



Bond v. United States: Validity and Construction of the Federal Chemical Weapons Statute

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Summary

The Chemical Weapons Convention obligates the United States to outlaw the use, production, and retention of weapons consisting of toxic chemicals. The Chemical Weapons Convention Implementation Act outlaws the possession or use of toxic chemicals, except for peaceful purposes. The Supreme Court has agreed to hear a case in which the petitioner argues that use of the federal implementing statute in a “run of the mill” assault case exceeds Congress’s legislative power under the Constitution’s Necessary and Proper Clause, *Bond v. United States*. The case asks whether the primacy of the states over criminal matters limits the Court’s assertion in *Missouri v. Holland* that “if the treaty is valid there can be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of the Government.”

Carol Anne Bond, upon discovering that her husband had impregnated another woman, repeatedly dusted the woman’s mail box, front door knob, and car door handles with a toxic chemical. Mrs. Bond was indicted in federal court and pled guilty to possessing a chemical weapon, but reserved the right to appeal. The United States Court of Appeals for the Third Circuit rejected her constitutional challenge. A concurring member of the panel, however, urged the Supreme Court to clarify the nearly century-old pronouncement in *Missouri v. Holland*:

“Since *Holland*, Congress has largely resisted testing the outer bounds of its treaty-implementing authority. But if ever there was a statute that did test those limits, it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the mill criminal conduct.... Sweeping statutes like Section 229 are in deep tension with an important structural feature of our Government: The States possess primary authority for defining and enforcing the criminal law.”

The Tenth Amendment reserves to the states those powers the Constitution does not vest in the federal government. Yet, the Constitution vests the President with treaty-making powers. And, it authorizes Congress to enact legislation, necessary and proper to effectuate those powers. Hence the observation in *Holland*, no constitutional suspicion attends legislation necessary and proper to the implementation of a valid treaty perhaps even should it intrude upon state prerogatives. Mrs. Bond questions whether a statute of the breadth of the chemical weapons provision is constitutionally necessary and proper to implement the treaty, since primary responsibility for criminal law rests with the states.

In the alternative, Mrs. Bond has asked the Court to hold that the federal chemical weapons statute does not apply to her conduct. The question of whether the statute might be sustained under the Commerce Clause is not before the Court.

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Introduction

On January 18, 2013, the United States Supreme Court granted certiorari to again consider issues raised by Carol Bond's conviction under a statute enacted to implement the Convention on Chemical Weapons.¹ Mrs. Bond argues that the implementing statute is inapplicable to her case, or alternatively, that the federal principles reflected in the Tenth Amendment render the implementing legislation unconstitutional. The case affords the Court the opportunity to provide guidance, beyond that of Justice Holmes' *Missouri v. Holland* opinion, on the scope of the President's treaty making power and Congress's authority to enact treaty implementing legislation.

Background

On numerous occasions, Carol Bond, a microbiologist, coated the car door handles and mailbox of her husband's paramour with a mixture of toxic chemicals.² Although Mrs. Bond's efforts were clumsily done, the victim did on one such occasion sustain a minor chemical burn on her thumb.³ Mrs. Bond was eventually implicated and indicted in federal court for possession and use of a chemical weapon in violation of 18 U.S.C. 229(1)(a).⁴ Reserving the right to appeal, she pled guilty and was sentenced to imprisonment for six years.⁵

On appeal, Mrs. Bond argued that the implementing statute under which she was convicted was either unconstitutional or inapplicable.⁶ The United States Court of Appeals for the Third Circuit initially ruled that she lacked standing to raise the constitutional issue, since the Tenth Amendment exists for the protection of state, not individual, rights.⁷ The Supreme Court disagreed and returned the case to the Court of Appeals for a decision on the merits.⁸

Mrs. Bond's constitutional claim is grounded on the argument that the legislation is an intrusion upon sovereign prerogatives of the states with respect to local criminal offenses. The government has responded that (1) the authority to negotiate and ratify the Chemical Weapons Convention comes within the President's constitutional treaty making power; (2) enactment of legislation to implement the Convention comes within Congress's authority to make laws necessary and proper to carry into execution the President's treaty making power; and (3) Mrs. Bond's conduct is condemned by a literal reading the implementing legislation's criminal proscriptions.⁹

¹ *Bond v. United States*, ___ S.Ct. ___ (Jan. 18, 2013)(No. 12-158).

² *United States v. Bond*, 581 F.3d 128, 131-32 (3d Cir. 2009).

³ *Id.* at 132.

⁴ *Id.*

⁵ *Id.* at 133.

⁶ *Id.* at 134.

⁷ *Id.* at 134-38.

⁸ *Bond v. United States*, 131 S.Ct. 2355, 2367 (2011).

⁹ E.g., *United States v. Bond*, 581 F.3d at 134-35; *United States v. Bond*, 681 F.3d 149, 151 n.1 (3d Cir. 2012).

Mrs. Bond's Constitutional Challenge

To prevail on her constitutional challenge, Mrs. Bond must reconcile her position with the Supreme Court's decision in *Missouri v. Holland*.¹⁰ In *Missouri v. Holland*, state officials sought to enjoin federal enforcement of the Migratory Bird Treaty Act, which they argued constituted an intrusion on state authority in violation of the Tenth Amendment.¹¹ Prior to ratification of the treaty, lower federal courts had held that the Tenth Amendment limited Congress's constitutional authority to enact a similar measure. The state argued that the treaty could not vest Congress with legislative power that would otherwise rest beyond its constitutional reach.¹²

The Supreme Court, speaking through Justice Holmes, began with the observation that it was "not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, §2, the power to make treaties is delegated expressly.... If 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."¹³ The treaty collided with no explicit constitutional prohibition.¹⁴ The only question was whether the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment."¹⁵

Justice Holmes did not suggest that the question might never be answered in a state's favor; only that the State's interest was insufficient in the case before the Court. Missouri claimed exclusive authority over the birds within its domain. The treaty protected birds with international migratory habits, threatened with extinction by virtue of the hunting practices in some of the states they traversed. The federal interest was substantial, and Missouri's interest was not enough to cast doubt on the validity of the treaty or its implementing statute.¹⁶

¹⁰ 252 U.S. 416 (1920).

¹¹ *Missouri v. Holland*, 252 U.S. 416, 430-31 (1920).

¹² *Id.* at 432 ("It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 Fed. Rep. 154. *United States v. McCullagh*, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U.S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force").

¹³ *Id.*

¹⁴ *Id.* at 433.

¹⁵ *Id.* at 433-34.

¹⁶ *Id.* at 434-35 ("The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds.... To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.... Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld").

Although the Court in *Holland* identified no Tenth Amendment-implicit, contextual limits on Congress's legislative authority, it has done so in other cases. Thus, the Court has held that Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹⁷ Moreover, it has been said that legislation cannot be considered Necessary and Proper, if it fails to recognize the contextual limitations that flow from the Constitution's presumption of dual federal-state sovereignty.¹⁸

All of which proved to be of no avail for Mrs. Bond in the Third Circuit. The court concluded that the Convention was a proper subject for the President's treaty making power.¹⁹ Moreover, "with practically no qualifying language in *Holland* to turn to, [appellate courts] are bound to take at face value the Supreme Court's statement that 'if the treaty is valid there can be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of the Government,'" federalism concerns notwithstanding.²⁰

A concurring member of the panel, however, expressed the hope that the Supreme Court would "flesh out the most important sentence in the most important case about the constitutional law of foreign affairs, and in doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it."²¹

Mrs. Bond's Application Challenge

Mrs. Bond contends that the focus of the Chemical Weapons Convention and its implementing legislation is so distinct that Congress could not have intended them to apply to her conduct. The nature of the instruments makes her claim creditable; their breadth makes it difficult.

The United States signed the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction (the Convention) in Paris on January 13, 1993.²² The President supplied a capsulized description of the Convention when he transmitted it to the Senate:

The convention will require States Parties to destroy their chemical weapons and chemical weapons production facilities under the observations of international inspectors; subject

¹⁷ *New York v. United States*, 505 U.S. 144, 151 (1992); see also, *Printz v. United States*, 521 U.S. 898, 926-27 (1997).

¹⁸ *Printz v. United States*, 521 U.S. at 923-24 (emphasis in the original), quoting, The Federalist No. 33, at 204 (A. Hamilton), ("When a 'Law ... for carrying into Execution' [one of the enumerated powers] violates the principle of state sovereignty ... it is not a 'Law ... proper for carrying Execution' [the enumerated power], and is thus, in the words of the Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such'").

¹⁹ *United States v. Bond*, 681 F.3d 149, 161-62 (3d Cir. 2012)("Whatever the Treaty Power's proper bounds may be, however, we are confident that the Convention we are dealing with here falls comfortable within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use").

²⁰ *Id.* at 162. The court had earlier noted that "the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture," *id.* at 157.

²¹ *Id.* at 170 (internal citations omitted)(Ambro, J. concurring).

²² S. Treaty Doc. 103-21 (1993).

States Parties' citizens and businesses and other nongovernmental entities to its obligations; subject States Parties' chemical industry to declarations and routine inspection; and subject any facility or location in the State Party to international inspection to address other States Parties' compliance concerns.²³

The Convention requires signatories to condemn within their jurisdictions those activities it has agreed to forego. More specifically, "each State Party is prohibited from:

- (a) Developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons or transferring them, direct or indirectly to anyone;
- (b) *Using chemical weapons under any circumstances*, including retaliatory use (which many countries protected under the Geneva Protocol of 1925);
- (c) Engaging in any military preparations to use chemical weapons or assisting, encouraging, or inducing anyone to engage in any activity prohibited by [the Convention]; and
- (d) Using riot control agents as a method of warfare.²⁴

Each nation must establish corresponding restrictions upon others found within its own jurisdiction. That is, "each State Party must:

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction, as recognized by international law from undertaking any activity prohibited to a State Party under the Convention;
- (b) Not permit in any place under its control any activity prohibited by a State Party under the Convention; and
- (c) Extend its penal legislation enacted under subparagraph (a) above to any activity prohibited to a State Party under the Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.²⁵

The Senate did not readily give its advice and consent on the Convention. The Senate Foreign Relations Committee held six days of hearings towards the close of the 103th Congress.²⁶ The committee heard further witnesses during the 104th, and issued a favorable executive report under which the Senate's advice and consent would have been subject to 7 conditions and 11 declarations.²⁷ Even so, the Convention apparently lacked the votes, for it was never brought to the floor.²⁸

²³ *Id.* at III. In diplomatic parlance, "states" refers to nation states rather to the several states of the United States.

²⁴ *Id.* at XI (emphasis added), describing Article I.

²⁵ *Id.*, describing Article VII.

²⁶ *Chemical Weapons Convention (Treaty Doc 103-21): Hearings Before the Senate Comm. on Foreign Relations*, 103th Cong., 2d Sess. (1994).

²⁷ S. Ex. Rept. 104-33 (1996).

²⁸ See 143 *Cong. Rec.* 6033 (1997)(remarks of Sen. Helms)("And we have been here before, meaning the Senate. The point being that the Senate scheduled a time certain last September to take up this very same treaty. But, on the day of the scheduled vote, the White House asked to withdraw the treaty. Why? Well, because there were not 67 votes necessary to pass it").

Pressed by time deadlines within the Convention²⁹ during the 105th Congress, the Senate discharged the Foreign Relations Committee from further consideration of the Convention.³⁰ The Senate only then gave its advice and consent subject to page after page of conditions—none of them addressed to the criminal penalties which the Convention obligated the United States to enact with respect to the use of chemical weapons.³¹

Implementing proposals appeared in both the House and Senate shortly thereafter.³² The Senate held hearings³³ and passed an amended version of its bill.³⁴ A year later, the proposal that became the Chemical Weapons Convention Implementation Act was tucked in towards the end of the 900-plus-page Omnibus Consolidated and Emergency Supplemental Appropriations measure.³⁵

Throughout the ratification debate, the principal concerns were the protection of United States businesses subject to international inspection³⁶ and doubts that the pact would lead to international chemical weapons disarmament.³⁷ The need to protect American industry during the international inspection process drove the compromises necessary for Senate passage of implementing legislation.³⁸

²⁹ For the countries that had accepted it, the Convention entered into effect 180 days after the 65th country ratified it, Art. XXI. By operation of Article XXI, the Convention was schedule to go into effect, with or without Senate advice and consent, within days of Senate consideration, see 143 *Cong. Rec.* 6035 (1997)(remarks of Sen. Biden).

³⁰ 143 *Cong. Rec.* 6032 (1997).

³¹ 143 *Cong. Rec.* 6425-433 (1997).

³² S. 610 (105th Cong.); H.R. 1590 (105th Cong.).

³³ *Chemical Weapons Implementing Legislation: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (1997). The House had earlier held similar hearings, *Implementation of the Chemical Weapons Convention: Hearing Before the House Comm. on Foreign Relations*, 103d Cong., 2d Sess. (1994); see also, *Constitutional Implications of the Chemical Weapons Convention: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

³⁴ 143 *Cong. Rec.* 9554 (1997).

³⁵ P.L. 105-277, 112 Stat. 2681-856 (1998). The Implementation Act consists of six titles and a definition section: Title I (general provisions, designation of a Convention central authority for the United States, inter alia); Title II (18 U.S.C. 229 et seq. and revocation of export privileges); Title III (inspections); Title IV (reports); Title V (enforcement relating to inspections); Title VI (miscellaneous provisions, bankruptcy and testing on civilian populations, among others).

³⁶ E.g., S. Exec. Rept. 104-33, at 285-87 (Minority Views) (“The U.S. chemical[,], pharmaceutical, and biotechnology industries have long been heavily targeted for industrial espionage.... Proprietary information is often the basis for a chemical company’s competitive edge.... CWC inspections will be conducted by international teams of inspectors including nationals from U. S. political and/or economic adversaries. During even a routine inspection a skilled chemical engineer equipped with knowledge of the target facility and list of specific questions to be answered could learn a great deal about the activities of a given business”).

³⁷ E.g., S. Exec. Rept. 104-33, at 241-42 (Minority Views) (“[W]e do not believe that the treaty submitted to the Senate is verifiable. Nor will it reduce the arsenals of terrorist countries and other nations hostile to the United States.... Furthermore, not one country that is pursuing chemical weapons – with the exception of the United States and its allies – can be expect to abide by the CWC, whether or not they ratify. Too many chemicals are dual-use in nature.... Countries are well aware that if they ratify the CWC they can cheat with impunity.... The CWC also will undo decades of arms control efforts at stemming the tide of chemical weapons proliferation.... Russia has withdrawn from a much older bilateral commitment to the United States to destroy its chemical weapons stockpiles, citing the less intrusive, less-effective CWC as a preferable alternative”).

³⁸ 143 *Cong. Rec.* 9552 (1997)(remarks of Sen. Hatch) (“The bill before us today is the product of negotiations with the administration and with my colleagues on the other side of the aisle.... I believe that we have achieved a bill that comprehensively implements the treaty, while also protecting the constitutional rights of Americans. Let me explain briefly why that is true: First our bill provides for civil liability of the United States for the loss of property resulting from inspection procedures under the treaty. Second the Chemical Weapons Convention authorizes a team of international officials to inspect the facilities of private American businesses. Our bill protects the constitutional rights (continued...)”).

There can be little doubt, however, that Mrs. Bond’s conduct falls within a literal reading of the implementing legislation. The legislation outlaws knowingly using a chemical weapon.³⁹ A chemical weapon is any toxic chemical, and a toxic chemical is any chemical that “can cause death, temporary incapacitation or permanent harm to humans or animals.”⁴⁰ The legislation does establish several exceptions, such as the exceptions for possession by members of the Armed Forces or the exceptions for use for peaceful purposes “related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”⁴¹ Neither these nor any of the other exceptions, however, seem to fit Mrs. Bond’s conduct.

On appeal, the Third Circuit conceded that the implementation legislation’s “breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache.”⁴² Nor was it impressed with the government’s decision to press prosecution.⁴³ Yet at the end of the day, Mrs. Bond’s conduct satisfied the statute’s broadly drafted elements. The Third Circuit affirmed her conviction and set the stage for Supreme Court review.⁴⁴

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of American citizens through the warrant requirement that must be satisfied for all inspections. Third, the bill protects confidential business information that, according to the treaty, must be reported to the U.S. National Authority. This bill also provides aggressive penalties for the person disclosing the information, as well as for those benefiting from the information. In sum, the Chemical Weapons Convention Implementation Act of 1997 is a reasonable effort to protect the constitutional rights of our citizens against unlawful inspections under the treaty”).

³⁹ 18 U.S.C. 229(a) (“... it shall be unlawful for any person knowingly - (1) to ... use ... any chemical weapon ...”).

⁴⁰ 18 U.S.C. 229F(1), (8).

⁴¹ 18 U.S.C. 229F(1), (7).

⁴² *United States v. Bond*, 681 F.3d 149, 155 n.7 (3d Cir. 2012).

⁴³ *Id.* at 165 (footnote 20 of the court’s opinion in brackets) (“... Bond’s prosecution seems a questionable exercise of prosecutorial discretion, [The decision to use the Act – a statute designed to implement a chemical weapons treaty – to deal with a jilted spouse’s revenge on her rival is, to be polite, a puzzling use of the federal government’s power.], and indeed appears to justify her assertion that this case ‘trivializes the concept of chemical weapons’”).

⁴⁴ *Id.* at 151. The Third Circuit found it unnecessary to decide the implementing legislation lies within Congress’ legislative authority under the Commerce Clause, *id.* at 162 n.14. Therefore, Supreme Court is unlikely rule on that issue.