

## BOND, CLEAR STATEMENT REQUIREMENTS, AND POLITICAL PROCESS

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In its decision yesterday in *Bond v. United States*,<sup>1</sup> the Supreme Court carefully avoided addressing either the constitutional scope of the treaty power or the scope of Congress's constitutional authority to implement treaties under the Necessary and Proper Clause. The decision is nevertheless important in holding that a federalism-based clear statement requirement, which was originally developed in the context of purely domestic legislation, applies even to legislation implementing a treaty. It also signals more generally (as had earlier decisions such as *Medellín v. Texas*) that the Court will be attentive to federalism values even in cases involving foreign affairs. In this post, I will highlight both a process point in support of the Court's clear statement approach and a potential drawback of that approach. I conclude with some miscellaneous observations about the decision.

As the Court explained, it has previously held—in decisions such as *Gregory v. Ashcroft* (1991), and *United States v. Bass* (1971)—that federal statutes should not be construed as intruding on traditional state authority absent a clear indication that Congress intended this effect. The Court has justified this clear statement requirement partly on political process grounds: requiring that Congress expressly consider whether to intrude on state authority, rather than having the courts infer such intrusions, helps ensure that advocates of state authority will be able to express their opposition adequately during the legislative process. (It can be difficult for opponents to fight for federalism interests if they do not know such interests are at stake.) Such political safeguards are especially important if the courts are unwilling or unable to play an active role in policing substantive limitations on the national government's authority.

These justifications have particular salience, I think, in the context of legislation implementing treaties. Treaties, especially multilateral treaties with numerous parties, are generally not written with the precision expected of domestic legislation. To achieve agreement among a large number of diverse countries, many of which have unitary rather than federal legal system, treaties by necessity often contain broad and general terms and leave the details of implementation to be worked out by each country internally. Nevertheless, for a variety of reasons, Congress in its implementing legislation may simply copy the language from the treaty. That is what appears to have happened with the legislation implementing the provisions in the Chemical Weapons Convention that require criminalization of certain conduct. Such copying might have a number of virtues, including avoiding potential discrepancies between U.S. law and the United States' international obligations and harmonizing the domestic implementation of international rules among treaty parties. When this happens, however, there is no reason to think, merely from the existence of broad language, that Congress is deliberately seeking to change the traditional balance of state and federal authority through its implementing legislation.

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<sup>1</sup> *Bond v. United States*, 134 S.Ct. 2077 (2014).

As understood by the Court, the clear statement requirement can be very potent, in that it can render ambiguous even statutory language that on its face otherwise seems clear. The Court explained that, in this case, the ambiguity in the statute derived not from the statute's plain language, but rather from "the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism."<sup>2</sup> Moreover, the Court said that a mere "general definition" will not be sufficient to prevent such ambiguity.<sup>3</sup> This approach, which has elements of purposivism and consequentialism, is likely to bother some textualists, and it obviously bothered Justice Scalia. But the majority's basic point here seems right: whether statutory language (or constitutional language, for that matter) is perceived to be clear depends in part on considerations outside the text, including background understandings and presumptions. (My colleague Neil Siegel and I discuss related points about perceptions of clarity in a forthcoming article.<sup>4</sup>)

Nevertheless, this ability of the clear statement requirement to destabilize otherwise clear text has a potential downside: it means that, instead of clarifying an ambiguity, applying the requirement could render the meaning of a statute too uncertain to serve as a proper vehicle for domestic application, at least in the criminal context. The majority in *Bond* suggested vaguely, for example, that to be subject to prosecution under the statute at issue there, the chemicals being used must be "of the sort that an ordinary person would associate with instruments of chemical warfare."<sup>5</sup> The majority also indicated that it would be important to consider whether the chemicals were being used in "combat,"<sup>6</sup> although it did say that this would always be required. As Justice Scalia pointed out in his concurrence, with the addition of these fairly indeterminate contextual considerations, which are not themselves set forth in or defined by Congress, it may be difficult for a statute to provide sufficient notice to potential defendants of what conduct it is criminalizing.<sup>7</sup> Of course, one potential answer to this concern would be for Congress to legislate more precisely when implementing a treaty, and perhaps this decision will help prompt Congress to do so going forward.

Here are a few additional observations about the decision: although a reversal seemed likely after the oral argument, it is noteworthy, and somewhat surprising, that the vote was 9-0 to reverse. Moreover, for whatever reason, no Justice wrote in defense of an unlimited treaty power, or even in defense of the analysis in *Missouri v. Holland*. It seems reasonable to think that the liberal Justices may have refrained from writing separately in order to ensure that the majority opinion was narrowly written. We know that there are at least three votes on the Court for a subject matter-oriented limitation on the treaty power, and at least two votes for structural limitations, but it is difficult to know whether and to what extent other Justices (including most notably the Chief Justice and Justice Kennedy) would agree with those limitations. Nothing in the majority opinion precludes arguing for such limitations, and at least some of the language in that opinion (such as about how "the National Government possesses only limited powers" and lacks a general police power<sup>8</sup>) could be read as providing at least modest support for them. Finally, this case was a poor vehicle for the government to defend the use of its treaty power, and the government should feel lucky that its loss in the case was not worse than it is. My guess is that the prosecution's decision to use the chemical weapons statute against *Bond* was not

<sup>2</sup> *Id.* at 2090.

<sup>3</sup> *Id.*

<sup>4</sup> Curtis A. Bradley & Neil Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2014).

<sup>5</sup> *Bond*, 134 S. Ct. at 2090.

<sup>6</sup> *Id.* at 2090-2091.

<sup>7</sup> *Bond*, 134 S. Ct. at 2111 (Scalia, J. concurring).

<sup>8</sup> *Bond*, 134 S. Ct. at 2086.

cleared with the State Department. If not, the executive branch should reconsider how it decides when to use treaty implementation legislation.