BOND V. UNITED STATES AND CONGRESS'S ROLE IN IMPLEMENTING TREATIES

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Bond v. United States[1] had long been anticipated as the case in which the Supreme Court would revisit *Missouri v. Holland* (1920) and limit Congress's authority to implement treaties. In the event, the Court did nothing of the kind. Only three Justices would have recognized judicially enforceable limits on the Treaty Power (Thomas, joined by Scalia and Alito, concurring in the judgment), and only two would have adopted the crabbed reading of the Necessary and Proper Clause advocated by Professor Nicholas Rosenkranz (Scalia, joined by Thomas, concurring in the judgment).[2]

The majority opinion, written by Chief Justice Roberts, avoided these constitutional questions and decided the case on narrow, statutory-interpretation grounds. Roberts characterized Carol Anne Bond's unsuccessful attempt to harm her husband's lover with toxic chemicals as "a purely local crime"[3] that would normally be left to the State, rather than the sort of offense the Chemical Weapons Convention Implementation Act was designed to address. The Chief Justice was not willing to trust the prosecutorial discretion of the federal executive to moderate the broad scope of the Act, although he noted that the federal government had generally acted responsibly[4] and he had nice things to say about the prosecutorial discretion of state officials.[5] "We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[6] Significantly, the Court's decision leaves open the possibility that Congress could provide a clear indication that it meant to reach crimes like Ms. Bond's, though it seems highly unlikely that Congress would want to do so.

The opinion in *Bond* reminds me of *Medellín v. Texas* (2008), another Roberts opinion. *Medellín* held that Article 94 of the U.N. Charter, obligating U.N. member states to comply with decisions of the International Court of Justice, was non-self-executing and rejected the President's attempt to make such a decision binding under his own authority. But the Court also made clear that Congress could decide to give ICJ decisions domestic effect through implementing legislation. *Medellín* is representative of the opinions of the Roberts Court, which (as Harlan Cohen[7] and Ingrid Wuerth[8] have each noted) tends to distrust the executive branch unless statutory authorization is clear. In *Bond*, as in *Medellín*, we see the Supreme Court establishing certain

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

[2] Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

[3] Bond, 134 S.Ct. at 2083.

[4] *Id.*

[5] *Id.* at 2092-2093.

[6] *Id.* at 2090.

[7] Harlan Grant Cohen. *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380 (2015).

[8] Ingrid Wuerth, *Chief Justice Roberts – [Not Yet] The Most Important Author of Foreign Relations Opinions in the History of the Supreme Court?*, LAWFARE BLOG (May 12, 2014, 10:47 AM).

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baseline rules for treaty implementation, distrustful of the executive, but apparently willing to let Congress have the final say.

The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism. In *United States v. Bass* (1971)[9], the Court applied to the federal firearms possession statute a presumption that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bond* simply applied the same rule of interpretation to treaty-implementing legislation. As Curtis Bradley[10] has noted, the Court's approach has the salutary effect of protecting the political process or, as the Court put it in *Bond*, assuring "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved."[11]

It is true, as Jean Galbraith[12] points out, that the Court's approach potentially creates a wedge between the interpretation of a treaty and its implementing legislation because "the statute—unlike the Convention—must be read consistent with principles of federalism."[13] And yet this approach does not threaten to put the United States in breach of its obligations under the Chemical Weapons Convention, which "is agnostic between enforcement at the state versus federal level."[14] The Chief Justice was also careful to note that "[t]he Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering" and that "nothing we have said here will disrupt the Government's authority to prosecute such offenses."[15] So long as Congress is free to alter the federal-state balance to the extent it deems necessary in order to implement a treaty, the authority of the federal government to ensure compliance with the United States' international obligations remains unimpaired.

Of course, it is possible that the Court could, in a future case, impose substantive limits on the Treaty Power, as Justices Thomas, Scalia, and Alito were willing to do in this one. "Given the increasing frequency with which treaties have begun to test the limits of the Treaty Power," Justice Thomas predicted, "that chance will come soon enough." (p. 16). I doubt it. First, Congress has a broad array of powers with which to implement treaty obligations, not just the combination of the Treaty Power and the Necessary and Proper Clause, but also the Commerce Clause (which the U.S. attorney somehow managed to waive in *Bond*) and the Define and Punish Clause (which Sarah Cleveland and I have argued[16] provides additional constitutional authority for the Chemical Weapons Implementation Act). Second, in giving its advice and consent, the Senate is extremely careful not to commit the United States to obligations that intrude on the traditional authority of the State. When the United States ratified the International Covenant on Civil and Political Rights, for example, it reserved the right to impose the death penalty on juveniles (although the Supreme Court subsequently ruled the juvenile death penalty unconstitutional under the Eighth Amendment). As Oona Hathaway and her students[17] have shown, it is through the political process that limits on the Treaty Power are supposed to be enforced.

[9] U.S. v. Bass, 404 U.S. 336, 349 (1971)

[10] Curtis A. Bradley, *Bond, Clear Statement Requirements, and Political Process*, 108 AJIL UNBOUND 83 (2014).

[11] Bond, 134 S.Ct. at 2089 (quoting Bass, 404 U.S. 336, 349 (1971)).

[12] Jean Galbraith, *Guest Post: Silences in the Bond Case*, OPINIO JURIS (June 2, 2014).

[13] Bond, 134 S.Ct. at 2088.

[14] *Id.* at 2092.

[15] *Id.*

[16] Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015).

[17] Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 CORNELL L. REV. 239 (2013).

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It has long been held that the Treaty Power "extends to all proper subjects of negotiation with foreign governments" (Thomas, concurring, p. 13, quoting *In re Ross* (1891)). The real question is who gets to decide what the "proper subjects of negotiation" are. Justices Thomas, Scalia, and Alito would assign that responsibility to the Supreme Court. The better course, I submit, is to leave that responsibility to the political branches of our government, a course the decision in *Bond* leaves open.

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