

US Perspectives

US Supreme Court Questions America's Power To Carry Out Treaties *

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By [Steven Seidenberg](#) for Intellectual Property Watch

On 5 November, the United States Supreme Court heard oral arguments in a case that could undermine America's ability to carry out its treaty obligations. The case casts a shadow over the country's power to implement a wide variety of international agreements, including trade and intellectual property agreements.

In [Bond v. United States](#), Carol Anne Bond is challenging a federal statute that implements the [Convention](#) on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction, to which the United States is a signatory. The implementing [statute](#) passed by the US Congress makes it unlawful for any person to possess, make, or use "any chemical weapon."

Bond was convicted of violating this statute because she used dangerous chemicals in an attempt to poison her husband's mistress.

Bond appealed her conviction and is now asking the nation's highest court to strike down the law she violated. She is asking the Supreme Court to rule that Congress did not have the power to enact the federal statute implementing the Convention.

Bond is arguing that Congress' legislative powers are specified in Article I, [Section 8](#) of the US Constitution, and that none of these powers allows the federal legislature to criminalize her use of deadly chemicals against another individual. The states have traditionally been responsible for punishing such attempted homicides, and according to Bond, the [10th Amendment](#) to the Constitution prevents the Congress from usurping this responsibility. (The 10th Amendment states that "powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people.")

The United States government is arguing that the statute at issue is constitutional because Congress' powers go beyond those listed by Article I, Section 8 of the Constitution. The statute is justified, the government contends, by the federal government's [Article II](#) power to make treaties – which implies the power to implement these treaties. Moreover, treaties are "the supreme Law of the Land" according to [Article VI](#) of the Constitution, so they and their implementing statutes are not limited by the 10th Amendment's protection of states' rights.

Bond has countered that the treaty power does not expand Congress' power to legislate. If it did, there would be no limit on the scope of Congress' power. It could pass a law on any subject, no matter how

local, so long as the law implements some treaty.

Reopening a Settled Issue

Most experts thought this issue had been settled long ago. In 1920, the Supreme Court held in [*Missouri v. Holland*](#) that Congress has the power to pass laws implementing a treaty, even if those laws would otherwise be beyond the legislative powers granted to Congress by Article I, Section 8 of the Constitution. The high court rejected the argument that such implementing legislation violated the 10th Amendment. This ruling has been followed by US courts for the past 93 years.

The current Supreme Court, however, appears poised to overturn these precedents. At oral argument, only three Justices sceptically questioned Bond's position. Five Justices grilled the government over its position. Many observers thus expect the court to rule against the government.

This inference, however, should be viewed with some skepticism. Justices' questions in oral arguments often do not reflect their final positions in a case. Still, the fact that at least four Justices voted to hear this case suggests that a large segment of the court is seriously considering overturning the legal principle established in *Missouri v. Holland*.

If the court rules in favour of Bond and overturns *Missouri v. Holland*, "there would be uncertainty about the United States' ability to carry out its treaty obligations," said Dr. Klinton W. Alexander, an Of Counsel at Baker Donelson who specializes in international trade issues.

All types of non-self-executing treaties could be affected, including international IP agreements, according to Alexander.

"A Supreme Court decision overturning, or modifying, *Missouri v. Holland* ... will signal to the world that if the prohibition against the use of chemical weapons can be set aside in certain 'local' instances, then so can US commitments under the WTO or the Patent Cooperation Treaty," he said.

Moreover, a decision against the government in *Bond* could significantly damage America's standing as a dependable international partner – and undermine other nations' willingness to enforce their own treaty obligations.

If US judges can "engage in case-by-case invalidation of exercises of the Treaty Power when they thought conduct was too 'local' to be regulated," that "would prompt similar reciprocal behaviour in other nations, hamstring US trade negotiators, and undermine global confidence in the United States as a reliable treaty partner to the detriment of the national security and economic interests of the United States," Alexander said. "This would send a signal to countries around the world that entering into a treaty with the US is an uncertain endeavour at best."

Some experts, however, assert that if the Supreme Court rules against the government in *Bond*, the fallout will be limited. Self-executing treaties might not be affected at all, Prof. Rick Pildes of New York University Law School has [argued](#).

But there is a powerful reason why many international agreements, including the [WTO agreements](#), are not self-executing: Any treaty that requires proactive enforcement on the ground, such as an IP treaty, requires nation-by-nation implementing legislation, Alexander explained. Thus it could prove impracticable for the United States to try to make many types of international agreements self-executing.

Other experts assert that a US government loss in *Bond* would have little or no effect on many non-self-executing agreements, because they concern legislative subjects that are within Congress' Article I powers – such as patents, copyrights, and regulating interstate commerce.

"Most IP laws that are relevant to today's society are made at the federal level, so the issues raised in

the *Bond* case won't impact them," said Douglas F. Stewart, a partner in the Seattle office of Bracewell & Giuliani.

But even under this legal interpretation, some important non-self-executing agreements could be imperiled. If the US wanted to enter into a treaty on moral rights, trade secrets or other IP rights beyond the scope of Article I-sanctioned patent, trademark and copyright law, that could still run afoul of states' rights.

Whatever the decision in *Bond*, it is unlikely to be the Supreme Court's last word on the extent to which international agreements are effective in the US.

"There is an anti-international law movement in this country," Alexander said. This case, he added, is "part of movement to assert states' rights as a way to minimize or outlaw the effect of international law. Again, the 10th Amendment rears its ugly head as a way towards isolationism."

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