1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   CAROL ANNE BOND,   :

4   Petitioner   :   No. 12-158

5   v.   :

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, November 5, 2013

10

11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:05 a.m.

14 APPEARANCES:

15 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

16   Petitioner.

17 DONALD B. VERRILLI, JR., ESQ., Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:05 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 12-158,

5   Bond v. United States.

6   Mr. Clement?

7   ORAL ARGUMENT OF PAUL D. CLEMENT

8   ON BEHALF OF THE PETITIONER

9   MR. CLEMENT: Mr. Chief Justice, and may it

10   please the Court:

11   If the statute at issue here really does

12   reach every malicious use of chemicals anywhere in the

13   nation, as the government insists, then it clearly

14   exceeds Congress' limited and enumerated powers. This

15   Court's cases have made clear that it is a bedrock

16   principle of our federalist system that Congress lacks a

17   general police power to criminalize conduct without

18   regard to a jurisdictional element or some nexus to a

19   matter of distinctly Federal concern.

20   The President's negotiation and the Senate's

21   ratification of a treaty with a foreign nation does not

22   change that bedrock principle of our constitutional

23   system.

24   JUSTICE GINSBURG: But, Mr. Clement, you

25   said that -- that the treaty is valid and the

1   implementing legislation seems to largely copy the words

2   of the treaty without adding anything. So it's a puzzle

3   that the treaty could be constitutional, but the

4   implementing legislation that adds nothing is

5   unconstitutional.

6   MR. CLEMENT: Well, Justice Ginsburg, I

7   guess I would quarrel with your premise, which is, it is

8   true that the convention in the statute used similar

9   terms and terminology, but there's one very important

10   difference between the convention and the statute, and

11   that actually differentiates this case from Missouri v.

12   Holland.

13   And that difference is that the convention

14   itself doesn't directly regulate individual conduct at

15   all. And so all the -- all the convention does --

16   JUSTICE KAGAN: But the convention -- but

17   the convention tells the State parties, go regulate

18   individual conduct in exactly the way that this

19   convention regulates State parties. And then what the

20   legislation does is, as Justice Ginsburg said, just

21   mirror the convention as the convention contemplated.

22   MR. CLEMENT: Well, Justice Kagan, to be

23   quite precise, though, what the convention says -- and

24   this is Article 7, Section 1, it's 33a of the Blue Brief

25   appendix. What it says is that each nation state that

1   signs the convention agrees, in accordance with its

2   constitutional processes, to pass penal laws that make

3   unlawful for individuals conduct that would violate the

4   convention, if undertaken by a nation state.

5   And I would respectfully suggest that making

6   that translation, if you will, between what violates the

7   convention if you're a nation state and what would be

8   comparable individual conduct is not obvious. And when

9   the government does that through penal legislation,

10   there's no reason why that penal legislation shouldn't

11   have to comply --

12   JUSTICE SOTOMAYOR: Why not?

13   MR. CLEMENT: -- as we promised with our --

14   JUSTICE SOTOMAYOR: Mr. Clement, why not?

15   Meaning there -- there can be no doubt that chemical

16   weaponry is at the forefront of our foreign policy

17   efforts right now. Look at the Syria situation alone.

18   It would be deeply ironic that we have expended so much

19   energy criticizing Syria, when if this Court were now to

20   declare that our joining or creating legislation to

21   implement the treaty was unconstitutional. We're

22   putting aside the impact that we could have on foreign

23   relations.

24   Why is it -- if it's okay to regulate the

25   possession of marijuana, a purely local crime, why is it

1 unconstitutional to regulate the use of something that

2 can kill or maim another human being -- a chemical that

3 can kill or maim another human being?

4   MR. CLEMENT: Well, I think --

5   JUSTICE SOTOMAYOR: I don't understand where

6 the disconnect is in terms of our Federal or State

7 system.

8   MR. CLEMENT: Well, Justice Sotomayor, I

9 think it really gets down to the difference between

10 Raich on the one hand and Lopez on the other, which, as

11 this Court has held, that it is a classic and rational

12 way to regulate commerce, to basically prohibit certain

13 items from commerce. And --

14   JUSTICE SOTOMAYOR: So why isn't this

15 saying -- there's no dispute that these chemicals were

16 transported against -- along interstate lines. That's

17 not even disputed in this case.

18   MR. CLEMENT: Well -- but I don't think it

19 was really disputed in Lopez that the firearm would have

20 had to cross State lines. But the problem in Lopez was

21 the Federal statute was not structured in a way that had

22 a jurisdictional nexus that made the statute only

23 applicable as a regulation.

24   JUSTICE SOTOMAYOR: Now --

25   JUSTICE SCALIA: Well, we didn't take this

 1   case to -- to decide the Commerce Clause question, did

 2   we? The government didn't even assert it below. It

 3   asserts it now, but as we took the case, the issue was

 4   whether the treaty supported the -- the laws.

 5   MR. CLEMENT: That's right, Justice Scalia.

 6   And we do think that the government, like a private

 7   party, can waive a constitutional argument.

 8   On the other hand, I would say that we're

 9   not particularly concerned about the Commerce Clause

10   argument because we think the Commerce Clause argument

11   has the same basic defect as the treaty power argument,

12   which is that the police --

13   JUSTICE KAGAN: Do you think -- do you

14   think, Mr. Clement, and this goes back to Justice

15   Ginsburg's question, could the -- could this treaty have

16   itself regulated individual conduct? Could the treaty

17   have been self-executing?

18   MR. CLEMENT: Well, I think that's an

19   interesting question, and I don't think the Court needs

20   to answer it. I mean, I would take the position that if

21   there really were a self-executing treaty that tried to

22   impose criminal prohibitions, and I don't think there is

23   any treaty like that, but if there were one, I would

24   say, here, that it violates the Constitution for the

25   same basic reasons that this implementing legislation

1 does. But I -- but I --

2   JUSTICE KAGAN: So where would you find that

3 in the Constitution? Because there's clearly a treaty

4 power that does not have subject matter limitations.

5 And, indeed, if you go back to the founding history,

6 it's very clear that they thought about all kinds of

7 subject matter limitations, and James Madison and others

8 decided, quite self-consciously, not to impose them.

9   So where would you find that limitation in

10 the Constitution.

11   MR. CLEMENT: I would find that limitation

12 in the structural provisions of the Constitution and the

13 enumerated powers of Congress. And I would say that it

14 would be very --

15   JUSTICE KAGAN: But this is an enumerated

16 power. The enumerated power is the treaty power. So

17 you have to find a constraint on the treaty power.

18 Where does it come from?

19   MR. CLEMENT: Well, I think that where it

20 would come from, again, is the structural provisions of

21 the Constitution. If we had a self-executing treaty

22 that purported, at a national level, to commandeer State

23 and local police officers, I would think that there

24 might be -- you could call it a Tenth Amendment

25 objection, you could call it an enumerated power

1 objection. There might be an objection to that treaty.

2   JUSTICE ALITO: Well, don't you think the

3 word "treaty" has some meaning? It is certainly true

4 that, going back to the beginning of the country, there

5 have been many treaties that have been implemented in

6 ways that affect matters that otherwise would be within

7 the province of the States.

8   One of the original purposes of the--

9 objectives of the Constitution was to deal with -- with

10 a treaty power was to deal with the issue of debts owed

11 to British creditors. And there have been cases about

12 the property rights of -- of foreign subjects, about the

13 treatment of foreign subjects here, about things that

14 are moving across international borders, about

15 extradition and all of those.

16   But in all of those, until fairly recently,

17 certainly until, generally, after World War II, all of

18 those concerned matters that are of legitimate concern

19 of a foreign State. That was the purpose of a treaty.

20 So can't we see something in that, in the meaning of a

21 treaty, what it was understood to mean when the

22 Constitution was adopted?

23   MR. CLEMENT: I think that's right,

24 Justice Alito. And I didn't mean, in answering Justice

25 Kagan's question, to fully accept the premise that

1   there's no limit on the treaty power whatsoever. But I

2   do think that it's important to recognize that, in the

3   context of non-self-executing treaties, there's a real

4   opportunity to leave for another day the question of

5   whether the treaty itself is valid because, sometimes, a

6   treaty is non-self-executing precisely because the

7   Senate recognizes --

8   JUSTICE KENNEDY: If you had been the

9   President's counsel, would you have advised him that it

10 was unconstitutional to sign this treaty as written?

11   MR. CLEMENT: No. Absolutely not,

12 Justice Kennedy, but that's precisely because it's a

13 valid non-self-executing treaty. By its terms, it

14 doesn't do anything to direct -- directly regulate

15 individual conduct. And if I were the President's

16 counsel, I would have said, honestly, Mr. President, I

17 don't think this requires us to have any law that

18 applies to garden variety assaults with chemicals.

19   But if we need that to discharge our treaty

20 obligations, the States are absolutely ready and able to

21 shoulder that task. There's no State in this country

22 that doesn't have a general assault statute that would

23 be covered by this conduct. There is no State that

24 doesn't have a murder statute to cover this conduct --

25   JUSTICE GINSBURG: Mr. Clement, there's an

1   irony in what you just said, because the victim, many

2   times, went to the State police and said, please help

3   me. And they turned her away a dozen times. And

4   finally they said, go to the post office.

5   So this doesn't seem to be -- you're arguing

6   that this trenches on the State's domain. And, yet, in

7   this very case, it wasn't until the State referred her

8   to the post office, Federal officials, that she got any

9   action.

10   MR. CLEMENT: Well, Justice Ginsburg, one

11   way to understand that is that the State of Pennsylvania

12   exercised its prosecutorial discretion not to pursue

13   this matter. I don't think that -- I don't even think

14   the government says that that exercise of prosecutorial

15   discretion put us in violation of our treaty

16   obligations.

17   Our treaty obligation, at most, is to have a

18   law that prohibits this conduct, which the States

19   certainly do. The treaty obligation is not to make sure

20   that every single use -- malicious use of chemicals is,

21   in fact, prosecuted by the State or local officials.

22   JUSTICE KAGAN: Mr. Clement, could I make

23   sure I understand your test? Your test is to say that

24   with respect to every prosecution under this -- under

25   this treaty, that a court has to ask whether the

1   prosecution has a sufficient nexus to national or

2   international concerns? Is that -- is that your test?

3   MR. CLEMENT: No, that's not my test,

4   Justice Kagan. I would actually come at it from the

5   other end of the stick, which is to say, that the one

6   thing I think I know from this Court's precedence is

7   that the Federal government doesn't have a general

8   police power.

9   So as I look at this statute, it can either

10   be saved by essentially creating a jurisdictional

11   element out of the phrase "peaceful" and equating it

12   with non-war-like or, if the statute really has this

13   general character, then at least as applied to the

14   chemicals here, which are pure dual use chemicals, it

15   can't be constitutionally applied.

16   JUSTICE KAGAN: Well, I guess I'm still

17   looking for a test, and I thought that the test that I

18   just articulated was really directly out of your briefs.

19   But if it's -- if -- if you're suggesting that

20   that's not the test, give me the test that we're

21   supposed to ask with respect to this case or any other

22   as to whether the prosecution is unconstitutional.

23   MR. CLEMENT: It's whether the Federal

24   statute exercises a general police power. And if it

25   does --

1   JUSTICE KAGAN: That sounds like a facial

2   challenge. Now, I thought that you made very careful to

3   talk about that this was an as-applied challenge to this

4   particular prosecution.

5   MR. CLEMENT: Well, that's because the only

6   relief I'm seeking is to have my client's conviction

7   vacated, so this is the classic as-applied challenge.

8   Now, the reasoning that the Court may employ in

9   vindicating my as-applied challenge may suggest that the

10   statute is unconstitutional in some or all of different

11   applications, but our claim has always been that

12   the --

13   JUSTICE KAGAN: So you're saying, if the

14   statute extends to things that we've generally thought

15   of as part of the police power, that's sufficient.

16   MR. CLEMENT: I would say that, if a Federal

17   statute exercises the police power -- by which I mean it

18   criminalizes conduct without regard to jurisdictional

19   element or some nexus to a matter of distinctly Federal

20   concern, then that statute exceeds Congress' power.

21   That was the case in Lopez; that was the case in

22   Morrison. And I think, unless you accept our narrowing

23   construction, that's the case here.

24   JUSTICE KAGAN: Okay. Nexus -- nexus to a

25   national concern, again, is what I understood you to say

 1   in your brief. But let me give you a hypothetical, and

 2   you tell me whether your test meets it.

 3   Let's say it's the same convention, except

 4   it relates only to Sarin gas, and -- and there's a

 5   chemist out there and -- you know, the -- the

 6   implementing legislation mirrors the convention.

 7   There's a chemist out there who manufactures Sarin

 8   gas -- I take it it's pretty easy to manufacture -- and

 9   sends it through the ducts of a house and kills

10   everybody in it.

11   Does that have a nexus to national concerns?

12   MR. CLEMENT: It does, Your Honor, and it

13   would be valid legislation precisely because Sarin is

14   something that, clearly, Congress could prohibit in all

15   its uses. And as I understand how this statute applies

16   to Sarin gas or other things, certainly, on Schedule

17   I -- there are some Schedule I substances that are

18   talked about both in the convention and the treaty --

19   those things are always unlawful.

20   What is particularly unusual about the

21   statute's application to something like potassium

22   dichromate or vinegar or whatever you have is that, in

23   most of its possession and uses, it's perfectly lawful,

24   and what makes it a chemical weapon in the government's

25   theory is when it's used purely intrastate in a

1   malicious way.

2   JUSTICE KAGAN: So -- but this is -- in my

3   hypothetical -- and you didn't run away from it at all;

4   I applaud that. In my hypothetical, it's a completely

5   domestic use -- you know, it's just this chemist didn't

6   like his neighbor and used Sarin gas. And you're saying

7   that the difference is, well, what the treaty makers did

8   was define the category of chemicals more broadly.

9   And I guess what I want to know is you are

10   imagining a world in which judges day to day try to get

11   inside the head of treaty makers to think about -- you

12   know, in this case, we understand that there's a

13   national interest in regulating Sarin gas, but we don't

14   think that there's a sufficient national interest in regulating

15   some other chemical or some other chemical or so on down

16   the line.

17   It seems to me a completely indeterminate

18   test and one that would have judges take the place of

19   treaty makers, in terms of deciding what is in the

20   national and international interest.

21   MR. CLEMENT: Well, Justice Kagan, I would

22   beg to differ. I actually think that our approach to

23   this case avoids judges being put in that difficult

24   position, precisely because we distinguish, unlike the

25   government, between the validity of the convention and

1   the validity of the implementing legislation.

2   And then, as to the implementing

3   legislation, we simply ask the courts to do what they do

4   in every other context, which is to check and see if

5   that implementing legislation is consistent with our

6   basic chartering document.

7   And it's the government's position, which I

8   don't really understand why this would work, but their

9   theory is that, if the non-self-executing treaty is

10   valid, then the implementing legislation is ipso facto

11   somehow valid.

12   JUSTICE ALITO: And do you think it would be

13   difficult --

14   MR. CLEMENT: And think about the convention

15   that was before this Court in the Medellin case, the

16   Vienna Convention on Consular Notification. It puts an

17   obligation on any arresting official to provide

18   notification to the consulate about an arrested foreign

19   national.

20   Now, I suppose it would be a perfectly

21   rational way to implement that convention to have a

22   national police force, and so every arresting officer is

23   a Federal officer who's fully apprised of the Vienna

24   Convention responsibilities. That would be a rational

25   way to implement the treaty, but it wouldn't be remotely

1   consistent with our Constitution.

2   On the other hand, that same valid

3   non-self-executing treaty can be validly implemented by

4   chartering the State Department to work with police

5   officers on a State and local level to understand their

6   obligations.

7   JUSTICE ALITO: Do you think it would be

8   difficult for a judge to ask, is there any possibility

9   that there is any other country in the world that has

10   the slightest interest in how the United States or any

11   of its subdivisions deals with the particular situation

12   that's involved in this case?

13   MR. CLEMENT: Justice Alito, I think that

14   would be one way of approaching the question. I think

15   that would be a --

16   JUSTICE ALITO: Do you think that would be

17   beyond the -- that would be beyond the ability of

18   Federal judges when they -- when a case like this comes

19   before them?

20   MR. CLEMENT: I don't think it would be

21   beyond their ability. I also don't think it would be

22   beyond -- beyond the ability of a Federal judge to say,

23   okay, let's hypothetically ask the question in the

24   absence of a non-self-executing treaty, would Congress

25   have the power to pass this statute?

1   And if the answer to that is no, then I

2   think the burden sort of shifts to figure out why it is

3   that the treaty adds something to the powers of the

4   Federal government.

5   And I think this, just to make clear, I

6   think this is a very different context from what the

7   Court had in Missouri v. Holland because, there, the

8   treaty itself prohibited individual action. An

9   individual violated the treaty if they took a migratory

10   bird out of season.

11   And so in that sense, the enforcement

12   statute did nothing more than put a criminal penalty on

13   violating conduct that was already prohibited to the

14   individual. And in that --

15   JUSTICE KENNEDY: Is it -- is it one way to

16   characterize your argument or is it too unfairly

17   confining to your argument to say that what you're

18   suggesting is something like a clear statement rule,

19   that, if the treaty intends nation states to have their

20   own constitutional structure superseded at a minimum, it

21   has to say so, and then we will come to the question of

22   whether or not they can do it?

23   MR. CLEMENT: I think that would be a fair

24   characterization of our argument, but only to add that

25   this would be the anti-clear statement case. Because

1   the one place that this convention talks about imposing

2   obligations on individuals, it's a promise by the nation

3   state to pass penal legislation that is in accordance

4   with their constitutional systems.

5   So it's very bizarre -- that's Article VII,

6   Section 1, it's, I think, 33a. And so it's very bizarre

7   when the only way we're reaching individual conduct

8   here, unlike the treaty in Holland, is a United States

9   promise to pass legislation that comports with our

10   constitutional process, to say that the convention,

11   therefore, allow us to pass legislation that doesn't

12   comport with our constitutional process.

13   JUSTICE SCALIA: Mr. Clement, I -- I don't

14   understand how -- how you distinguish Sarin gas. Why is

15   Sarin gas different from vinegar?

16   MR. CLEMENT: Because Sarin gas is, I think,

17   more equivalent to something that the Congress would try

18   to deal with like the way it dealt with marijuana in

19   Raich. I think -- it's just a reflection of the idea

20   that, when you're talking about things where the Federal

21   Government is trying to prohibit it, then there's a

22   greater Federal power to do that.

23   And I think, with Sarin gas, you could

24   imagine -- put aside the commerce power for a second,

25   put aside the treaty power -- it may be that, with Sarin

1   gas, even under the war powers, the Federal Congress can

2   say, look, that's something that's -- you know, it's

3   sort of inherently a chemical weapon, and we're going to

4   prohibit people from having that.

5   That's very different from these situations

6   where, if you think about it, the only thing that makes

7   these chemicals chemical weapons instead of chemicals is

8   their internal, intrastate use in a malicious way. And

9   that's different, I think, from at least a hypothetical

10   statute that says, look, here are -- I mean, there's

11   three schedules in the statute, 43 different chemicals

12   that are particularly problematic.

13   If the Federal government wants to regulate

14   those and prohibit the unauthorized possession of those,

15   I don't see why they couldn't do that with or without

16   the treaty. But when -- what is so anomalous here is

17   the idea that these chemicals, everything, rat poison,

18   vinegar, whatever it is, these things are perfectly

19   lawful, we don't think of them as chemical weapons,

20   unless and until they're used in a malicious way, and

21   then all of a sudden, they become classified as chemical

22   weapons.

23   That's a very odd statute.   But it does, I

24   think, operate in a way that is just inconsistent with

25   the bedrock principle that the Federal Congress just

1   doesn't have this kind of police power.

2   JUSTICE BREYER: Is the chemical used here

3   one of the chemicals that's listed in the annex to the

4   treaty?

5   MR. CLEMENT: I don't believe so. It's

6   certainly not one that is listed on the three schedules.

7   There are 43 chemicals. Neither of these are on there.

8   And I do think there is an important difference

9   because -- this is perhaps an odd way to think about it,

10   but -- you know, this is a statute that's really trying

11   to regulate nouns, chemical weapons. And with respect

12   to something like weaponized chemicals or Sarin gas, it

13   makes sense to say those are chemical weapons.

14   But with respect to otherwise harmless

15   chemicals, the only thing that under the government's

16   theory turns them from chemical weapons -- I'm sorry --

17   from chemicals into chemical weapons isn't a noun, it's

18   a verb. It's their malicious use. And that puts you in

19   a very odd sort of situation.

20   And I think that -- you know, if Congress

21   had come in and said, look, there are certain chemicals

22   that, by their very nature, are almost inherently

23   weaponized, I think Congress would have a lot more

24   authority to proceed in that kind of situation.

25   JUSTICE SOTOMAYOR: Counsel -- counsel, we

1   permit that in all sorts of definitional sections of the

2   criminal code. We call a dangerous weapon anything that

3   you use to inflict serious injury on someone. I don't

4   think of a car as, necessarily, a dangerous weapon. It

5   is something I use to transport myself.

6   It's only when I'm using it for a prohibited

7   purpose that it turns itself into a dangerous weapon.

8   MR. CLEMENT: Well --

9   JUSTICE SOTOMAYOR: So I'm -- I'm having a

10 problem with this noun-verb distinction. Why isn't the

11 intentional burning, killing of another human being

12 using chemicals the essence of what this treaty is

13 trying to stop? I thought that's what it was trying to

14 do.

15   MR. CLEMENT: A couple points --

16   JUSTICE SOTOMAYOR: You want to add on the

17 war-like purposes, but the -- the treaty permits

18 exceptions for any peaceful purpose.

19   MR. CLEMENT: Justice Sotomayor, a couple of

20 points. First of all, generally, you might be right

21 that -- that the criminal law takes objects that are

22 otherwise innocent and say -- say they can be used in a

23 malicious way and criminalizes it.

24   But most of that work is done by State and

25 local criminal law, and at the Federal level, you need

1   something else. You need a jurisdictional element,

2   something that has a distinct Federal concern.

3   Second, as to the concerns about this

4   convention --

5   JUSTICE SOTOMAYOR: The treaty power.

6   MR. CLEMENT: Well, I don't think that the

7   treaty power --

8   JUSTICE SOTOMAYOR: That's what was said in

9   the --

10   MR. CLEMENT: -- especially when there's

11   this much of a disconnect between what the treaty power

12   does and what the statute does, which is the treaty,

13   again, does not directly regulate at all individual

14   conduct. It is regulated at nation state conduct.

15   Now, with all due respect, I don't think

16   that nation states poison romantic rivals, attempt to

17   commit suicide, or try to get rodents out of their

18   houses. And so, when individuals do those things, I

19   think it's -- it's hard to draw an analogy between

20   what's forbidden to a nation state and the individual

21   action.

22   But any work that is done in the statute by

23   drawing that analogy is done by the statute and not by

24   the convention. So I don't --

25   JUSTICE SOTOMAYOR: So if a terrorist took

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 1   these chemicals and put it on every doorknob in Boston,

 2   that wouldn't be regulated by this or -- the very exact

 3   same chemicals.

 4        MR. CLEMENT:          Right.  And we would say that,

 5   under our narrowing construction, that that's covered.

 6        JUSTICE SOTOMAYOR:          Because it's war-like.

 7        MR. CLEMENT:          Because it's a war-like use of

 8   the chemicals.

 9        JUSTICE SOTOMAYOR:          All right.  Now, we

10   have -- we have --

11        MR. CLEMENT:          We would also point out for

12   the record that that same conduct would obviously be

13   covered directly by Federal statutes that target

14   terrorism directly.  So no matter how you decide that

15   case, whether you accept our narrowing -- if you accept

16   our narrowing construction, that conduct will be covered

17   by two Federal statutes.  If you don't accept our

18   narrowing construction, but hold this statute

19   unconstitutional, then that conduct is still going to be

20   covered.

21        And I just think, when you are trying again

22   to think about what the convention is after, it is not

23   really after Ms. Bond's conduct.  I don't think any one

24   of our treaty partners said, oh, my goodness, there's

25   been a deployment of chemical weapons in Norristown,
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1   Pennsylvania; I sure hope the United States steps up to

2   its treaty obligations and prosecutes this horrible

3   deployment of chemical weapons.

4   Nobody would say that because nobody

5   speaking normal English would identify this as a

6   deployment of chemical weapons at all.

7   JUSTICE KAGAN: Well, but, Mr. Clement, it's

8   absolutely clear that the treaty was after enforcement

9   as to individuals with respect to all the prohibitions,

10   that the treaty said, go enforce this as to individuals

11   and do it consistent with your constitutional processes.

12   And then Congress passes a law that is

13   consistent with its constitutional processes, and it

14   completely mirrors the treaty.

15   MR. CLEMENT: Two things, Justice Kagan,

16   neither of which will surprise you, I suppose. One is I

17   don't think this is consistent with our constitutional

18   processes --

19   JUSTICE KAGAN: I guess I'm still trying to

20   figure out why. I mean, Holmes dealt with this in

21   Missouri v. Holland. He says there's a treaty power,

22   it's an enumerated power, there's a Necessary and Proper

23   Clause that functions to -- to allow Congress to give

24   effect to that treaty power. It's -- you know, this is

25   a -- a situation where there's a prohibition on the

1   States in terms of entering into treaties or in terms of

2   sharing that power in any way.

3   And he says -- you know, it's just these

4   invisible radiations that you think come from the

5   structure of the Constitution. And he specifically

6   rejected this argument, the same argument that you're

7   making, the penumbras and emanations of the

8   Constitution.

9   MR. CLEMENT: Justice Kagan, I think you

10   have to read Missouri v. Holland both in the context of

11   the treaty that the Court had before it and the argument

12   that it had before it. Missouri made a very strange

13   argument in Missouri v. Holland, one that no modern

14   litigant would make. They made an argument that -- they

15   went out of their way to identify a conflict between the

16   Federal treaty and State law and said, therefore, we win

17   under the Supremacy Clause.

18   And Holmes scratched his head and said no.

19   The treaty under -- under Article 6 is supreme to both

20   State law and not the other way around. But he also

21   said this one sentence that sort of bedeviled the lower

22   courts here, which says, well, and if the treaty's

23   valid, of course, the legislation is valid.

24   That made sense in the context of the treaty

25   he had before him because he had a treaty that directly

1 prohibited individual conduct and a statute that

2 enforced that individualized prohibition with criminal

3 penalties.

4   So in that case, I suppose it was right,

5 that the treaty and the implementing legislation stood

6 or fell together. That's not the case here.

7   If I could reserve my time.

8   CHIEF JUSTICE ROBERTS: Thank you, counsel.

9   General Verrilli.

10   ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.,

11   ON BEHALF OF THE RESPONDENT

12   GENERAL VERRILLI: Mr. Chief Justice, and

13 may it please the Court:

14   The framers gave the Federal Government

15 exclusive control over the treaty function to ensure

16 that it could knit the nation together as one and allow

17 it to be fully sovereign in the conduct of foreign

18 affairs.

19   Petitioner's ad hoc "too local" limit on the

20 treaty power can't be squared with a judgment the

21 framers made, this Court's precedent, or consistent

22 historical practice since the time of the founding, and

23 it would compromise foreign affairs and national

24 security interests of the first order.

25   CHIEF JUSTICE ROBERTS: General, let's

1   suppose there's a multilateral treaty, the -- the

2   international convention to ensure that national

3   legislatures have full authority to carry out their

4   obligations, i.e., that the national legislature has the

5   police power.

6   And Congress passes a statute saying we have

7   the authority to prosecute purely local crimes pursuant

8   to this international convention that the President has

9   signed. Any problem with that?

10   GENERAL VERRILLI: There may well be. Let

11   me walk through the analysis that I think you'd have to

12   go through. First, I would make the point,

13   Mr. Chief Justice, that it seems unimaginable that a

14   convention of that kind would be ratified by two-thirds

15   of the Senate, which it would have to be --

16   CHIEF JUSTICE ROBERTS: Why?

17   JUSTICE KENNEDY: It also seems

18   unimaginable that you would bring this prosecution. But

19   let's leave that.

20   (Laughter.)

21   GENERAL VERRILLI: And that does go to the

22   point --

23   CHIEF JUSTICE ROBERTS: And just to press it

24   further, the -- the point is that it's a transfer of

25   authority from the States to the national legislature.

26   I don't know why you'd look to the national legislature

1   to say, well, we'd never do that.

2   GENERAL VERRILLI: Well, the framers thought

3   that the two-thirds guarantee -- the two-thirds

4   ratification requirement, was an important structural

5   guarantee to protect the interests of the States.

6   CHIEF JUSTICE ROBERTS: At a time when the

7   Senate was elected by the State legislatures.

8   GENERAL VERRILLI: Yes, Mr. Chief Justice.

9   But there's no doubt that the framers thought that would

10   be an important protection.

11   But beyond that, this Court has said that --

12   that there is an inquiry. It said in dictum. It has

13   never held that a ratified treaty exceeds -- exceeds the

14   Federal government's constitutional authority. It's

15   never held that a provision implementing a ratified

16   treaty exceeds the Federal government's constitutional

17   authority.

18   JUSTICE SCALIA: So your answer is if -- if

19   that unimaginable thing should happen, it would be okay?

20   GENERAL VERRILLI: No.

21   JUSTICE SCALIA: All right.

22   GENERAL VERRILLI: My answer is this: That

23   the Court has said that there is an inquiry into whether

24   the -- it is a proper subject of a treaty and that that

25   inquiry could take into account whether it is imposing a

1   fundamental change in the character of the government.

2   But that's not a question the Court needs to

3   answer here because this treaty, the -- the Petitioner

4   concedes, is a valid exercise of the treaty power, and

5   the legislation implementing this treaty is coextensive

6   with the obligations of the treaty. There is no --

7   CHIEF JUSTICE ROBERTS: Well, I don't know

8   why it would not be a valid exercise of the treaty

9   power. A case like Medellin caused serious conflict

10   with our international obligations because we held,

11   look, the Federal government does not have the authority

12   to tell the sheriff in Texas what to do. That caused a

13   great deal of strain in -- in our international

14   relations.

15   And I think the United Nations could well

16   say, look, we don't want treaty parties to have to deal

17   with whether it's somebody in this State or somebody in

18   that province who has the authority, so every signatory

19   must have the authority. It doesn't strike me as not

20   reasonably related to international obligations.

21   GENERAL VERRILLI: All right. But -- but

22   here, Mr. Chief Justice, this is a valid exercise of the

23   treaty power, and there is no daylight between the

24   implementing legislation and the obligations that the

25   Petitioner concedes are valid.

1   CHIEF JUSTICE ROBERTS: No, no. I know

2   your -- I know the case --

3   GENERAL VERRILLI: And therefore -- and

4   therefore, that may be a question that the Court would

5   have to answer in a different case. But this case

6   doesn't present the opportunity to answer that question.

7   CHIEF JUSTICE ROBERTS: So the -- the

8   purpose of my hypothetical was try to find out if

9   there's any situation in which you believe an erosion or

10 intrusion by the Federal government on the police power

11 could be a constraint against an international treaty.

12   GENERAL VERRILLI: There -- there may be an

13 outer bound, but this case is nowhere close to it.

14 And -- and it isn't -- it can't be a "too local"

15 exception to the treaty power, which Petitioners argue.

16   CHIEF JUSTICE ROBERTS: Well, it seems to me

17 that if you say there may be an outer bound, but this

18 case isn't one of them, you're subjecting yourself to

19 the same criticisms that have been leveled against the

20 other side, that you're proposing a case-by-case

21 evaluation with respect to each treaty.

22   GENERAL VERRILLI: No. I think, Your Honor,

23 that the question here is whether this legislation

24 validly -- it validly implements a valid treaty.

25   The treaty is concededly valid.   The

1   legislation is concededly valid on its face.

2   JUSTICE SCALIA: I'd like to -- I'd like to

3   explore that, your proposition that there's no daylight

4   between the treaty itself and the implementing

5   legislation.

6   It seems to me there -- there's a lot of

7   daylight between the two. Let's take -- and I pick this

8   example, not because it's controversial, but because it

9   relates to an area where the Federal government has

10   never been thought to have authority, namely family law.

11   There are no -- you know, Federal marriage,

12   Federal divorce, Federal adoption. It's all been State

13   law. Let's assume that an international treaty is

14   approved by two-thirds of the Senate and the president

15   which requires States to -- to approve same-sex

16   marriage. All right?

17   Now, if -- if that were a self-executing

18   treaty, same-sex marriage would have to be approved by

19   every State. If it is not self-executing, however, it

20   will be up to Congress to produce that result, and

21   Congress would do it or could do it at least by having a

22   Federal marriage law. And then you would have to have a

23   Federal divorce law and, I suppose, a Federal adoption

24   law.

25   I think there is a big difference between

1   just doing it through a self-executing treaty and

2   dragging the Congress into -- into areas where it has

3   never been before.

4   I think there is daylight between the treaty

5   and requiring the treaty to be implemented in the

6   fashion that -- that you assert is necessary here.

7   GENERAL VERRILLI: Your Honor, I'd like to

8   make a structural point and then a specific point about

9   this case. The structural point, Justice Scalia, is

10   this: If it is the case, as -- as Your Honor's

11   hypothetical seems to concede and as I believe

12   Petitioner concedes, that a self-executing treaty that

13   requires the President to negotiate and two-thirds of

14   the Senate to ratify it, can impose an obligation of

15   that kind, then it has to be the case that a

16   non-self-executing treaty that is -- that has the same

17   approval of the President, the same two-thirds

18   ratification, and the additional structural protection

19   of passage of legislation by the Senate and the House

20   and being signed into law by the President, can do what

21   the self-executing treaty can do. It has to be the

22   case.

23   The power, if the --

24   JUSTICE SCALIA: I don't think it has to be

25   the case. I think there -- there's a great difference

1   between requiring the states, by a self-executing

2   treaty, to permit same-sex marriage and dragging the

3   Federal government or allowing the Federal government to

4   enter into this whole field of marriage, divorce,

5   adoption, family law, where the Federal government has

6   never been.

7   GENERAL VERRILLI: Well, with respect --

8   now, the point, with respect to this treaty, I don't

9   think that, with all due respect, there is any daylight

10   here with respect to this treaty.

11   Section 229(a) does precisely what the

12   treaty obligates the United States government to do, and

13   I think the notion that the treaty obligation can be

14   satisfied by relying on the States to enforce their

15   assault laws, which I think is the core of my friend's

16   argument here, is directly contrary to the history of

17   the framing --

18   JUSTICE BREYER: It is? It is? It is?

19   That's the part that I can't yet get my mind to these

20   dramatic questions of whether, here, the local police

21   power or, in some other case, some other inherently

22   State power make a treaty beyond the power of the

23   Federal government to enter into. It's a very big

24   question.

25   But I'm not there yet.   And the reason I'm

1   not there is because there's some words in this treaty

2   called "other peaceful purpose," and we have to

3   interpret those words, and the same words are in the

4   statute.

5   And my question to you is: What reason is

6   there to think that those matters on List A fall within

7   those words? What is List A? It's infinitely long. A

8   few things on it are in Holmes' opinion in Peasley, a

9   great case on attempted murder where he talks about

10 paying a small boy to move a barrel of kerosene with a

11 candle in it alit, so that it will burn down a barn

12 after a few hours. The kerosene is a chemical.

13   He talks about a case where a person went to

14 a racetrack and gave a horse a poison potato.

15   He talks about a case involving somebody

16 else trying to light a match, which is a chemical, and

17 setting fire to a haystack.

18   We can all think, sadly, of athletes, Lance

19 Armstrong, at least accused of unlawfully taking drugs.

20 I mean, why do we think matters of List A fall within

21 those words, outside the words "other peaceful purpose,"

22 even though they're unlawful?

23   And by the way, did anyone say to the

24 drafters of the convention -- I found nothing in this

25 brief on the point -- or did anyone tell Congress that

1   poison potatoes, drug-enhancing -- performance-enhancing

2   drugs, the example that Justice Alito used last time,

3   you give vinegar to a goldfish -- I mean, these are all

4   chemicals not in the annex, but they are chemicals.

5   And they are absolutely nothing to do with

6   chemical weapons. And why do we think that we have to

7   get beyond that fact?

8   GENERAL VERRILLI: This is a very important

9   point here, and it gets, I think, to the heart of what

10   the national interest is in this case with respect to

11   this treaty and this implementing legislation. And the

12   harm inheres in the process of line drawing.

13   What the Petitioner is asking as a rule of

14   either constitutional law or statutory construction is

15   that courts, on a case-by-case basis, after the fact

16   make ad hoc judgments about whether they --

17   JUSTICE BREYER: No, no. There's an easy

18   way out of that. All we do is say the chemicals

19   involved are the chemicals in the annex. But you're not

20   prepared to say that, I guarantee it.

21   GENERAL VERRILLI: No -- no, I'm not. I --

22   JUSTICE BREYER: Okay. Now, we're outside

23   the annex. And I guess once we get outside the annex,

24   we either have to draw lines or we have to say, well,

25   this encompasses the poison potato, the poisoned

1   goldfish, the small boy with the candle, the -- for

2   performance-enhancing drugs.

3   I would say judges are here to draw lines,

4   and between throwing all those things into it or drawing

5   lines, it's better to draw a few lines.

6   GENERAL VERRILLI: We can -- we can talk

7   about hypotheticals, but the key point about them is

8   that they're hypothetical.

9   JUSTICE BREYER: No, no. These are real

10   cases, by the way. The poison potato was in fact --

11   GENERAL VERRILLI: The vinegar and the

12   goldfish is not a real case, and I would submit that de

13   minimis non curat lex --

14   JUSTICE ALITO: They're not real -- they're

15   not real cases because you haven't prosecuted them yet.

16   If you told --

17   (Laughter.)

18   JUSTICE ALITO: If you told ordinary people

19   that you were going to prosecute Ms. Bond for using a

20   chemical weapon, they would be flabbergasted. It's --

21   it -- it's so far outside of the ordinary meaning of the

22   word.

23   JUSTICE SOTOMAYOR: If her child had died --

24   excuse me.

25   JUSTICE ALITO: This statute has an

1   enormous -- an enormous breadth, anything that can cause

2   death or injury to a person or an animal.

3   Would it shock you if I told you that a few

4   days ago, my wife and I distributed toxic chemicals to a

5   great number of children?

6   (Laughter.)

7   GENERAL VERRILLI: Your Honor, I understand

8   the point.

9   JUSTICE ALITO: On Halloween, we gave them

10 chocolate bars. Chocolate is poison to dogs, so it's a

11 toxic chemical under the chemical weapons --

12   GENERAL VERRILLI: I think de minimis non

13 curat lex would take care of that, but this -- there is

14 serious -- this is --

15   JUSTICE BREYER: There's chocolate all over

16 the place.

17   (Laughter.)

18   JUSTICE SCALIA: Do horses eat potatoes? I

19 didn't know horses ate potatoes.

20   GENERAL VERRILLI: With all due respect --

21 this is serious business. With all due respect, the

22 line that the Petitioner is asking --

23   JUSTICE BREYER: No, I'm not -- I want your

24 answer to the line -- my question was a question to get

25 your answer. And the answer that I wanted you to

 1   address yourself to is the problem of, once you depart

 2   from the annexes in defining the chemicals, you throw

 3   into it a list a thousand miles long.

 4   And we can tell joke after joke, but it's

 5   not a joke that it's so easy to make up examples that

 6   seem to have nothing to do with the problem of chemical

 7   weapons, like the Syrian problem, nothing to do with

 8   that.

 9   GENERAL VERRILLI: I understand that, Your

10   Honor, but the law --

11   JUSTICE BREYER: So what is your answer?

12   That's what I want to know.

13   GENERAL VERRILLI: If you will permit me to

14   answer the question this way: The line that the

15   Petitioner is asking courts to draw is whether the

16   particular use is warlike or whether it constitutes a

17   peaceful purpose under this convention and under the

18   implementing statute.

19   Well, the very -- one of the very things we

20   are trying to sort out right now in Syria, under the

21   Chemical Weapons Convention, is where the line is

22   between peaceful uses and warlike uses. And this phrase

23   "peaceful uses" is not only in the Chemical Weapons

24   Convention, it's in the Nuclear Nonproliferation Treaty,

25   and we're engaged in very sensitive negotiations right

1   now under the Nuclear Nonproliferation Treaty, trying to

2   draw exactly the same line.

3   And it would be terribly unfortunate, I

4   would submit, if the Court were to announce in the

5   context of this case, as Petitioner is asking, a

6   definition of what warlike constitutes that could have

7   an unfortunate bearing on those --

8   JUSTICE BREYER: Why don't you tell us --

9   can you tell us what the line is that we're trying to

10   draw?

11   GENERAL VERRILLI: And the -- the -- the

12   framers of the convention and Congress in implementing

13   the convention made a judgment that there needs to be a

14   comprehensive ban and that you can't be drawing these

15   kinds of lines because you can't --

16   JUSTICE KAGAN: Well, General, could I ask

17   why that is? I mean, because this -- this Convention

18   and the implementing legislation is very broad, and it's

19   broad because it applies to a very large category of

20   weapons and it applies to a very large category of

21   uses -- of conduct.

22   So what were they thinking about, about why

23   they wanted these very broad categories, why it's not

24   more limited with respect either to the chemicals or to

25   the conduct?

1   GENERAL VERRILLI: Well, with respect to the

2   chemicals, I think they made the judgment because you

3   can't predict in advance how chemicals are going to be

4   used and how toxic they will be in particular

5   combinations and how dangerous they will be in

6   particular combinations, and therefore, you need a

7   comprehensive definition.

8   JUSTICE BREYER: Well, look, also, if you're

9   telling me -- I am attempting to draw the line, that's

10   just what I was going to do.

11   And if you're saying it's against the

12   national security interest, which is the first time I've

13   heard that, that it is the national interests -- against

14   the national interests of the United States for me to

15   attempt to draw such a line, then I guess the State

16   Department better file a brief explaining why or you

17   ought -- or why you -- why you want to push this case

18   or -- I mean, I'm -- is that what you're telling me,

19   that if I write the opinion that I think the law

20   requires me to write, that I somehow am hurting the

21   national security interests of the United States.

22   GENERAL VERRILLI: Well, I think there is

23   a -- I think there is a real risk in courts getting

24   involved in defining the line between warlike and

25   peaceful purposes --

1   JUSTICE BREYER: You're the one --

2   GENERAL VERRILLI: -- and the meaning of the

3   convention when the -- when the convention is purposely

4   drafted broadly.

5   And there -- there are additional risks in

6   terms of this -- the very act of bringing this process

7   of line-drawing to bear; case-by-case, ad hoc judgments

8   about what constitutes a violation and what doesn't is

9   going to undermine the ability of our negotiators

10   into -- to make treaties in the future because they

11   are --

12   JUSTICE KENNEDY: But you did not give the

13   line to the Chief Justice's question where there was a

14   treaty that intruded on the Federal structure. You can

15   have a treaty where the President is required to set

16   aside any State law that, in his view, contravenes a

17   national interest. That's a structure problem.

18   You've -- you've given us no -- no principle

19   the other way.

20   GENERAL VERRILLI: Well, I -- what I think

21   it would, Justice Kennedy, would suffice to decide this

22   case, were the Court to conclude that the "too local"

23   limit that the Petitioner is advocating here as an

24   as-applied, case-by-case "too local" limit is not one

25   that is inconsistent with the constitutional structure

1   because, if you go back to the framers, it is clear from

2   the era of the framing that the framers intended to give

3   the national government the power using --

4   JUSTICE KENNEDY: Well, is it your precept,

5   then, that a treaty cannot be inconsistent with our

6   constitutional structure?

7   GENERAL VERRILLI: This Court has said that

8   the -- this Court has said that, in dictum, repeatedly,

9   but it has said that the -- the treaty -- there's a

10   question in a treaty power case of whether the subject

11   matter of the treaty is a proper subject for a treaty.

12   That's a question the Court can ask.   And --

13   and although I'm not prepared to draw a specific line

14   here today, there -- there may well be a line to be

15   drawn. But here, the Petitioner has conceded, and I

16   think all of us would agree, this is the proper subject

17   of the treaty.

18   CHIEF JUSTICE ROBERTS: But there are a lot

19   of treaties, particularly I think Justice Alito pointed

20   out, after the World War II era, where you have

21   international conventions affecting everything. We have

22   international conventions on the abduction of children,

23   international conventions that -- human rights. They

24   cover a vast swathe of -- of subject matter.

25   And it seems to me the only thing you're

1 saying that is a limit on what the treaty power can be

2 as a source for is some determination, no more --

3 less -- no less arbitrary than the lines other people

4 are asking us to draw between what's appropriate under

5 the treaty power and what's not.

6   And I just would like a fairly precise

7 answer whether there are or are not limitations on what

8 Congress can do with respect to the police power. If

9 their authority is asserted under a treaty, is their --

10 is their power to intrude upon the police power

11 unlimited?

12   GENERAL VERRILLI: If the -- if the

13 treaty -- well, the way I would answer that,

14 Mr. Chief Justice, is if the treaty is valid --

15   CHIEF JUSTICE ROBERTS: Okay. The treaty is

16 valid.

17   GENERAL VERRILLI: Then implementing

18 legislation that doesn't go beyond the treaty is valid

19 even if it addresses a subject that would otherwise be

20 within the police power of the States.

21   CHIEF JUSTICE ROBERTS: Okay.

22   GENERAL VERRILLI: That was the judgment the

23 framers made, and that's what -- that's this case. And

24 so -- and because the treaty is valid, the Petitioner's

25 concede that the treaty is valid, this statute

1   implements the treaty -- word-for-word implementation of

2   the obligations that --

3   CHIEF JUSTICE ROBERTS: So you would rather

4   have the Court determine, if we're concerned about the

5   intrusion on the police power, whether treaties are

6   valid or not than whether -- determine whether

7   particular implementing legislation is valid or not.

8   GENERAL VERRILLI: No. I think, Your Honor,

9   that because it is conceded in this case that the treaty

10   is valid, and the Petitioner hasn't elaborated any

11   argument that -- or any principle that would allow this

12   Court to make a judgment about when an exercise of the

13   treaty power is valid and when it isn't, that you've got

14   to take, as a given in this case, that the treaty is

15   valid --

16   CHIEF JUSTICE ROBERTS: I know this case.

17   The point of the hypothetical is I'm trying to get your

18   general principle. I can imagine treaties that you

19   would say are within the treaty power, again,

20   particularly in the post-World War II era, but that

21   could give rise to implementing legislation that I think

22   would be extraordinary from the point of view of the

23   framers and the power that it gave Congress to intrude

24   upon State authority.

25   GENERAL VERRILLI: So there is a structure

1   of limitations -- you know, as I said earlier. The

2   two-thirds ratification requirement is real with respect

3   to this. One of the treaties Your Honor just referred

4   to, the U.N. Convention on Civil and Political Rights,

5   of course, when the Senate ratified it, it did use its

6   power to make reservations to preserve our Federal

7   system.

8   So that operated in exactly the manner that

9   the framers intended there to protect, to safeguard the

10   interests of federalism. And there are -- you know,

11   there are about 1,000 ratified treaties on the books

12   right now, and we don't have the Congress using the

13   treaty power to -- to usurp the role of the States --

14   JUSTICE BREYER: Oh, no. That isn't the

15   problem.

16   CHIEF JUSTICE ROBERTS: It's -- it's kind of

17   question begging. I mean, the whole point is that some

18   people think we do have exactly that in this case. Now,

19   usually, when we have a case that implicates significant

20   and serious bilateral concerns, we get a lot of briefs

21   and all that from our -- our treaty partners.

22   Is -- is there any concern that's been

23   expressed in any concrete way by them about whether

24   Mrs. Bond is prosecuted?

25   GENERAL VERRILLI: I doubt that, Your Honor,

 1 because --

 2   CHIEF JUSTICE ROBERTS: No, no. Yes. So

 3 nothing in --

 4   GENERAL VERRILLI: Nobody -- no -- nobody

 5 would -- we're not saying -- and I don't think anybody

 6 would say that -- that whether or not Ms. Bond is

 7 prosecuted would give rise to an international incident.

 8 The question is whether Congress has the authority to

 9 pass a comprehensive ban.

10   Now, there may, of course, be applications

11 of that comprehensive ban that don't advance the

12 national interest in a profound or poignant way; we

13 understand that. But the question is whether Congress

14 can pass a comprehensive ban implementing a treaty.

15   JUSTICE BREYER: That is the question --

16   JUSTICE KAGAN: And, General, don't we have

17 an amicus brief from almost all of the legal counsels of

18 the State Department, Republican and Democrat, talking

19 about how, if Petitioner's argument were accepted, it

20 would severely damage the United States' ability to

21 enter into and to negotiate treaties?

22   GENERAL VERRILLI: That's right. And

23 that -- and that's true, it's -- and that's certainly

24 true.

25   CHIEF JUSTICE ROBERTS: I'm sure that the

1   people who've worked in the national branch of

2   government, particularly for the State Department, would

3   like to have as much authority as they can get to

4   negotiate treaties. We're concerned about limitations

5   on other.

6   Do we have any briefs from State

7   legislatures, State authorities, concerning intrusion on

8   their prerogatives?

9   GENERAL VERRILLI: Your Honor, this

10   convention is a convention that all, but four nations on

11   Earth, have signed. The legislation that we have

12   enacted is a model legislation that over 120 other

13   nations have enacted as well.

14   JUSTICE ALITO: Whenever -- when this Court

15   has issued decisions in recent years holding that there

16   are some limits on Congress' power, cases like Lopez and

17   Morrison and City of Boerne, there have been legal

18   commentators who have written articles saying that could

19   be circumvented to -- through the use of the treaty

20   power. Do you agree with that?

21   GENERAL VERRILLI: I don't think there's a

22   yes-or-no answer to that. I think that -- because I

23   don't think it would be -- the question would be: What

24   does the treaty power encompass? It wouldn't be a

25   circumvention if this is something that could be

1   constitutionally done under the treaty power, but --

2   JUSTICE ALITO: Could you -- all right.

3   I'll take back the word "circumvention." Could you

4   reach the opposite result? Could it -- could Congress

5   regulate the possession of a gun within a school zone by

6   entering into a treaty that authorizes such legislation?

7   GENERAL VERRILLI: I think the question in

8   that case would be whether the treaty is a valid

9   exercise of the treaty power.

10   JUSTICE BREYER: Oh, but it is. That is the

11   problem. There is an underlying -- I don't mean to cut

12   you off, but at some point, you seem not to see a

13   problem that I think I see.

14   And the problem underlying it, if you get

15   into the treaty area, is this: Given the power, as

16   there is in Medellin's majority, to have some

17   self-executing treaties, in principle, your position

18   constitutionally would allow the President and the

19   Senate, not the House, to do anything through a treaty

20   that is not specifically within the prohibitions of the

21   rights protections of the Constitution.

22   That's Missouri v. Holland.   And I doubt

23   that, in that document, the Framers intended to allow

24   the President and the Senate to do anything.

25   Now, you ask us, now, to say whether the

1   answer to that question is yes or no. We still have a

2   democracy, in other words, of which the House is part.

3   Now, if you carry it to an extreme, that's what you

4   are -- that's where you are, and I am worried about

5   that, and I think others are, too.

6   So I had asked you, isn't there an easier

7   way to deal with this case? And you tell me, no, no,

8   because it will interfere with some problem of foreign

9   affairs that was never mentioned in any brief -- or at

10   least hit me for the first time when you said it.

11   Now, there, you have an expression of my

12   uncertainties at the moment, and any way you want to

13   reply to that would be helpful.

14   GENERAL VERRILLI: I understand the point,

15   Justice Breyer, I do. I understand that there is

16   something that seemed attractive in trying think about

17   this as a question of statutory construction. What I'm

18   trying to point out is that it's not as easy as it

19   seems, that there are real risks to trying to draw a

20   line of that kind. And, yes, that does -- I understand

21   that.

22   That -- that does raise the stakes some, I

23   understand that. But I think that risk is real, and I

24   think it -- that risk is real, the risk that the State

25   Department legal advisor's brief pointed out is real of

 1 undermining our ability --

 2   JUSTICE GINSBURG: General Verrilli, before

 3 your time is out, you haven't answered directly why the

 4 Bill of Rights does constrain the treaty power, the

 5 implementation of it, Reid v. Colbert?

 6   Why is the Bill of Rights different from the

 7 federalism concern that the Court has expressed in many

 8 cases, when you say, yes, there is a check, the Bill of

 9 Rights is a check, but not the Tenth Amendment.

10   GENERAL VERRILLI: There is a historical

11 answer to that question, Justice Ginsburg, which is that

12 that's how the framers understood it. I think that's

13 clear from what Hamilton said in the -- in the quotes

14 that we have in our brief, and others of the Framers

15 understood that that's where the line would be.

16   And I think the reason for that is that the

17 treaty power is, itself, a great and substantial

18 independent power of the national government. And it is

19 not constrained by a "too local" limitation. That is

20 the lesson of the era of the framing, that there is a

21 not a "too local" limitation on the exercise of the

22 treaty power.

23   And, therefore, while --

24   JUSTICE SCALIA: Well, all of those quotes

25 pertain to self-executing treaties. Yes, there is no

 1   limitation on what -- what the President and the Senate

 2   can impose as a self-executing requirement, namely, that

 3   the States must give back to British citizens property

 4   that they confiscated or whatever else.

 5   But it's a different question whether a

 6   treaty can expand the power of the Federal Congress into

 7   areas that it has never been before. That's a separate

 8   question. And neither Hamilton, nor any of the other

 9   quotes that you refer to, address that question.

10   GENERAL VERRILLI: Your Honor, so long as

11   the treaty -- it's a valid exercise of the treaty power,

12   I think a fortiori, if all you do is implement the

13   treaty in haec verba, it's a valid exercise of Congress'

14   power.

15   And I will say, I said, earlier, that this

16   is serious business. I understand that principles of

17   federalism are serious business also, but federalism is

18   a two-way street. And with respect to the exercise of

19   the treaty power, the framers made a judgment that --

20   that this power was going to be exclusively in the hands

21   of the national government.

22   And it needed to be exclusively in the hands

23   of the national government, in order to ensure that the

24   United States could be a full sovereign on the world

25   stage.

1   Now, it is true that the subject matter of

2   treaties is different now than it was at the time of the

3   founding, but the -- but the framers understood that.

4   They were careful not to impose subject matter

5   limitations on the treaty power because they were wise

6   enough to know they could not foresee what might be

7   important for the United States to be able to negotiate

8   about on a world stage in order to participate fully as

9   a sovereign.

10   That -- and the Chemical Weapons Convention

11   is a deeply apt illustration of exactly why the framers

12   were wise in ensuring that there were not subject matter

13   limitations on the exercise of the treaty power.

14   The Chemical Weapons Convention -- the

15   United States' leadership in the Chemical Weapons

16   Convention has made a big difference in ensuring that

17   this norm, which is in our national interests, our

18   foreign relations interests, and our national security

19   interest, is a norm that the -- that the nations of the

20   world have agreed to and that we are then in a position

21   to have leverage to insist that the nations of the world

22   abide by it.

23   It is leverage we are trying to exercise

24   right now. It is critically important, and I

25   respectfully submit that the line that the Petitioner is

 1   asking this Court to draw is not consistent with the

 2   intent of the framers, with this Court's precedent or

 3   with the national interests that I have described.

 4   Thank you.

 5   CHIEF JUSTICE ROBERTS: Thank you, General.

 6   Mr. Clement, you have 4 minutes remaining.

 7   REBUTTAL ARGUMENT OF PAUL D. CLEMENT

 8   ON BEHALF OF THE PETITIONER

 9   MR. CLEMENT: Thank you, Mr. Chief Justice.

10   Just a few points in rebuttal.

11   First of all, the Senate's role in the

12   ratification of treaties cannot be a sufficient

13   political check, and one reason is that, sometimes, the

14   precise role they play as a check is to make a treaty

15   non-self-executing.

16   And so, to take Justice Scalia's

17   hypothetical example of an international treaty that

18   purported to regulate marriage rights, one thing that

19   the Senate very well might do in that case is to say,

20   well, we will ratify it, but we're going to make sure

21   it's non-self-executing, and maybe we will use our

22   spending power or something to get the States on board,

23   but we are not just going to impose a national solution.

24   So it doesn't make any sense to say that a

25   non-self-executing treaty necessarily, even if it's

1   valid, guarantees the validity of the enacting

2   legislation, because some of the reason that you make a

3   treaty non-self-executing is to preserve federalism.

4   A second point is to respond to the

5   argument, which I think I've already explained why it's

6   not correct, but it is the suggestion that there is no

7   daylight between the convention and the statute. There

8   is huge daylight, and the daylight is precisely whether

9   it affects individual conduct and how it affects

10   individual conduct.

11   With all respect, everything on

12   Justice Breyer's List A is not stuff that I think

13   implicates the convention at all. But, yet, under the

14   government's unwavering theory that you can't make any

15   limitations on the statute, that's all covered by the

16   statute. There's your daylight.

17   Now, I would respectfully suggest that our

18   statutory construction argument is one way out of this.

19   I think that you have to understand the way that

20   "peaceful" is used in the statute is, essentially, a

21   term of art. I would analogize it to a situation where

22   two scientists in Antarctica get in a fistfight.

23   Okay.   That's not conduct we would condone,

24   but I don't think we've violated our pledge to reserve

25   Antarctica for only peaceful purposes. And that's the

     1   same way we would like you to interpret this statute.

     2   Now, the government says you can't do that

     3   because that's going to mess up what's going on in

     4   Syria. With all due respect, I assume that the issue in

     5   Syria is whether or not the nation state of Syria is

     6   doing something that would violate the convention if,

     7   contrary to fact, they were signatory to this

     8   convention.

     9   So if you want to make clear that you're

    10   only talking about individual conduct, I think you can

    11   solve that whole problem right there. But if I'm wrong

    12   and the only way, as the government assures you that you

    13   can make this legislation work is to have it be an

    14   exercise of the police power, well, then the answer is

    15   that the legislation is simply unconstitutional.

    16   JUSTICE KAGAN: Can I just ask you,

    17   Mr. Clement, and it's a variant of the hypothetical I

    18   gave you before, but it focuses more on your statutory

    19   point, the peaceful purposes.

    20   Suppose that Ms. Bond used Sarin gas and

    21   sent it through the ducts of Haynes' house; would you

    22   say that that's a peaceful purpose?

    23   MR. CLEMENT: I would say it's not, but I

    24   think it has to do more with the particular qualities of

    25   Sarin gas, the fact that it's on Schedule A, the fact

1   that nobody can possess that for any lawful use.

2   And what makes something like vinegar or

3   even potassium dichromate different is what puts it over

4   the ledge from being an ordinary chemical to a chemical

5   weapon is precisely its use and its use alone.

6   Now, Justice Kagan, you asked a great

7   question. What was Congress thinking when they did

8   this? I think, with respect, the Congress wasn't

9   focused on this issue at all.

10   If you look at the legislation they passed

11   to implement this, the chemical industry and others put

12   in front of them the possibility that there was a Fourth

13   Amendment problem with the inspections of chemical

14   production facilities that were authorized under the

15   convention. When Congress had the constitutional

16   problem in front of it, they had all sorts of provisions

17   to deal with that constitutional concern.

18   Now, the future Ms. Bonds of the world

19   didn't have quite the same lobbying resources as the

20   chemist -- the chemical industry, so they didn't avert

21   to this problem. And that's precisely why some kind of

22   clear statement rule or the like would make perfect

23   sense in this, to make sure Congress doesn't exercise

24   the police power, when all it thinks it's doing is

25   implementing a treaty.

1   The last thing is just to say about the

2   State Department legal advisor's --

3   JUSTICE SOTOMAYOR: A clear statement

4   about -- about the treaty or -- I'm sorry.

5   CHIEF JUSTICE ROBERTS: Thank you, counsel.

6   General.

7   The case is submitted.

8   (Whereupon, at 11:05 a.m., the case in the

9   above-entitled matter was submitted.)

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