

The Volokh Conspiracy

« [Welcome to the Union! Here's Your Special Certiorari Grant as a Present Thugs Win Again](#) »

[Federalism, Bond v. United States, and the Treaty Power](#)

[Ilya Somin](#) • September 1, 2012 12:30 pm

When we last we heard of the case of *Bond v. United States*, the Supreme Court had ruled that a criminal defendant can challenge the constitutionality of a federal statute she was charged with violating on the grounds that it exceeds the scope of congressional power under the Constitution. In a rare unanimous decision on a federalism issue, the Court ruled that “[f]ederalism secures the freedom of the individual” as well as the prerogatives of state governments. Therefore, individuals as well as states have standing to raise federalism-based challenges to federal statutes.

However, the case is not over. When it was returned to the lower federal courts for a decision on the merits, the US Court of Appeals for the Third Circuit ruled that the statute under which Bond was convicted is authorized by an international treaty. That raises the longstanding question of whether the federal government’s power to make treaties authorizes Congress to legislate in areas that would otherwise be beyond its authority. The Cato Institute has filed an amicus brief urging the Supreme Court to hear this new phase of the litigation and reverse the Third Circuit. The brief was authored by Georgetown law professor Nicholas Rosenkranz (a leading academic expert on the constitutional law of treaties), Ilya Shapiro (no relation), and Trevor Burrus. The brief and a summary of its argument are available [here](#):

In 2010, the Supreme Court decided *United States v. Bond*, a case that seems right out of a soap opera. Carol Anne Bond learned that her best friend was having an affair with her husband, so she spread toxic chemicals on the woman’s car and mailbox. Postal inspectors discovered this plot after they caught Bond on film stealing from the woman’s mailbox.... [A] federal prosecutor charged Bond with violating a statute that implements U.S. treaty obligations under the 1993 Chemical Weapons Convention. Bond pled guilty and was sentenced, but she reserved the right to appeal her conviction on the ground that the statute at issue violates the Tenth Amendment—in that her offense was local in nature and not properly subject to federal prosecution. She won the first part of that appeal process: The Supreme Court unanimously accepted the argument... that there’s no reason in constitutional structure or history that someone can’t use the Tenth Amendment to challenge the constitutionality of the statute under which she was convicted. On remand to the.... U.S Court of Appeals for the Third Circuit, Bond... raised the argument that

Congress's limited and enumerated powers cannot be increased by treaties.... The Third Circuit disagreed, however—if reluctantly—based on one sentence by Justice Oliver Wendell Holmes in *Missouri v. Holland* (1920) that has been interpreted to mean that Congress's constitutional powers can indeed be expanded by treaties. Writing separately, Judge Ambro agreed that *Holland* clearly addressed the issue but “urge[d] the Supreme Court to provide a clarifying explanation of its statement” regarding the treaty power. Bond has thus brought her case back to the Supreme Court, asking the Court to clarify and cabin *Holland*. In this, our third brief in the case, we are joined again by the Center for Constitutional Jurisprudence in arguing that allowing Congress to broaden its powers via treaties is an astounding manner in which to interpret a document that creates a federal government of limited powers. Not only would this mean that the Executive has the ability to expand federal power by signing a treaty, but it would mean that foreign governments could change federal power by abrogating a previously valid treaty—thus removing the constitutional authority from certain laws. We also point out how the most influential argument supporting *Holland* is based on a clear misreading of constitutional history that has gotten repeated without question and that the ruling is in deep tension with other cases. We're in a constitutional quagmire with respect to the treaty power that can only be escaped by limiting or overturning *Missouri v. Holland*.

In my view, unconstrained federal power under the treaty clause isn't as dangerous as unconstrained federal power under the Commerce Clause or the Necessary and Proper Clause. A treaty only becomes law if ratified by a two-thirds supermajority of the Senate, which is a high hurdle to overcome, and in practice usually requires a broad national consensus. Nonetheless, for the reasons outlined in the Cato brief and in Rosenkranz's [important academic work on the subject](#), I think the power to make treaties is best understood as a power allowing the federal government to make commitments regarding the use of its other enumerated powers, not a power that allows the federal government to legislate on whatever subjects it wants, so long as the issue is covered by a treaty. Among other things, the latter would enable the federal government to circumvent limits on the scope of its power by paying off a foreign power (e.g. – a weak client state dependent on US aid) to sign a treaty covering the subject.

It will be interesting to see whether *Bond* becomes one of the rare cases that get to the Supreme Court twice.