out the obligations of treaties. It is necessary and proper for the making of treaties that the obligations of treaties be given the force of law.[33] Without the assurance

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26 U.S. CONST. art. I, § 8, cl. 18 (Congress has the power "[t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution . . . all other [p]owers vested by this Constitution in the Government of the United States or in any Department or Officer thereof").

27 *Id.* art. II, § 2, cl. 2 (The President "shall have [p]ower, by and with the [a]dvice and [c]onsent of the Senate, to make Treaties").

28 *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring).

29 *Id.* at 2099.

30 This summary does not intend to represent any original historical research, but instead relies on the prior work of other scholars.

31 Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 764 (1988) ("[M]ost of the Framers intended all treaties *immediately* to become binding on the whole nation, superadded to the laws of the land . . . . In these ways at least, all treaties (to the extent of their grants, guarantees or obligations) were to be self-executing.").

32 Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 700–01 (1995); *see id.* at 700 n.27 ("The *Foster* self-execution holding was an alternative ground for denying relief. Before reaching the self-execution issue, the Court held that the treaty was inapplicable . . . ." (internal citations omitted)). *See generally* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

33 Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 76 (2014) (arguing that Justice Scalia's reasoning "fails to account for the possibility that some treaties may require implementing legislation in order

(and likelihood) of treaty obligations being enforced, the power to make treaties would be hindered. Other nations would hesitate to make treaties with the United States if it was unable to trust that the United States would actually enforce the agreed upon terms.[34] *Missouri v. Holland*[35] was the most recent, prominent case prior to *Bond* in which the Supreme Court considered the treaty power. Although Justice Scalia dismisses the Court's single sentence[36] from that opinion dealing with the treaty-implementing power as "unreasoned and citation-less," his statement does not necessarily reflect the whole story. Missouri's brief "focused on challenging the scope of the treaty power and did not offer any clear separate challenge to Congress' treaty-implementing power"[37] because, at that time, "Congress'[] treaty-implementing power was uncontroversial. It had a straightforward textual basis in the Necessary and Proper Clause combined with the Treaty Clause . . . [and it] had the sanction of historical practice in the political branches and the approval of leading commentators . . . ."[38] In this context, it no longer seems as odd that the issue of the Necessary and Proper Clause did not receive a more in-depth treatment in *Missouri*. Furthermore, separating the power to make treaties from Congress' power to carry out the obligations of the treaty is not as simple as Justice Scalia makes it seem.

Justice Scalia based the second portion of his concurrence on the structure of the Constitution and notions of enumerated and separated powers.[39] He seemed concerned with the possibility of the government utilizing the treaty power to regulate areas which it normally could not,

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to be 'made'—that is, to be ratified or to enter into force. . . . [H]istorically, U.S. practice sometimes required that the implementation of treaties occur prior to their ratification or entry into force").

34 *Id.* at 76–77 ("[T]his reasoning does not account for the possibility that implementing legislation might in fact facilitate the making of treaties. . . . [B]asic accounts of treaty negotiation . . . recognize that treaty negotiators take the likelihood of compliance into account and may demand stiffer terms or decline to negotiate with countries known to have past difficulties complying with treaties." (citing Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 596 (2005) (explaining that when a state with past compliance problems "seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions of their own in exchange for promises from that country. If there is enough suspicion, potential partners may simply refuse to deal with the state"))).

35 252 U.S. 416 (1920).

36 *Id.* at 432 (stating that "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").

37 Galbraith, *supra* note 33, at 108–09.

38 *Id.* at 108. *See generally id.* at 81–108 (reviewing the historical development of the treaty-implementing power prior to *Missouri v. Holland*).

39 Bond v. United States, 134 S. Ct. 2077, 2099–100 (2014) (Scalia, J., concurring).

rendering it "one treaty away from acquiring a general police power."[40] Although there has been some argument for the treaty power having no limitations on subject matter,[41] others, including Justice Thomas in his concurring opinion, advocate for a "domestic concern" limitation.[42] Justice Scalia's concern that the treaty power could be used for the creation of pretextual treaties also appears to be a problem with a solution. The powers being discussed here are a combination of the treaty power and Necessary and Proper Clause. It is here the oft-quoted words of Justice Marshall pertaining to the Necessary and Proper Clause come to mind: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[43] If the government—with, as in this case, the acquiescence of the President, two-thirds of the Senate, and the passage of a statute by the Congress—conspired to create a pretextual treaty to overrule a decision of the Supreme Court, it would be a situation wherein the end would be illegitimate, outside the scope of the Constitution, and the means both inappropriate and not plainly adapted. Such a law would be unconstitutional and would fail.

If one considers the political safeguards of federalism to be a functioning check on the national government in any way, the process for a non-self-executing treaty appears to be the most stringent—outside of the amendment process—and yet, is still able to be repealed by the same process as other statutes. Requiring the approval of both the President and two-thirds of the Senate, then having the domestic component undergo bicameralism and presentment, provides perhaps the best opportunity for political safeguards to work. Although the power of non-self-executing treaties creates concern, self-executing treaties are more worrisome because they are not required to go through bicameralism and presentment. The need for congressional action should be seen as beneficial, allowing Congress to craft laws which comply with the treaty but also represent the concerns of their constituents.[44] That is not to say there should be no limits on the treaty power once combined with the Necessary and Proper Clause.

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40 *Id.* at 2101.

41 *See id.* at 2100 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 191, 197 (2d ed. 1996)). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 433–39 (2000).

42 *Bond*, 134 S. Ct. at 2103–11 (Thomas, J., concurring). This limitation will be discussed *infra*.

43 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

44 Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 437 (2003) (stating that the Founders "took special steps to ensure that the treaty power would not be used to abuse state interests"); *see also id.* at 437 n.138 ("Ordinary legislation requires [Presidential agreement or a two-thirds supermajority] . . . . The

As discussed previously, the restrictions on the Necessary and Proper Clause should already provide some restrictions on Congress' use of the treaty power.[45] Justice Thomas, in his concurrence, brings up the potential limit of domestic concerns.[46] After reviewing the history of the Treaty Power through statements from the Founders[47] and caselaw,[48] Justice Thomas concludes that although "the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases[,] . . . hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit," positing to "draw a line that respects the original understanding of the Treaty Power."[49] There are different ways to draw the line between domestic and international affairs. Professor Curtis Bradley discusses two main ways that this "subject matter limitation" could be read.[50] The first aligns with Justice Thomas's concurrence and limits the treaty power to matters that have international effects.[51] The second limits the power to those matters that need "international cooperation in order to be addressed."[52] The problem with the first understanding is that, given the interconnectedness of nations in the modern world, "almost any issue can plausibly be labeled 'international.'"[53] The second understanding is subject to similar issues, though it appears to be consistent with the decision in *Holland*, in which the limitation required that the nations involved agree on a cooperative approach.[54] There is a concern about the ability of the courts to draw this line in a consistent, applicable way,[55] but the difficulty should not

significance of that difference turns in part on the Senate's value in protecting state prerogatives." (citing Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 722 (2002))).

45 *See supra* note 43 and accompanying text.

46 *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring).

47 *Id.* at 2103–08 ("The postratification theory and practice of treaty-making accordingly confirms the understanding that treaties by their nature relate to intercourse with other nations . . . rather than to purely domestic affairs.").

48 *Id.* at 2108–10 ("[T]he holding in *Holland* is consistent with the understanding that treaties are limited to matters of international intercourse. The Court observed that the treaty at issue addressed *migratory* birds that were 'only transitorily within the State and ha[d] no permanent habitat therein.'" (citing Missouri v. Holland, 252 U.S. 416, 435 (1920))).

49 *Id.* at 2110.

50 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451–56 (1998).

51 *Id.* at 452–53.

52 *Id.* at 453.

53 *Id.* at 451–52.

54 *Id.* at 453.

55 *Id.*

necessarily mean the courts disregard this potential limit, as Justice Thomas asserted.[56]

Others suggest that the treaty power distinction between domestic and international is not really a workable distinction,[57] and there are other constitutional constraints that might apply.[58] This case in particular presented an odd situation in light of the government's decision not to argue that the Commerce Clause supported its enactment. However, due to the purely local, criminal nature of Mrs. Bond's conduct, it seems that this is an instance where the Court could have made clear what is *not* "international."

CONCLUSION

Although the majority's outcome was correct, the application of the clear statement rule in this situation seems incorrect. The majority misconstrues the statute not to reach Mrs. Bond's conduct when it should have done so. The concurrences properly assert that despite the conduct here falling within the clear definition of the statute, the Court should have reversed the conviction on constitutional grounds. As a result of this decision, Congress should now plan to make clarifying statements about the scope of the statute in order to avoid the clear statement problem identified here.

Separately, although only dicta, Justice Scalia's assertion that the Necessary and Proper Clause does not extend beyond the "making" of treaties does not seem correct. It appears necessary and proper for the making of treaties that the power to execute be implied, and the non-self-executing treaty was a later judicial invention that the original language could not have taken into account. However, Justice Thomas's use of the domestic and international matter distinction appears to be a useful limit on the treaty power, and it is on that point that future cases could seek to draw a distinction.[59]

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56 Bond v. United States, 134 S. Ct. 2077, 2110 (Thomas, J., concurring).

57 *See* Symposium, *The Treaty Power After* Bond v. United States*: Interpretative and Constitutional Constraints*, 90 NOTRE DAME L. REV. (forthcoming 2015).

58 Bradley, *supra* note 50, at 456–61 ("[T]here is a strong case—based on history, doctrine, and policy—for subjecting the treaty power to the same federalism limitations that apply to Congress's legislative powers.").

59 *See supra* notes 45–56 and accompanying text.