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IN THE SUPREME COURT OF THE UNITED STATES

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CAROL ANNE BOND, :

Petitioner : No. 12-158

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Tuesday, November 5, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-158, Bond v. United States.

Mr. Clement?

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

If the statute at issue here really does reach every malicious use of chemicals anywhere in the nation, as the government insists, then it clearly exceeds Congress's limited and enumerated powers. This Court's cases have made clear that it is a bedrock principle of our federalist system that Congress lacks a general police power to criminalize conduct without regard to a jurisdictional element or some nexus to a matter of distinctly Federal concern.

The President's negotiation and the Senate's ratification of a treaty with a foreign nation does not change that bedrock principle of our constitutional system.

JUSTICE GINSBURG: But, Mr. Clement, you 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
3 puzzle 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 vs.
12 Holland. And that difference is that the convention
13 itself doesn't directly regulate individual conduct at
14 all. And so all the -- all the convention does --

15 JUSTICE KAGAN: But the convention -- but
16 the convention tells the State parties, go regulate
17 individual conduct in exactly the way that this
18 convention regulates State parties. And then what the
19 legislation does is, as Justice Ginsburg said, just
20 mirror the convention as the convention contemplated.

21 MR. CLEMENT: Well, Justice Kagan, to be
22 quite precise, though, what the convention says -- and
23 this is Article 7, Section 1, it's 33-A of the blue
24 brief appendix. What it says is that each nation State
25 that signs the convention agrees in accordance with its

1 constitutional processes to pass penal laws that make
2 unlawful for individuals conduct that would violate the
3 convention if undertaken by a nation State.

4 And I would respectfully suggest that making
5 that translation, if you will, between what violates the
6 convention if you're a nation State and what would be
7 comparable individual conduct is not obvious. And when
8 the government does that through penal legislation,
9 there's no reason why that penal legislation shouldn't
10 have to comply --

11 JUSTICE SOTOMAYOR: Why not?

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

13 JUSTICE SOTOMAYOR: Mr. Clement, why not?
14 Meaning there -- there can be no doubt that chemical
15 weaponry is at the forefront of our foreign policy
16 efforts right now. Look at the Syria situation alone.
17 It would be deeply ironic that we have expended so much
18 energy criticizing Syria, when if this Court were now to
19 declare that our joining or creating legislation to
20 implement the treaty was unconstitutional. We're
21 putting aside the impact that we could have on foreign
22 relations.

23 Why is it, if it's okay to regulate the
24 possession of marijuana, a purely local crime, why is it
25 unconstitutional to regulate the use of something that

1 can kill or maim another human being? A chemical that
2 can kill or maim another human being?

3 MR. CLEMENT: Well, I think --

4 JUSTICE SOTOMAYOR: I don't understand where
5 the disconnect is in terms of our Federal or State
6 system.

7 MR. CLEMENT: Well, Justice Sotomayor, I
8 think it really gets down to the difference between
9 Raich on the one hand and Lopez on the other, which as
10 this Court has held, that it is a classic and rational
11 way to regulate commerce to basically prohibit certain
12 items from commerce.

13 JUSTICE SOTOMAYOR: So why isn't this
14 saying, there's no dispute that these chemicals were
15 transported against -- along interstate lines. That's
16 not even disputed in this case.

17 MR. CLEMENT: But I don't think it was
18 really disputed in Lopez that the firearm would have had
19 to cross State lines. But the problem in Lopez was the
20 Federal statute was not structured in a way that had a
21 jurisdictional nexus that made the statute only
22 applicable as a regulation.

23 JUSTICE SCALIA: Well, we didn't take this
24 case to -- to decide the Commerce Clause question, did
25 we? The government didn't even assert it below. It

1 asserts it now, but as we took the case, the issue was
2 whether the treaty supported the laws.

3 MR. CLEMENT: That's right, Justice Scalia.
4 And we do think that the government, like a private
5 party, can waive a constitutional argument.

6 On the other hand, I would say that we're
7 not particularly concerned about the Commerce Clause
8 argument because we think the Commerce Clause argument
9 has the same basic defect as the treaty power argument,
10 which is that the police --

11 JUSTICE KAGAN: Do you think -- do you
12 think, Mr. Clement, and this goes back to Justice
13 Ginsburg's question, could the -- could this treaty have
14 itself regulated individual conduct? Could the treaty
15 have been self-executing?

16 MR. CLEMENT: Well, I think that's an
17 interesting question, and I don't think the Court needs
18 to answer it. I mean, I would take the position that if
19 there really were a self-executing treaty that tried to
20 impose criminal prohibitions, and I don't think there is
21 any treaty like that, but if there were one, I would say
22 here that it violates the Constitution for the same
23 basic reasons that this implementing legislation does.
24 But I -- but I --

25 JUSTICE KAGAN: Where would you find that in

1 the Constitution? Because there's clearly a treaty
2 power that does not have subject matter limitations.
3 And, indeed, if you go back to the founding history,
4 it's very clear that they thought about all kinds of
5 subject matter limitations and James Madison and others
6 decided, quite self-consciously, not to impose them. So
7 where would you find that limitation in the
8 Constitution?

9 MR. CLEMENT: I would find that limitation
10 in the structural provisions of the Constitution and the
11 enumerated powers of Congress. And I would say that it
12 would be very --

13 JUSTICE KAGAN: But this isn't an enumerated
14 power. The enumerated power is the treaty power. So
15 you have to find a constraint on the treaty power.
16 Where does it come from?

17 MR. CLEMENT: Well, I think where that it
18 would come from, again, is the structural provisions of
19 the Constitution. If we had a self-executing treaty
20 that purported at a national level to commandeer State
21 and local police officers, I would think that there
22 might be -- you could call it a Tenth Amendment
23 objection, we could call it an enumerated power
24 objection. There might be an objection to that treaty.

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

1 word "treaty" has some meaning? It is certainly true
2 that going back to the beginning of the country, there
3 have been many treaties that have been implemented in
4 ways that affect matters that otherwise would be within
5 the province of the States.

6 One of the original purposes of --
7 objectives of the Constitution was to deal with -- with
8 a treaty power was to deal with the issue of debts owed
9 to British creditors. And there have been cases about
10 the property rights of -- of foreign subjects, about the
11 treatment of foreign subjects here, about things that
12 are moving across international borders, about
13 extradition and all of those.

14 But in all of those, until fairly recently,
15 certainly until generally after World War II, all of
16 those concerned matters that are of legitimate concern
17 of a foreign State. That was the purpose of a treaty.
18 So can't we see something in that, in the meaning of a
19 treaty, what it was understood to mean when the
20 Constitution was adopted?

21 MR. CLEMENT: I think that's right,
22 Justice Alito. And I didn't mean in answering Justice
23 Kagan's question to fully accept the premise that
24 there's no limit on the treaty power whatsoever. But I
25 do think that it's important to recognize that in the

1 context of non-self-executing treaties, there's a real
2 opportunity to leave for another day the question of
3 whether the treaty itself is valid, because sometimes a
4 treaty is non-self-executing precisely because the
5 Senate recognizes --

6 JUSTICE KENNEDY: If you had been the
7 President's counsel, would you have advised him that it
8 was unconstitutional to sign this treaty as written?

9 MR. CLEMENT: No. Absolutely not,
10 Justice Kennedy, but that's precisely because it's a
11 valid non-self-executing treaty. By its terms, it
12 doesn't do anything to direct -- directly regulate
13 individual conduct. And if I were the President's
14 counsel, I would have said, honestly, Mr. President, I
15 don't think this requires us to have any law that
16 applies to garden variety assaults with chemicals.

17 But if we need that to discharge our treaty
18 obligations, the States are absolutely ready and able to
19 shoulder that task. There's no State in this country
20 that doesn't have a general assault statute that would
21 be covered by this conduct. There is no State that
22 doesn't have a murder statute to cover this conduct --

23 JUSTICE GINSBURG: Mr. Clement, there's an
24 irony in what you just said, because the victim, many
25 times, went to the State police and said, please help

1 me. And they turned her away a dozen times. And
2 finally they said, go to the post office. So this
3 doesn't seem to be -- you're arguing that this trenches
4 on the State's domain. And, yet, in this very case, it
5 wasn't until the State referred her to the post office,
6 Federal officials, that she got any action.

7 MR. CLEMENT: Well, Justice Ginsburg, one
8 way to understand that is that the State of Pennsylvania
9 exercised its prosecutorial discretion not to pursue
10 this matter. I don't think that -- I don't even think
11 the government says that that exercise of prosecutorial
12 discretion put us in violation of our treaty
13 obligations.

14 Our treaty obligation, at most, is to have a
15 law that prohibits this conduct, which the States
16 certainly do. The treaty obligation is not to make sure
17 that every single use -- malicious use of chemicals is,
18 in fact, prosecuted by the State or local officials.

19 JUSTICE KAGAN: Mr. Clement, could I make
20 sure I understand your test? Your test is to say that
21 with respect to every prosecution under this -- under
22 this treaty, that a court has to ask whether the
23 prosecution has a sufficient nexus to national or
24 international concerns? Is that -- is that your test?

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

1 Justice Kagan. I would actually come at it from the
2 other end of the stick, which is to say, that the one
3 thing I think I know from this Court's precedence is
4 that the Federal government doesn't have a general
5 police power.

6 So as I look at this statute, it can either
7 be saved by essentially creating a jurisdictional
8 element out of the phrase "peaceful" and equating it
9 with non-war-like or, if the statute has this general
10 character, then at least as applied to the chemicals
11 here, which are pure dual use chemicals, it can't be
12 constitutionally applied.

13 JUSTICE KAGAN: Well, I guess I'm still
14 looking for a test and I thought that the test that I
15 just articulated was really directly out of your briefs.
16 But if it's -- but if -- if you're suggesting that
17 that's not the test, give me the test that we're
18 supposed to ask with respect to this case or any other
19 as to whether the prosecution is unconstitutional.

20 MR. CLEMENT: It's whether the Federal
21 statute exercises a general police power. And if it
22 does --

23 JUSTICE KAGAN: That sounds like a facial
24 challenge. Now, I thought that you made very careful to
25 talk about that this was an as-applied challenge to this

1 particular prosecution.

2 MR. CLEMENT: Well, that's because the only
3 relief I'm seeking is to have my client's conviction
4 vacated. So this is the classic as-applied challenge.
5 Now, the reasoning that the Court may employ in
6 vindicating my as-applied challenge may suggest that the
7 statute is unconstitutional in some or all of different
8 applications, but our claim has always been that
9 the --

10 JUSTICE KAGAN: So you're saying if the
11 statute extends to things that we've generally thought
12 of as part of the police power, that's sufficient.

13 MR. CLEMENT: I would say that if a Federal
14 statute exercises the police power, by which I mean it
15 criminalizes conduct without regard to jurisdictional
16 element or some nexus to a matter of distinctly Federal
17 concern, then that statute exceeds Congress's power.
18 That was the case in Lopez; that was the case in
19 Morrison. And I think unless you accept our narrowing
20 construction, that's the case here.

21 JUSTICE KAGAN: Okay. Nexus, nexus to a
22 national concern, again, is what I understood you to say
23 in your brief. But let me give you a hypothetical and
24 you tell me whether your test meets it.

25 Let's say it's the same convention except it

1 relates only to Sarin gas, and -- and there's a chemist
2 out there and, you know, the -- the implementing
3 legislation mirrors the convention. There's a chemist
4 out there who manufactures Sarin gas -- I take it it's
5 pretty easy to manufacture -- and sends it through the
6 ducts of a house and kills everybody in it. Does that
7 have a nexus to national concerns?

8 MR. CLEMENT: It does, Your Honor, and it
9 would be valid legislation precisely because Sarin is
10 something that clearly Congress could prohibit in all
11 its uses. And as I understand how this statute applies
12 to Sarin gas or other things certainly on Schedule I --
13 there are some Schedule I substances that are talked
14 about both in the convention and the treaty -- those
15 things are always unlawful.

16 What is particularly unusual about the
17 statute's application to something like potassium
18 dichromate or vinegar or whatever you have is that in
19 most of its possession and uses it's perfectly lawful,
20 and what makes it a chemical weapon in the government's
21 theory is when it's used purely intrastate in a
22 malicious way.

23 JUSTICE KAGAN: So but this is -- in my
24 hypothetical -- and you didn't run away from it at all;
25 I applaud that. In my hypothetical, it's a completely

1 domestic use. You know, it's just this chemist didn't
2 like his neighbor and used Sarin gas. And you're saying
3 what the difference is, well, what the treaty makers did
4 was to find the category of chemicals more broadly.

5 And I guess what I want to know is, you are
6 imagining a world in which judges day to day try to get
7 inside the head of treaty makers to think about, you
8 know, in this case we understand that there's a national
9 interest in regulating Sarin gas, but we don't think
10 that there's a sufficient interest in regulating some
11 other chemical or some other chemical or so on down the
12 line. It seems to me a completely indeterminate test
13 and one that would have judges take the place of treaty
14 makers in terms of deciding what is in the national and
15 international interest.

16 MR. CLEMENT: Well, Justice Kagan, I would
17 beg to differ. I actually think that our approach to
18 this case avoids judges being put in that difficult
19 position, precisely because we distinguish, unlike the
20 government, between the validity of the convention and
21 the validity of the implementing legislation. And then
22 as to the implementing legislation, we simply ask the
23 courts to do what they do in every other context, which
24 is to check and see if that implementing legislation is
25 consistent with our basic chartering document.

1 And it's the government's position, which I
2 don't really understand why this would work, but their
3 theory is if that the non-self-executing treaty is
4 valid, then the implementing legislation is ipso facto
5 somehow valid.

6 JUSTICE ALITO: And do you think it would be
7 difficult --

8 MR. CLEMENT: And think about the convention
9 that was before this Court in the Medellin case, the
10 Vienna Convention on Consular Notification. It puts an
11 obligation on any arresting official to provide
12 notification to the consulate about an arrested foreign
13 national.

14 Now, I suppose it would be a perfectly
15 rational way to implement that convention to have a
16 national police force and so every arresting officer is
17 a Federal officer who's fully apprised of the Vienna
18 Convention responsibilities. That would be a rational
19 way to implement the treaty, but it wouldn't be remotely
20 consistent with our Constitution.

21 On the other hand, that same valid
22 non-self-executing treaty can be validly implemented by
23 chartering the State Department to work with police
24 officers on a State and local level to understand their
25 obligations.

1 JUSTICE ALITO: Do you think it would be
2 difficult for a judge to ask, is there any possibility
3 that there is any other country in the world that has
4 the slightest interest in how the United States or any
5 of its subdivisions deals with the particular situation
6 that's involved in this case?

7 MR. CLEMENT: Justice Alito, I think that
8 would be one way of approaching the question. I think
9 that would be a --

10 JUSTICE ALITO: Do you think that would be
11 beyond the -- that would be beyond the ability of
12 Federal judges when they -- when a case like this comes
13 before them?

14 MR. CLEMENT: I don't think it would be
15 beyond their ability. I also don't think it would be
16 beyond -- beyond the ability of a Federal judge to say,
17 okay, let's hypothetically ask the question in the
18 absence of a non-self-executing treaty, would Congress
19 have the power to pass this statute? And if the answer
20 to that is no, then I think the burden sort of shifts to
21 figure out why it is that the treaty adds something to
22 the powers of the Federal government.

23 And I think this, just to make clear, I
24 think this is a very different context from what the
25 Court had in *Missouri v. Holland*, because there the

1 treaty itself prohibited individual action. An
2 individual violated the treaty if they took a migratory
3 bird out of season. And so in that sense, the
4 enforcement statute did nothing more than put a criminal
5 penalty on violating conduct that was already prohibited
6 to the individual. And in that --

7 JUSTICE KENNEDY: Is it -- is it one way to
8 characterize your argument or is it too unfairly
9 confining to your argument to say that what you're
10 suggesting is something like a clear statement rule,
11 that if the treaty intends nation states to have their
12 own constitutional structure superseded at a minimum it
13 has to say so, and then we will come to the question of
14 whether or not they can do it?

15 MR. CLEMENT: I think that would be a fair
16 characterization of our argument, but only to add that
17 this would be the anti-clear statement case. Because
18 the one place that this convention talks about imposing
19 obligations on individuals, it's a promise by the nation
20 state to pass penal legislation that is in accordance
21 with their constitutional systems.

22 So it's very bizarre -- that's Article VII,
23 Section 1, it's I think 33a. So it's very bizarre when
24 the only way we're reaching individual conduct here,
25 unlike the treaty in Holland, is a United States promise

1 to pass legislation that comports with our
2 constitutional process, to say that the convention,
3 therefore, allow us to pass legislation that doesn't
4 comport with our constitutional process.

5 JUSTICE SCALIA: Mr. Clement, I -- I don't
6 understand how -- how you distinguish Sarin gas. Why is
7 Sarin gas different from vinegar?

8 MR. CLEMENT: Because Sarin gas is I think
9 more equivalent to something that the Congress would try
10 to deal with like the way it dealt with marijuana in
11 Raich. I think -- it's just a reflection of the idea
12 that when you're talking about things where the Federal
13 Government is trying to prohibit it, then there's a
14 greater Federal power to do that.

15 And I think with Sarin gas you could
16 imagine -- put aside the commerce power for a second,
17 put aside the treaty power -- it may be that with Sarin
18 gas, even under the war powers, the Federal Congress can
19 say, look, that's something that's -- you know, it's
20 sort of inherently a chemical weapon and we're going to
21 prohibit people from having that.

22 That's very different from these situations
23 where, if you think about it, the only thing that makes
24 these chemicals chemical weapons instead of chemicals is
25 their internal, intrastate use in a malicious way. And

1 that's different, I think, from at least a hypothetical
2 statute that says, look, here are -- I mean, there's
3 three schedules in the statute, 43 different chemicals
4 that are particularly problematic.

5 If the Federal government wants to regulate
6 those and prohibit the unauthorized possession of those,
7 I don't see why they couldn't do that with or without
8 the treaty. But when -- what is so anomalous here is
9 the idea that these chemicals, everything, rat poison,
10 vinegar, whatever it is, these things are perfectly
11 lawful, we don't think of them as chemical weapons,
12 unless and until they're used in a malicious way, and
13 then all of a sudden they become classified as chemical
14 weapons. That's a very odd statute. But it does I
15 think operate in a way that is just inconsistent with
16 the bedrock principle that the Federal Congress just
17 doesn't have this kind of police power.

18 JUSTICE BREYER: Is the chemical used here
19 one of the chemicals that's listed in the annex to the
20 treaty?

21 MR. CLEMENT: I don't believe so. It's
22 certainly not one that is listed on the three schedules.
23 There are 43 chemicals. Neither of these are on there.
24 And I do think there is an important difference
25 because -- this is perhaps an odd way to think about it,

1 but, you know, this is a statute that's really trying to
2 regulate nouns, chemical weapons. And with respect to
3 something like weaponized chemicals or Sarin gas, it
4 makes sense to say those are chemical weapons. But with
5 respect to otherwise harmless chemicals, the only thing
6 that under the government's theory turns them from
7 chemical weapons -- I'm sorry -- from chemicals into
8 chemical weapons isn't a noun, it's a verb. It's their
9 malicious use. And that puts you in a very odd sort of
10 situation.

11 I think that, you know, if Congress had come
12 in and said, look, there are certain chemicals that by
13 their very nature are almost inherently weaponized, I
14 think Congress would have a lot more authority to
15 proceed in that kind of situation.

16 JUSTICE SOTOMAYOR: Counsel, we permit that
17 in all sorts of definitional sections of the criminal
18 code. We call a dangerous weapon anything that you use
19 to inflict serious injury on someone. I don't think of
20 a car as necessarily a dangerous weapon. It is
21 something I use to transport myself. It's only when I'm
22 using it for a prohibited purpose that it turns itself
23 into a dangerous weapon.

24 MR. CLEMENT: Well --

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

1 problem with this noun-verb distinction.

2 Why isn't the intentional burning, killing
3 of another human being using chemicals the essence of
4 what this treaty is trying to stop? I thought that's
5 what it was trying to do.

6 MR. CLEMENT: A couple points --

7 JUSTICE SOTOMAYOR: You want to add on the
8 war-like purposes. But the treaty permits exceptions
9 for any peaceful purpose.

10 MR. CLEMENT: Justice Sotomayor, a couple of
11 points. First of all, generally, you might be right
12 that -- that the criminal law takes objects that are
13 otherwise innocent and say they can be used in a
14 malicious way and criminalizes it. But most of that
15 work is done by State and local criminal law, and at the
16 Federal level you need something else. You need a
17 jurisdictional element, something that has a distinct
18 Federal concern.

19 Second, as to the concerns about this
20 convention --

21 JUSTICE SOTOMAYOR: The treaty power.

22 MR. CLEMENT: Well, I don't think that the
23 treaty power --

24 JUSTICE SOTOMAYOR: That's what was said in
25 the --

1 MR. CLEMENT: -- especially when there's
2 this much of a disconnect between what the treaty power
3 does and what the statute does, which is the treaty,
4 again, does not directly regulate at all individual
5 conduct. It is regulated at nation State conduct.

6 Now, with all due respect, I don't think
7 that nation States poison romantic rivals, attempt to
8 commit suicide or try to get rodents out of their
9 houses. And so when individuals do those things, I
10 think it's -- it's hard to draw an analogy between
11 what's forbidden to a nation State and the individual
12 action. But any work that is done in the statute by
13 drawing that analogy is done by the statute and not by
14 the convention. So I don't --

15 JUSTICE SOTOMAYOR: So if a terrorist took
16 these chemicals and put it on every doorknob in Boston,
17 that wouldn't be regulated by this or -- the very exact
18 same chemicals.

19 MR. CLEMENT: Right. And we would say that
20 under our narrowing construction, that that's covered.

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

22 MR. CLEMENT: Because it's a war-like use of
23 the chemicals.

24 JUSTICE SOTOMAYOR: All right. Now we
25 have --

1 MR. CLEMENT: We would also point out for
2 the record that that same conduct would obviously be
3 covered directly by Federal statutes that target
4 terrorism directly. So no matter how you decide that
5 case, whether you accept our narrowing -- if you accept
6 our narrowing construction, that conduct will be covered
7 by two Federal statutes. If you don't accept our
8 narrowing construction but hold this statute
9 unconstitutional, then that conduct is still going to be
10 covered.

11 And I just think when you try again to think
12 about what the convention is after, it is not really
13 after Ms. Bond's conduct. I don't think any one of our
14 treaty partners said, oh, my goodness. There's been a
15 deployment of chemical weapons in Norristown,
16 Pennsylvania; I sure hope the United States steps up to
17 its treaty obligations and prosecutes this horrible
18 deployment of chemical weapons. Nobody would say that
19 because nobody speaking normal English would identify
20 this as a deployment of chemical weapons at all.

21 JUSTICE KAGAN: Well, but, Mr. Clement, it's
22 absolutely clear that the treaty was after enforcement
23 as to individuals with respect to all the prohibitions,
24 that the treaty said: Go enforce this as to individuals
25 and do it consistent with your constitutional processes.

1 And then Congress passes a law that is consistent with
2 its constitutional processes, and it completely mirrors
3 the treaty.

4 MR. CLEMENT: Two things, Justice Kagan,
5 neither of which will surprise you, I suppose. One is I
6 don't think this is consistent with our constitutional
7 processes.

8 JUSTICE KAGAN: I guess I'm still trying to
9 figure out why. I mean, Holmes dealt with this in
10 Missouri v. Holland. He says there's a treaty power,
11 it's an enumerated power, there's a necessary and proper
12 clause that functions to -- to allow Congress to give
13 effect to that treaty power. It's -- you know, this is
14 a -- a situation where there's a prohibition on the
15 States in terms of entering into treaties or in terms of
16 sharing that power in any way.

17 And he says, you know, it's just these
18 invisible radiations that you think come from the
19 structure of the Constitution. And he specifically
20 rejected this argument, the same argument that you're
21 making, the penumbras and emanations of the
22 Constitution.

23 MR. CLEMENT: Justice Kagan, I think you
24 have to read Missouri v. Holland both in the context of
25 the treaty that the Court had before it and the argument

1 that it had before it. Missouri made a very strange
2 argument in Missouri v. Holland, one that no modern
3 litigant would make. They made an argument that -- they
4 went out of their way to identify a conflict between the
5 Federal treaty and State law and said, therefore, we win
6 under the Supremacy Clause.

7 And Holmes scratched his head and said no.
8 The treaty under -- under Article 6 is supreme to both
9 State law and not the other way around. But he also
10 said this one sentence that sort of bedeviled the lower
11 courts here, which says, well, and if the treaty's
12 valid, of course, the legislation is valid. That made
13 sense in the context of the treaty he had before him,
14 because he had a treaty that directly prohibited
15 individual conduct and a statute that enforced that
16 individualized prohibition with criminal penalties.

17 So in that case, I suppose it was right,
18 that the treaty and the implementing legislation stood
19 or fell together. That's not the case here.

20 If I could reserve my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 General Verrilli.

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

24 ON BEHALF OF THE RESPONDENT

25 GENERAL VERRILLI: Mr. Chief Justice, and

1 may it please the Court:

2 The framers gave the Federal Government
3 exclusive control over the treaty function to ensure
4 that it could knit the nation together as one and allow
5 it to be fully sovereign in the conduct of foreign
6 affairs. Petitioner's ad hoc "too local" limit on the
7 treaty power can't be squared with a judgment the
8 framers made, this Court's precedent, or consistent
9 historical practice since the time of the founding, and
10 it would compromise foreign affairs and national
11 security interests of the first order.

12 CHIEF JUSTICE ROBERTS: General, let's
13 suppose there's a multilateral treaty, the -- the
14 international convention to ensure that national
15 legislatures have full authority to carry out their
16 obligations, i.e., that the national legislature has the
17 police power. And Congress passes a statute saying we
18 have the authority to prosecute purely local crimes
19 pursuant to this international convention that the
20 President has signed. Any problem with that?

21 GENERAL VERRILLI: There may well be. Let
22 me walk through the analysis that I think you'd have to
23 go through. First, I would make the point,
24 Mr. Chief Justice, that it seems unimaginable that a
25 convention of that kind would be ratified by two-thirds

1 of the Senate, which it would have to be.

2 JUSTICE KENNEDY: It also seems unimaginable
3 that you would bring this prosecution. But let's leave
4 that.

5 (Laughter.)

6 GENERAL VERRILLI: And that does go to the
7 point --

8 CHIEF JUSTICE ROBERTS: And just to press it
9 further, the -- the point is that it's a transfer of
10 authority from the States to the national legislature.
11 I don't know why you'd look to the national legislature
12 to say, well, we'd never do that.

13 GENERAL VERRILLI: Well, the framers thought
14 that the two-thirds guarantee -- the two-thirds
15 ratification requirement, was an important structural
16 guarantee to protect the interests of the States.

17 CHIEF JUSTICE ROBERTS: At a time when the
18 Senate was elected by the State legislatures.

19 GENERAL VERRILLI: Yes, Mr. Chief Justice.
20 But there's no doubt that the framers thought that would
21 be an important protection.

22 But beyond that, this Court has said that --
23 that there is an inquiry. It said in dictum. It has
24 never held that a ratified treaty exceeds -- exceeds the
25 Federal Government's constitutional authority. It's

1 never held that a provision implementing a ratified
2 treaty exceeds the Federal Government's constitutional
3 authority.

4 JUSTICE SCALIA: So your answer is if -- if
5 that unimaginable thing should happen, it would be okay?

6 GENERAL VERRILLI: No.

7 JUSTICE SCALIA: All right.

8 GENERAL VERRILLI: My answer is this: That
9 the Court has said that there is an inquiry into whether
10 the -- it is a proper subject of a treaty and that that
11 inquiry could take into account whether it is imposing a
12 fundamental change in the character of the government.

13 But that's not a question the Court needs to
14 answer here, because this treaty, the -- the Petitioner
15 concedes, is a valid exercise of the treaty power, and
16 the legislation implementing this treaty is coextensive
17 with the obligations of the treaty. There is no --

18 CHIEF JUSTICE ROBERTS: I don't know why it
19 would not be a valid exercise of the treaty power. A
20 case like *Medellin* caused serious conflict with our
21 international obligations because we held, look, the
22 Federal Government does not have the authority to tell
23 the sheriff in Texas what to do. That caused a great
24 deal of strain in -- in our international relations.

25 And I think the United Nations could well

1 say, look, we don't want treaty parties to have to deal
2 with whether it's somebody in this State or somebody in
3 that province who has the authority, so every signatory
4 must have the authority. It doesn't strike me as not
5 reasonably related to international obligations.

6 GENERAL VERRILLI: All right. But -- but
7 here, Mr. Chief Justice, this is a valid exercise of the
8 treaty power, and there is no daylight between the
9 implementing legislation and the obligations that the
10 Petitioner concedes are valid.

11 CHIEF JUSTICE ROBERTS: No, no. I know
12 your -- I know the case --

13 GENERAL VERRILLI: And therefore -- and
14 therefore, that may be a question that the Court would
15 have to answer in a different case. But this case
16 doesn't present the opportunity to answer that question.

17 CHIEF JUSTICE ROBERTS: So the -- the
18 purpose of my hypothetical was try to find out if
19 there's any situation in which you believe an erosion or
20 intrusion by the Federal Government on the police power
21 could be a constraint against an international treaty.

22 GENERAL VERRILLI: There -- there may be an
23 outer bound, but this case is nowhere close to it.
24 And -- and it isn't -- it can't be a "too local"
25 exception to the treaty power, which Petitioners argue.

1 CHIEF JUSTICE ROBERTS: Well, it seems to me
2 that if you say there may be an outer bound but this
3 case isn't one of them, you're subjecting yourself to
4 the same criticisms that have been leveled against the
5 other side, that you're proposing a case-by-case
6 evaluation with respect to each treaty.

7 GENERAL VERRILLI: No. I think, Your Honor,
8 that the question here is whether this legislation
9 validly -- it validly implements a valid treaty.

10 The treaty is concededly valid. The
11 legislation is concededly valid on its face.

12 JUSTICE SCALIA: I'd like to -- I'd like to
13 explore that, your proposition that there's no daylight
14 between the treaty itself and the implementing
15 legislation.

16 It seems to me there -- there's a lot of
17 daylight between the two. Let's take -- and I pick this
18 example not because it's controversial, but because it
19 relates to an area where the Federal government has
20 never been thought to have authority, namely family law.
21 There are no, you know Federal marriage, Federal
22 divorce, Federal adoption. It's all been State law.
23 Let's assume that an international treaty is approved by
24 two-thirds of the Senate and the president which
25 requires States to -- to approve same sex marriage. All

1 right?

2 Now, if -- if that were a self-executing
3 treaty, same sex marriage would have to be approved by
4 every State. If it is not self-executing, however, it
5 will be up to Congress to produce that result, and
6 Congress would do it or could do it at least by having a
7 Federal marriage law. And then you would have to have a
8 Federal divorce law and, I suppose, a Federal adoption
9 law.

10 I think there is a big difference between
11 just doing it through a self-executing treaty and
12 dragging the Congress into -- into areas where it has
13 never been before.

14 I think there is daylight between the treaty
15 and requiring the treaty to be implemented in the
16 fashion that you assert is necessary here.

17 GENERAL VERRILLI: Your Honor, I'd like to
18 make a structural point and then a specific point about
19 this case. The structural point, Justice Scalia, is
20 this: If it is the case, as Your Honor's hypothetical
21 seems to concede and as I believe Petitioner concedes,
22 that a self-executing treaty that requires the President
23 to negotiate and two-thirds of the Senate to ratify it,
24 can impose an obligation of that kind, then it has to be
25 the case that a non-self-executing treaty that is --

1 that has the same approval of the President, the same
2 two-thirds ratification, and the additional structural
3 protection of passage of legislation by the Senate and
4 the House and being signed into law by the President,
5 can do what the self-executing treaty can do. It has to
6 be the case. The power, if the --

7 JUSTICE SCALIA: I don't think it has to be
8 the case. I think there -- there's a great difference
9 between requiring the states by a self-executing treaty
10 to permit same sex marriage and dragging the Federal
11 government or allowing the Federal government to enter
12 into this whole field of marriage, divorce, adoption,
13 family law, where the Federal government has never been.

14 GENERAL VERRILLI: Well, with respect, now
15 the point with respect to this treaty. I don't think
16 that, with all due respect, there is any daylight here
17 with respect to this treaty. Section 229(a) does
18 precisely what the treaty obligates the United States
19 government to do, and I think the notion that the treaty
20 obligation can be satisfied by relying on the States to
21 enforce their assault laws, which I think is the core of
22 my friend's argument here, is directly contrary to the
23 history of the framing --

24 JUSTICE BREYER: It is? It is? It is?
25 That's the part that I can't yet get my mind to these

1 dramatic questions of whether here the local police
2 power or in some other case some other inherently State
3 power make a treaty beyond the power of the Federal
4 government to enter into. It's a very big question.

5 But I'm not there yet. And the reason I'm
6 not there is because there's some words in this treaty
7 called "other peaceful purpose," and we have to
8 interpret those words and the same words are in the
9 statute.

10 And my question to you is: What reason is
11 there to think that those matters on List A fall within
12 those words? What is List A? It's infinitely long. A
13 few things on it are in Holmes' opinion in Peasley, a
14 great case on attempted murder where he talks about
15 paying a small boy to move a barrel of kerosene with a
16 candle in it alit, so that it will burn down a barn
17 after a few hours. The kerosene is a chemical.

18 He talks about a case where a person went to
19 a racetrack and gave a horse a poison potato.

20 He talks about a case involving somebody
21 else trying to light a match, which is a chemical, and
22 setting fire to a haystack.

23 We can all think sadly of athletes, Lance
24 Armstrong, at least accused of unlawfully taking drugs.
25 I mean, why do we think matters of List A fall within

1 those words, outside the words "other peaceful purpose,"
2 even though they're unlawful? And by the way, did
3 anyone say to the drafters of the convention -- I found
4 nothing in this brief on the point -- or did anyone tell
5 Congress that poison potatoes, drug-enhancing,
6 performance-enhancing drugs, the example that
7 Justice Alito used last time, you give vinegar to a
8 goldfish -- I mean, these are all chemicals not in the
9 annex, but they are chemicals. And they are absolutely
10 nothing to do with chemical weapons. And why do we
11 think that we have to get beyond that fact?

12 GENERAL VERRILLI: This is a very important
13 point here, and it gets I think to the heart of what the
14 national interest is in this case with respect to this
15 treaty and this implementing legislation. And the harm
16 inheres in the process of line drawing.

17 What the Petitioner is asking as a rule of
18 either constitutional law or statutory construction is
19 that courts, on a case by case basis, after the fact
20 made ad hoc judgments about whether they --

21 JUSTICE BREYER: No, no. There's an easy
22 way out of that. All we do is say the chemicals
23 involved are the chemicals in the annex. But you're not
24 prepared to say that, I guarantee it.

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

1 JUSTICE BREYER: Okay. Now, we're outside
2 the annex. And I guess once we get outside the annex,
3 we either have to draw lines or we have to say, well,
4 this encompasses the poison potato, the poisoned
5 goldfish, the small boy with the candle, the -- for
6 performance-enhancing drugs. I would say judges are
7 here to draw lines, and between throwing all those
8 things into it or drawing lines, it's better to draw a
9 few lines.

10 GENERAL VERRILLI: We can -- we can talk
11 about hypotheticals, but the key point about them is
12 that they're hypothetical.

13 JUSTICE BREYER: No, no. These are real
14 cases, by the way. The poison potato was in fact --

15 GENERAL VERRILLI: The vinegar and the
16 goldfish is not a real case, and I would submit that de
17 minimis non curat lex.

18 JUSTICE ALITO: They're not real -- they're
19 not real cases because you haven't prosecuted them yet.

20 (Laughter.)

21 JUSTICE ALITO: If you told ordinary people
22 that you were going to prosecute Ms. Bond for using a
23 chemical weapon, they would be flabbergasted. It's --
24 it -- it's so far outside of the ordinary meaning of the
25 word.

1 JUSTICE SOTOMAYOR: If her child had died --

2 JUSTICE ALITO: This statute has an
3 enormous -- an enormous breadth, anything that can cause
4 death or injury to a person or an animal. Would it
5 shock you if I told you that a few days ago my wife and
6 I distributed toxic chemicals to a great number of
7 children?

8 (Laughter.)

9 GENERAL VERRILLI: Your Honor, I understand
10 the point.

11 JUSTICE ALITO: On Halloween we gave them
12 chocolate bars. Chocolate is poison to dogs, so it's a
13 toxic chemical under the chemical weapons --

14 GENERAL VERRILLI: I think de minimis non
15 curat lex would take care of that, but this -- there is
16 serious -- this is --

17 JUSTICE BREYER: There's chocolate all over
18 the place.

19 (Laughter.)

20 JUSTICE SCALIA: Do horses eat potatoes? I
21 didn't know horses ate potatoes.

22 GENERAL VERRILLI: This is serious business.
23 With all due respect, the line that the Petitioner is
24 asking --

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

1 answer to the line -- my question was a question to get
2 your answer. And the answer that I wanted you to
3 address yourself to is the problem of once you depart
4 from the annexes in defining the chemicals, you throw
5 into it a list a thousand miles long. And we can tell
6 joke after joke, but it's not a joke that it's so easy
7 to make up examples that seem to have nothing to do with
8 the problem of chemical weapons like the Syrian problem,
9 nothing to do with that.

10 GENERAL VERRILLI: I understand that, Your
11 Honor, but the law --

12 JUSTICE BREYER: So what is your answer?
13 That's what I want to know.

14 GENERAL VERRILLI: If you will permit me to
15 answer the question this way: The line that the
16 Petitioner is asking courts to draw is whether the
17 particular use is warlike or whether it constitutes a
18 peaceful purpose under this convention and under the
19 implementing statute.

20 Well, the very -- one of the very things we
21 are trying to sort out right now in Syria under the
22 Chemical Weapons Convention is where the line is between
23 peaceful uses and warlike uses. And this phrase,
24 "peaceful uses" is not only in the Chemical Weapons
25 Convention, it's in the Nuclear Nonproliferation Treaty,

1 and we're engaged in very sensitive negotiations right
2 now under the Nuclear Nonproliferation Treaty trying to
3 draw exactly the same line.

4 And it would be terribly unfortunate, I
5 would submit, if the Court were to announce in the
6 context of this case, as Petitioner is asking, a
7 definition of what warlike constitutes that could have
8 an unfortunate bearing on those --

9 JUSTICE BREYER: Why don't you tell us --
10 can you tell us what the line is that we're trying to
11 draw?

12 GENERAL VERRILLI: And the -- the -- the
13 framers of the convention and Congress in implementing
14 the convention made a judgment that there needs to be a
15 comprehensive ban and that you can't be drawing these
16 kinds of lines because you can't --

17 JUSTICE KAGAN: Well, General, could I ask
18 why that is? I mean, because this -- this Convention
19 and the implementing legislation is very broad and it's
20 broad because it applies to a very large category of
21 weapons and it applies to a very large category of uses,
22 of conduct. 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'
9 telling me I am attempting to draw the line. That's
10 just what I was going to do. And if you're saying it's
11 against the national security interest, which is the
12 first time I've heard that, that it is the national
13 interests -- against the national interests of the
14 United States for me to attempt to draw such a line,
15 then I guess the State Department better file a brief
16 explaining why or you ought -- or why you -- why you
17 want to push this case or -- I mean, I'm -- is that what
18 you're telling me, that if I write the opinion that I
19 think the law requires me to write that I somehow am
20 hurting the national security interests of the United
21 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. And there -- there are additional
5 risks in terms of this -- the very act of bringing this
6 process of line-drawing to bear; case-by-case, ad hoc
7 judgments about what constitutes a violation and what
8 doesn't is going to undermine the ability of our
9 negotiators into -- to make treaties in the future
10 because they are --

11 JUSTICE KENNEDY: But you did not give the
12 line to the Chief Justice's question where there was a
13 treaty that intruded on the Federal structure. You can
14 have a treaty where the President is required to set
15 aside any State law that in his view contravenes a
16 national interest. That's a structure problem.

17 You've -- you've given us no -- no principle
18 the other way.

19 GENERAL VERRILLI: Well, I -- what I think
20 it would, Justice Kennedy, would suffice to decide this
21 case, were the Court to conclude that the "too local"
22 limit that the Petitioner is advocating here as an
23 as-applied, case-by-case "too local" limit is not one
24 that is inconsistent with the constitutional structure
25 because if you go back to the framers, it is clear from

1 the era of the framing that the framers intended to give
2 the national government the power using --

3 JUSTICE KENNEDY: Well, is it your precept,
4 then, that a treaty cannot be inconsistent with our
5 constitutional structure?

6 GENERAL VERRILLI: This Court has said that
7 the -- this Court has said that, in dictum, repeatedly,
8 but it has said that the -- the treaty -- there's a
9 question in a treaty power case of whether the subject
10 matter of the treaty is a proper subject for a treaty.
11 That's a question the Court can ask. And -- and
12 although I'm not prepared to draw a specific line here
13 today, there -- there may well be a line to be drawn.

14 But here, the Petitioner has conceded and I
15 think all of us would agree, this is the proper subject
16 of the treaty.

17 CHIEF JUSTICE ROBERTS: But there are a lot
18 of treaties, particularly I think Justice Alito pointed
19 out, after the World War II era where you have
20 international conventions affecting everything. We have
21 international conventions on the abduction of children,
22 international conventions that -- human rights. They
23 cover a vast swath of -- of subject matter.

24 And it seems to me the only thing you're
25 saying that is a limit on what the treaty power can be

1 as a source for is some determination, no more --
2 less -- no less arbitrary than the lines other people
3 are asking us to draw between what's appropriate under
4 the treaty power and what's not.

5 And I just would like a fairly precise
6 answer whether there are or are not limitations on what
7 Congress can do with respect to the police power. If
8 their authority is asserted under a treaty, is their --
9 is their power to intrude upon the police power
10 unlimited?

11 GENERAL VERRILLI: If the -- if the
12 treaty -- well, the way I would answer that,
13 Mr. Chief Justice, is if the treaty is valid --

14 CHIEF JUSTICE ROBERTS: Okay. The treaty is
15 valid.

16 GENERAL VERRILLI: -- then implementing
17 legislation that doesn't go beyond the treaty is valid
18 even if it addresses a subject that would otherwise be
19 within the police power of the States.

20 CHIEF JUSTICE ROBERTS: Okay.

21 GENERAL VERRILLI: That is the judgment the
22 framers made and that's what -- that's this case. And
23 so, because the treaty is valid, the Petitioner's
24 concede that the treaty is valid, this statute
25 implements the treaty word-for-word implementation of

1 the obligations that --

2 CHIEF JUSTICE ROBERTS: So you would rather
3 have the Court determine, if we're concerned about the
4 intrusion on the police power, whether treaties are
5 valid or not than whether -- determine whether
6 particular implementing legislation is valid or not.

7 GENERAL VERRILLI: No. I think, Your Honor,
8 that because it is conceded in this case that the treaty
9 is valid, and the Petitioner hasn't elaborated any
10 argument or any principle that would allow this Court to
11 make a judgment about when an exercise of the treaty
12 power is valid and when it isn't, that you've got to
13 take as a given in this case that the treaty is valid.

14 CHIEF JUSTICE ROBERTS: I know this case.
15 The point of the hypothetical is I'm trying to get your
16 general principle. I can imagine treaties that you
17 would say are within the treaty power, again,
18 particularly in the post-World War II era, but that
19 could give rise to implementing legislation that I think
20 would be extraordinary from the point of view of the
21 framers and the power that it gave Congress to intrude
22 upon State authority.

23 GENERAL VERRILLI: So there is a structure
24 of limitations, you know, as I said earlier. The
25 two-thirds ratification requirement is real with respect

1 to this. One of the treaties Your Honor just referred
2 to, the U.N. Convention on Civil and Political Rights,
3 of course, when the Senate ratified it, it did use its
4 power to make reservations to preserve our Federal
5 system. So that operated in exactly the manner that the
6 framers intended there to protect, to safeguard the
7 interests of federalism. And there are, you know, there
8 are about 1,000 ratified treaties on the books right now
9 and we don't have the Congress using the treaty power
10 to -- to usurp the role of the States --

11 JUSTICE BREYER: Oh, no. That isn't the
12 problem.

13 CHIEF JUSTICE ROBERTS: It's -- it's kind of
14 question begging. I mean, the whole point is that some
15 people think we do have exactly that in this case. Now,
16 usually when we have a case that implicates significant
17 and serious bilateral concerns, we get a lot of briefs
18 and all that from our -- our treaty partners.

19 Is -- is there any concern that's been
20 expressed in any concrete way by them about whether
21 Mrs. Bond is prosecuted?

22 GENERAL VERRILLI: I doubt that, Your Honor,
23 because --

24 CHIEF JUSTICE ROBERTS: No, no. Yes. So
25 nothing in --

1 GENERAL VERRILLI: Nobody -- no -- nobody
2 would -- we're not saying -- and I don't think anybody
3 would say that -- that whether or not Ms. Bond is
4 prosecuted would give rise to an international incident.
5 The question is whether Congress has the authority to
6 pass a comprehensive ban.

7 Now, there may, of course, be applications
8 of that comprehensive ban that don't advance the
9 national interest in a profound or poignant way; we
10 understand that. But the question is whether Congress
11 can pass a comprehensive ban implementing a treaty.

12 JUSTICE BREYER: That is the question.

13 JUSTICE KAGAN: And, General, don't we have
14 an amicus brief from almost all of the legal counsels of
15 the State Department, Republican and Democrat, talking
16 about how if Petitioner's argument were accepted, it
17 would severely damage the United States' ability to
18 enter into and to negotiate treaties.

19 GENERAL VERRILLI: That's right. And
20 that -- and that's true, it's -- and that's certainly
21 true.

22 CHIEF JUSTICE ROBERTS: I'm sure that the
23 people who've worked in the national branch of
24 government, particularly for the State Department, would
25 like to have as much authority as they can get to

1 negotiate treaties. We're concerned about limitations
2 on other. Do we have any briefs from State
3 legislatures, State authorities, concerning intrusion on
4 their prerogatives?

5 GENERAL VERRILLI: Your Honor, this
6 convention is a convention that all but four nations on
7 Earth have signed. The legislation that we have enacted
8 is model legislation that over 120 other nations have
9 enacted as well.

10 JUSTICE ALITO: Whenever -- when this Court
11 has issued decisions in recent years holding that there
12 are some limits on Congress's power, cases like Lopez
13 and Morrison and City of Boerne, there have been legal
14 commentators who have written articles saying that could
15 be circumvented to -- through the use of the treaty
16 power. Do you agree with that?

17 GENERAL VERRILLI: I don't think there's a
18 yes or no answer to that. I think that -- because I
19 don't think it would be -- the question would be: What
20 does the treaty power encompass? It wouldn't be a
21 circumvention if this is something that could be
22 constitutionally done under the treaty power, but --

23 JUSTICE ALITO: Could you -- all right.
24 I'll take back the word "circumvention." Could you
25 reach the opposite result? Could it -- could Congress

1 regulate the possession of a gun within a school zone by
2 entering into a treaty that authorizes such legislation?

3 GENERAL VERRILLI: I think the question in
4 that case would be whether the treaty is a valid
5 exercise of the treaty power.

6 JUSTICE BREYER: Oh, it is. That is the
7 problem. There is an underlying -- I don't mean to cut
8 you off, but at some point you seem not to see a problem
9 that I think I see. And the problem underlying it, if
10 you get into the treaty area is this: Given the power,
11 as there is in *Medellin's* majority, to have some
12 self-executing treaties, in principle your position
13 constitutionally would allow the President and the
14 Senate, not the House, to do anything through a treaty
15 that is not specifically within the prohibitions of the
16 rights protections of the Constitution. That's *Missouri*
17 *v. Holland*. And I doubt that in that document the
18 Framers intended to allow the President and the Senate
19 to do anything.

20 Now, you ask us now to say whether the
21 answer to that question is yes or no. We still have a
22 democracy, in other words, of which the House is part.
23 Now, if you carry it to an extreme, that's what you are,
24 that's where you are, and I am worried about that and I
25 think others are, too.

1 So I had asked you: Isn't there an easier
2 way to deal with this case? And you tell me: No, no,
3 because we will interfere with some problem of foreign
4 affairs that was never mentioned in any brief, or at
5 least hit me for the first time when you said it.

6 Now, there you have an expression of my
7 uncertainties at the moment, and any way you want to
8 reply to that would be helpful.

9 GENERAL VERRILLI: I understand the point,
10 Justice Breyer, I do. I understand that there is
11 something that seemed attractive to think about this as
12 a question of statutory construction. What I'm trying
13 to point out is that it's not as easy as it seems, that
14 there are real risks to trying to draw a line of that
15 kind. And yes, that does -- I understand that. That
16 does raise the stakes some, I understand that. But I
17 think that risk is real, and I think that risk is real,
18 the risk that the State Department legal advisor's brief
19 pointed out is real of undermining our ability --

20 JUSTICE GINSBURG: General Verrilli, before
21 your time is out, you haven't answered directly why the
22 Bill of Rights does constrain the treaty power, the
23 implementation of it, Reid v. Colbert? Why is the Bill
24 of Rights different from the federalism concern that the
25 Court has expressed in many cases, when you say, yes,

1 there is a check, the Bill of Rights is a check, but not
2 the Tenth Amendment?

3 GENERAL VERRILLI: There is a historical
4 answer to that question, Justice Ginsburg, which is that
5 that's how the Framers understood it. I think that's
6 clear from what Hamilton said in the -- in the quotes
7 that we have in our brief, and others of the Framers
8 understood that that's where the line would be. And I
9 think the reason for that is that the treaty power is
10 itself a great and substantial independent power of the
11 national government. And it is not constrained by a
12 "too local" limitation. That is the lesson of the era
13 of the framing, that there is a not a "too local"
14 limitation on the exercise of the treaty power. And
15 therefore, while --

16 JUSTICE SCALIA: All of those quotes pertain
17 to self-executing treaties. Yes, there is no limitation
18 on what -- what the President and the Senate can impose
19 as a self-executing requirement, namely that the States
20 must give back to British citizens property that they
21 confiscated or whatever else. But it's a different
22 question whether a treaty can expand the power of the
23 Federal Congress into areas that it has never been
24 before. That's a separate question. And neither
25 Hamilton nor any of the other quotes that you refer to

1 address that question.

2 GENERAL VERRILLI: Your Honor, so long as
3 the treaty -- it's a valid exercise of the treaty power,
4 I think a fortiori if all you do is implement the treaty
5 in haec verba, it's a valid exercise of Congress' power.

6 And I will say, I said earlier that this is
7 serious business. I understand that principles of
8 federalism are serious business also, but federalism is
9 a two-way street. And with respect to the exercise of
10 the treaty power, the Framers made a judgment that this
11 power was going to be exclusively in the hands of the
12 national government. And it needed to be exclusively in
13 the hands of the national government in order to ensure
14 that the United States could be a full sovereign on the
15 world stage.

16 Now, it is true that the subject matter of
17 treaties is different now than it was at the time of the
18 founding, but the Framers understood that. They were
19 careful not to impose subject matter limitations on the
20 treaty power because they were wise enough to know they
21 could not foresee what might be important for the United
22 States to be able to negotiate about on a world stage in
23 order to participate fully as a sovereign.

24 And the Chemical Weapons Convention is a
25 deeply apt illustration of exactly why the Framers were

1 wise in ensuring that there were not subject matter
2 limitations on the exercise of the treaty power. The
3 Chemical Weapons Convention -- the United States'
4 leadership in the Chemical Weapons Convention has made a
5 big difference in ensuring that this norm, which is in
6 our national interests, our foreign relations interests,
7 and our national security interest, is a norm that the
8 nations of the world have agreed to and that we are then
9 in a position to have leverage to insist that the
10 nations of the world abide by it.

11 It is leverage we are trying to exercise
12 right now. It is critically important, and I
13 respectfully submit that the line that the Petitioner is
14 asking this Court to draw is not consistent with the
15 intent of the Framers, with this Court's precedent or
16 with the national interests that I have described.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, General.

19 Mr. Clement, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE PETITIONER

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

23 Just a few points in rebuttal.

24 First of all, the Senate's role in the
25 ratification of treaties cannot be a sufficient

1 political check, and one reason is that sometimes the
2 precise role they play as a check is to make a treaty
3 non-self-executing. And so, to take Justice Scalia's
4 hypothetical example of an international treaty that
5 purported to regulate marriage rights, one thing that
6 the Senate very well might do in that case is to say,
7 well, we will ratify it, but we're going to make sure
8 it's non-self-executing and maybe we will use our
9 spending power or something to get the States on board,
10 but we are not just going to impose a national solution.

11 So it doesn't make any sense to say that a
12 non-self-executing treaty necessarily, even if it's
13 valid, guarantees the validity of the enacting
14 legislation, because some of the reason that you make a
15 treaty non-self-executing is to preserve federalism.

16 A second point is to respond to the
17 argument, which I think I've already explained why it's
18 not correct, but it is the suggestion that there is no
19 daylight between the convention and the statute. There
20 is huge daylight, and the daylight is precisely whether
21 it affects individual conduct and how it affects
22 individual conduct. With all respect, everything on
23 Justice Breyer's List A is not stuff that I think
24 implicates the convention at all. But yet under the
25 government's unwavering theory that you can't make any

1 limitations on the statute, that's all covered by the
2 statute. There's your daylight.

3 Now, I would respectfully suggest that our
4 statutory construction argument is one way out of this.
5 I think that you have to understand the way that
6 "peaceful" is used in the statute is essentially a term
7 of art. I would analogize it to a situation where two
8 scientists in Antarctica get in a fistfight. Okay,
9 that's not conduct we condone, but I don't think we've
10 violated our pledge to reserve Antarctica for only
11 peaceful purposes. And that's the same way we would
12 like you to interpret this statute.

13 Now, the government says you can't do that
14 because that's going to mess up what's going on in
15 Syria. With all due respect, I assume that the issue in
16 Syria is whether or not the nation state of Syria is
17 doing something that would violate the convention if,
18 contrary to fact, they were signatory to this
19 convention.

20 So if you want to make clear that you're
21 only talking about individual conduct, I think you can
22 solve that whole problem right there. But if I'm wrong
23 and the only way, as the government assures you that you
24 can make this legislation work is to have it be in
25 exercise the police power, well, then the answer is that

1 the legislation is simply unconstitutional.

2 JUSTICE KAGAN: Can I just ask you,
3 Mr. Clement, and it's a variant of the hypothetical I
4 gave you before, but it focuses more on your statutory
5 point, the peaceful purposes.

6 Suppose that Ms. Bond used sarin gas and
7 sent it through the ducts of Haynes' house; would you
8 say that that's a peaceful purpose?

9 MR. CLEMENT: I would say it's not, but I
10 think it has to do more with the particular qualities of
11 sarin gas, the fact that it's on Schedule A, the fact
12 that nobody can possess that for any lawful use.

13 And what makes something like vinegar or
14 even potassium dichromate different is what puts it over
15 the ledge from being an ordinary chemical to a chemical
16 weapon is precisely its use and its use alone.

17 Now, Justice Kagan, you asked a great
18 question: What was Congress thinking when they did
19 this? I think, with respect, the Congress wasn't
20 focused on this issue at all. If you look at the
21 legislation they passed to implement this, the chemical
22 industry and others put in front of them the possibility
23 that there was a Fourth Amendment problem with the
24 inspections of chemical production facilities that were
25 authorized under the convention. When Congress had the

1 constitutional problem in front of it, they had all
2 sorts of provisions to deal with that constitutional
3 concern.

4 Now, the future Ms. Bonds of the world
5 didn't have quite the same lobbying resources as the
6 chemical industry, so they didn't avert to this problem.
7 And that's precisely why some kind of clear statement
8 rule or the like would make perfect sense in this to
9 make sure Congress doesn't exercise the police power
10 when all it thinks it's doing is implementing a treaty.

11 The last thing is just to say about the
12 State Department legal advisor's --

13 JUSTICE SOTOMAYOR: A clear statement about
14 the treaty -- I'm sorry.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 General.

17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the
19 above-entitled matter was submitted.)
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A	<p>agree 42:15 47:16 agreed 52:8 agrees 4:25 alit 34:16 Alito 8:25 9:22 16:6 17:1,7,10 35:7 36:18,21 37:2,11 42:18 47:10,23 allow 19:3 25:12 27:4 44:10 48:13,18 allowing 33:11 Amendment 8:22 50:2 55:23 amicus 46:14 analogize 54:7 analogy 23:10 23:13 analysis 27:22 animal 37:4 ANNE 1:3 annex 20:19 35:9,23 36:2,2 annexes 38:4 announce 39:5 anomalous 20:8 answer 7:18 17:19 29:4,8 29:14 30:15,16 38:1,2,2,12,15 43:6,12 47:18 48:21 50:4 54:25 answered 49:21 answering 9:22 Antarctica 54:8 54:10 anti-clear 18:17 anybody 46:2 APPEARAN... 1:14 appendix 4:24 applaud 14:25 applicable 6:22</p>	<p>application 14:17 applications 13:8 46:7 applied 12:10,12 applies 10:16 14:11 39:20,21 apprised 16:17 approach 15:17 approaching 17:8 appropriate 43:3 approval 33:1 approve 31:25 approved 31:23 32:3 apt 51:25 arbitrary 43:2 area 31:19 48:10 areas 32:12 50:23 argue 30:25 arguing 11:3 argument 1:12 2:2,5,8 3:4,7 7:5,8,8,9 18:8 18:9,16 25:20 25:20,25 26:2 26:3,23 33:22 44:10 46:16 52:20 53:17 54:4 Armstrong 34:24 arrested 16:12 arresting 16:11 16:16 art 54:7 Article 4:23 18:22 26:8 articles 47:14 articulated 12:15 as-applied 12:25 13:4,6 41:23 aside 5:21 19:16</p>	<p>19:17 41:15 asked 49:1 55:17 asking 35:17 37:24 38:16 39:6 43:3 52:14 assault 10:20 33:21 assaults 10:16 assert 6:25 32:16 asserted 43:8 asserts 7:1 assume 31:23 54:15 assures 54:23 ate 37:21 athletes 34:23 attempt 23:7 40:14 attempted 34:14 attempting 40:9 attractive 49:11 authorities 47:3 authority 21:14 27:15,18 28:10 28:25 29:3,22 30:3,4 31:20 43:8 44:22 46:5,25 authorized 55:25 authorizes 48:2 avert 56:6 avoids 15:18</p>	<p>15:25 basically 6:11 basis 35:19 bear 41:6 bearing 39:8 bedeviled 26:10 bedrock 3:15,22 20:16 beg 15:17 begging 45:14 beginning 9:2 behalf 1:15,18 2:4,7,10 3:8 26:24 52:21 believe 20:21 30:19 32:21 better 36:8 40:15 beyond 17:11,11 17:15,16,16 28:22 34:3 35:11 43:17 big 32:10 34:4 52:5 bilateral 45:17 Bill 49:22,23 50:1 bird 18:3 bizarre 18:22,23 blue 4:23 board 53:9 Boerne 47:13 Bond 1:3 3:5 36:22 45:21 46:3 55:6 Bond's 24:13 Bonds 56:4 books 45:8 borders 9:12 Boston 23:16 bound 30:23 31:2 boy 34:15 36:5 branch 46:23 breadth 37:3 Breyer 20:18 33:24 35:21</p>
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