No. 09-1227

In the

Supreme Court of the United States

CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

ILYA SHAPIRO
Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
DAVID L. LLEWELLYN, JR.
KAREN J. LUGO
Of Counsel, Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(877) 855-3330

Counsel for Amici Curiae
Center for Constitutional Jurisprudence
and Cato Institute

QUESTION PRESENTED

Whether Congress can use the treaty power to circumvent the constitutional enumeration of powers that is the basis for its authority and, if it does so, whether no directly harmed individual can challenge such abuse of power.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *American Electric Power Co. v. Connecticut*, No. 10-174 (*cert. granted*, Dec. 6, 2010); *Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S. Ct. 3323 (2010); *Medellin v. Texas*, 552 U.S. 491 (2008); *Rapanos v. United States*, 547 U.S. 715 (2006); *GDF Realty Investments, Ltd. v. Norton*, No. 03-1619, *cert. denied,* 545 U.S. 1114 (2005); *Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004); *Solid*

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. A letter of consent from attorneys for Respondent is being filed simultaneously with the Clerk of the Court and attorneys for Respondents and Court-appointed amicus curiae have filed blanket consents.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied,* 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. The present case centrally concerns Cato because it represents an opportunity to clarify the limits that the Constitution places on federal power.

SUMMARY OF ARGUMENT

A criminal defendant clearly has standing to challenge the constitutionality of the federal statute under which she was convicted. The government's confession of error demonstrates just how manifestly erroneous the lower court's decision to the contrary was. But a bald remand, without some direction on the merits, will likely lead to a repetition of the substantive error that lead the lower court to its mistaken conclusion. The lower court assumed that both the power to make treaties and Congress's power to make laws that are necessary and proper to give effect to the treaty power are unconstrained by the Constitution's "enumerated powers" limits on federal power. This assumption is premised on a perfuncto-

ry acceptance of an overly broad interpretation of *Missouri v. Holland*, 252 U.S. 416 (1920). That reading of *Missouri v. Holland,* however, is contrary to prior precedent, has been undermined by subsequent decisions of this Court, and if allowed to stand, will seriously undermine the notion that the national government is one of only limited, enumerated powers. Recognition by this Court that the constitutional questions presented by Mrs. Bond warrant the full consideration by the lower courts will begin the process of serious consideration that was lacking in *Missouri v. Holland* and its progeny.

ARGUMENT

I. It Is Axiomatic that a Criminal Defendant Has Standing to Challenge the Constitutionality of the Federal Statute Under Which She Was Convicted.

Of course a criminal defendant has standing to challenge the constitutionality of a statute under which she has been convicted, as the government now wisely concedes. While the government's confession of error does not bind this Court on jurisdictional questions such as this, the argument by Petitioner that led to the government's confession of error is persuasive. This Court should accept the government's position that Petitioner had standing, not because the government confessed it, but because it is correct. The erroneous interpretation of *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939), which led the court below astray, should be expressly repudiated.

A. The Tenth Amendment Argument is Simply the Flip Side of the Enumerated Powers Coin.

This Court has repeatedly recognized that the national government is one of limited, enumerated powers, not one of unlimited authority. *E.g., Wyeth v. Levine*, 129 S. Ct. 1187, 1206 (2009); *United States v. Morrison*, 529 U.S. 598, 618 and n.8 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York v. United States,* 505 U.S. 144, 156-57 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"); *see also* Federalist No. 45, pp. 292-93 (Madison) (Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite").

Carol Anne Bond's contention below was that the federal statute under which she was convicted was *ultra vires*, and therefore unconstitutional. *See, e.g.,* Bond CA3 Brief at 18 (contending that Congress cannot use the treaty power to criminalize conduct not within the federal government's jurisdictional reach). Whether couched as a claim that the statute

exceeds enumerated powers or violates the Tenth Amendment's proscription that the powers not delegated to the federal government are reserved to the states or to the people, the issue whether Mrs. Bond has standing to challenge the constitutionality of the statute is the same. The Tenth Amendment is merely the "mirror image" of the enumerated powers structure of the Constitution. *New York*, 505 U.S., at 156 (1991) ("the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress").

B. Even If the Tenth Amendment Recognizes a State Sovereignty Carve-out From Otherwise Valid Exercises of Federal Power, a Criminal Defendant Has Standing to Challenge the Constitutionality of Her Conviction On Those Grounds As Well.

The Third Circuit's decision below is based on a view that the Tenth Amendment also protects state sovereign interests even in the face of otherwise valid exercises of congressional power, and that only the states have standing to defend those interests. The Third Circuit's position is wrong, both in its premise and in the conclusion it draws from that premise.

To be sure, this Court has previously suggested that the Tenth Amendment creates a carve-out of state sovereign powers that cannot be infringed by

Congress even when Congress is acting pursuant to an enumerated power. *National League of Cities v. Usury*, 426 U.S. 833, 842-43 (1976); *Fry v. United States*, 421 U.S. 542, 547 (1975). The tension created by that extra-textual reading of the Tenth Amendment was subsequently cured, however, when this Court recognized that the same idea is more properly grounded in the "proper" element of the Necessary and Proper Clause than in a penumbra of the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 923-24 (1997); *see also Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) ("cases such as [*Printz*] affirm that a law is not *proper* for carrying into Execution the Commerce Clause when it violates a constitutional principle of state sovereignty" (emphasis in original, internal quotation marks and brackets omitted)).

Printz thus recognizes that even the "state sovereignty" concern flows from the enumerated powers doctrine, not from a separate preserve of state powers that only the states have standing to protect. Mrs. Bond therefore has as much standing to challenge the constitutionality of the statute under which she was convicted as Mr. Lopez had to challenge his conviction in *United States* v. *Lopez*. That Congress sought to criminalize conduct in excess of its authority under the Commerce Clause in *Lopez* and in excess of its authority under the Necessary and Proper Clause in the case *sub judice* is of no moment on the jurisdictional issue. Both criminal defendants had the "concrete and particularized" "injury in fact" that this Court has deemed necessary for Article III standing, and a finding of unconstitutionality would afford as much redress to Mrs. Bond as it did to Mr. Lopez. *See Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-61 (1992). Indeed, because Mrs. Bond is the "object of the action" by the government, there should be "little question" that the government's action—its criminal prosecution—"caused [her] injury, and that a judgment preventing . . . the action will redress it." *Id*., at 561-62.

Moreover, even if the Third Circuit's reasoning were simply shifted to an inquiry into whether the congressional intrusion into a matter of core state concern was "proper" under the Necessary and Proper Clause, Mrs. Bond would still have standing to press her challenge to the constitutionality of the statute under which she was convicted. One of the principal purposes of federalism is to protect individuals against an overreaching federal government, by subdividing sovereign authority between the federal and state governments, each capable of checking the other. *See, e.g., Gregory*, 501 U.S., at 458 ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'" (quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985))). It would be anomalous to hold that an individual beneficiary of this system of checks and balances could not defend her own particularized interests, when the state fails to do so. The States simply cannot sublet to the federal government powers that "We the People" assigned to the States or reserved to ourselves, and individuals who are particularly harmed by the attempted reallocation of power are not without recourse to the courts to challenge it.

C. Denying Standing to Federally Charged Criminal Defendants Eliminates an Important Avenue of Redress to the Increasing Over-Federalization of Criminal Law.

There is an emerging national consensus that the criminal law is becoming over-federalized and, as a consequence, less tethered to its core principles and aims. In May 2010, the Heritage Foundation and the National Association of Criminal Defense Lawyers—organizations often diametrically opposed to each other—co-published a study on the proliferation of the federal criminal code and the disturbing way in which such laws are often passed without a *mens rea* requirement. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Intent Requirement in Federal Law* (2010).

The sheer number of new federal crimes boggles the mind. To wit, the federal criminal code now includes at least 4,450 crimes. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes,* Legal Memorandum No. 26, Heritage Found. (June 16, 2008). Congress added an average of 56.5 crimes per year to the federal code between 2000 and 2007, *id.*, and has raised the total number of federal crimes by 40% since 1970. James Strazella et al., Task Force on the Federalization of Criminal Law, Am. Bar Ass'n Criminal Justice Section, *The Federalization of Criminal Law* 7 (1998). Moreover, the federal criminal code has grown not just in size but in complexity, making it difficult to both (1) determine what statutes constitute crimes, and (2) "differentiat[e] whether a single statute with different acts listed within a section or subsection includes more than a single crime and, if so, how many." John S. Baker,

Jr., *Jurisdictional and Separation of Powers Strategies To Limit the Expansion of Federal Crimes,* 54 Am. U. L. Rev. 545, 549 (2005).

Nevertheless, Congress keeps piling on. During the 109th Congress (2005-06), 446 new criminal offenses were proposed, less than half of which were sent for expert review at either the House or Senate Judiciary Committee. As a result, as this Court recently recognized in *Skilling v. United States*, 130 S. Ct. 2896 (2010), federal prosecutors are often left with enormously vague statutes that implicate core constitutional and due process concerns.

This complexity of the criminal law, as well as the sheer number of statutes on the books, makes the systemic cleansing of the federal criminal code a difficult task. It is thus crucial that criminal defendants have standing to challenge the laws under which they are charged as *ultra vires* congressional actions violating either Article I or the Tenth Amendment. As we have explained above, identical concerns underlie both constitutional provisions.

In *Lopez* and *Morrison*, this Court restored an important weapon in the arsenal of the lone criminal defendant fighting against the arrayed forces of the most powerful government the world has ever known: the idea that this government must still operate within a system of enumerated powers. One of the hallmarks of our constitutional system is that it is within the power of that lone defendant to challenge the federal government by asking the courts to review and check the actions of the coordinate branches.

Indeed, this Court has recognized that a government of enumerated powers was created for the benefit of those living under the duly constituted government, that the "first principles" of the Constitution "serve to prevent the accumulation of excessive power in any one branch," and that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (internal quotation marks omitted)). The same "first principles" hold true for any defendant charged with a federal crime that arguably goes beyond the enumerated powers of Congress, whether they bring a claim under Article I or the Tenth Amendment.

II. The Lower Court's Lack-of-Standing Determination Erroneously Assumed that the Underlying Exercise of Federal Power Was Valid; This Court Should Therefore Address The Merits or at Least Note that Mrs. Bond's Constitutional Challenge is Unresolved.

The perfunctory but erroneous reliance on *TVA* by the Court of Appeals on the standing question is paralleled by the equally perfunctory and erroneous treatment of the merits by the district court. The district court simply noted in conclusory fashion that because Section 229 "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution … [t]o comply with the provisions of a treaty," it was constitutionally valid and, apparently, did not contravene federalism principles, as Mrs. Bond had claimed. Pet. App. 28. Mrs. Bond's constitutional challenge cannot be dispensed with so easily.

A. The Treaty Power is Limited by the Constitution.

The root of the district court's error is the broad interpretation that has been given to this Court's century-old decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920), which in the lower courts has come to stand for two related and constitutionally dubious propositions: 1) that the treaty power is not limited to the enumerated powers otherwise delegated to the national government; and 2) that the Necessary and Proper Clause is likewise not limited when utilized in support of the treaty power. *See, e.g., United States v. Lue*, 134 F.3d 79, 83 (2nd Cir. 1998) ("the United States may make an agreement on any subject suggested by its national interests in relation with other nations"); *id.*, at 84 ("If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause"); *id.*, at 85 ("the treaty power is not subject to meaningful limitation under the terms of the Tenth Amendment"); *United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (agreeing with *Lue*); *see also* Nicholas Quinn Rosenkranz, "Executing the Treaty Power," 118 Harv. L. Rev. 1867, 1871 n.11 (2005), and cases cited therein.

The broad interpretation of *Missouri* v. *Holland* results in a *sub silentio* overruling of prior precedent. In *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836), this Court held that because the "government of the United States ... is one of limited powers" and "can exercise authority over no subjects, except those which have been delegated

to it," the congressional police power authority over federal territories could not "be enlarged under the treaty-making power." *Missouri v. Holland* does not mention that precedent, much less hold that it was being overruled.

Moreover, the broad interpretation of *Missouri v. Holland* has been severely undermined by two subsequent decisions of this Court: *Reid* v. *Covert*, 354 U.S. 1 (1957), and *United States* v. *Lopez*, 514 U.S. 549 (1995).

Reid addressed whether, by adopting a statute designed to give effect to a treaty, the federal government could avoid the requirements in Article III, Section 2 of the Constitution and in the Fifth and Sixth Amendments that civilians are entitled to indictment by grand jury and trial by jury. In a rare reversal of course after a petition for rehearing allowed the Court additional time to consider just how significant a matter of basic constitutional law was at stake, the Court held that the Constitution imposed limits even on the treaty power. "The United States is entirely a creature of the Constitution," noted Justice Black, writing for the plurality and announcing the judgment of the Court. *Reid*, 354 U.S., at 5-6 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119, 136-37 (1866); *Graves v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939); and *Ex parte Quirin*, 317 U.S. 1, 25 (1942)). "Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Id.*, at 6 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803); *Territory of Hawaii v. Mankichi*, 190 U.S.

197, 236-39 (1903) (Harlan, J., dissenting)). "[T]he United States Government … has no power except that granted by the Constitution." *Id.* at 12.

Although Justice Black was writing for a four-Justice plurality, Justice Harlan agreed with the essential point in his separate opinion concurring in the judgment: "Under the Constitution Congress has only such powers as are expressly granted or those that are implied as necessary and proper to carry out the granted powers." *Reid*, 354 U.S., at 66 (Harlan, J., concurring in judgment).[2]

The Court plurality flatly rejected the contention that the legislation depriving Mrs. Reid of her constitutional right to a civilian jury trial could "be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with [Great Britain and Japan]." According to the plurality:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Id., at 16. And Justice Harlan specifically disclaimed reliance on an unlimited treaty power in his separate opinion concurring in the judgment:

> To say that the validity of the statute may be rested upon the inherent 'sovereign powers' of

[2] Similarly, Justice Frankfurter, who also filed a separate opinion concurring in the judgment, recognized that a "particular provision" of the Constitution "cannot be dissevered from the rest of the Constitution." *Reid*, 354 U.S., at 44 (Frankfurter, J., concurring in judgment).

> this country in its dealings with foreign nations seems to me to be no more than begging the question. As I now see it, the validity of this court-martial jurisdiction must depend upon whether the statute, as applied to these women, can be justified as an exercise of the power, granted to Congress by Art. I, s 8, cl. 14 of the Constitution, 'To make Rules for the Government and Regulation of the land and naval Forces.' I can find no other constitutional power to which this statute can properly be related.

Id., at 66. Hence, neither the treaty power nor the Necessary and Proper Clause may be used to expand Congress' lawmaking authority beyond the powers enumerated in the Constitution.

Which brings us to *United States* v. *Lopez*, the second major decision of this Court that has undermined the overly broad interpretation that has been given to the *Missouri* v. *Holland* holding. In *Lopez*, this Court made clear that the doctrine of enumerated powers also serves as a significant restraint on the powers of the national government: "Congress' authority is limited to those powers enumerated in the Constitution, and … those enumerated powers are interpreted as having judicially enforceable outer limits[.]" *Lopez*, 514 U.S., at 566.

Lopez's holding complements quite nicely the reasoning of *Reid*, and the two cases together cast serious doubt on the continuing vitality of the broad reading that has been given to *Missouri* v. *Holland*. The *Reid* plurality noted, for example, that "the shield which the Bill of Rights *and other parts of the Constitution* provide to protect his life and liberty

should not be stripped away just because it happens to be in another land." *Reid*, 354 U.S., at 6 (emphasis added). Further, when repudiating the holding of *In re Ross*, 140 U.S. 453 (1891), that the Constitution did not apply abroad, the *Reid* plurality specifically noted that the problem with the statutory scheme upheld in *Ross* was the "blending of executive, legislative, and judicial powers in one person or even in one branch of the Government," which it described "as the very acme of absolutism." *Reid*, 354 U.S., at 11. While individual provisions of the Bill of Rights were undoubtedly implicated as well, the *Reid* plurality did not discuss them, focusing instead on the protection of liberty provided by the core separation of powers structure found in the main body of the Constitution itself. *Id.*, at 10-12.

Similarly, the *Reid* plurality rejected the notion that the Supremacy Clause exempted "treaties and the laws enacted pursuant to them" from "compl[iance] with the provisions of the Constitution." *Id.*, at 16. The only reason the Supremacy Clause does not use the "in pursuance" of the Constitution formulation for treaties that it uses for legislation was to confirm that agreements made by the United States under the Articles of Confederation "would remain in effect." *Id.*, at 16-17 (citing 4 Farrand, Records of the Federal Convention 123 (rev. ed. 1937)). "It would be manifestly contrary to the objectives of those who created the Constitution," noted the plurality,

> as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United

> States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Id., at 17 (citing Virginia Ratifying Convention, 3 Elliot's Debates 500-519 (1836 ed.)). Accordingly, the *Reid* plurality noted that "[t]his Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Id.* (citing *United States v. State of Minnesota*, 270 U.S. 181, 207-08 (1926); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870); *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1853)). The exemplary language cited by the *Reid* plurality from one such case is particularly instructive:

> The treaty power, as expressed in the constitution, is in terms unlimited *except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States*.

Id. (citing *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890)). The language quoted from *Geofroy* speaks of both kinds of restraints against the power of the federal government, the explicit prohibitions of the Bill of Rights and those arising from the nature of the gov-

ernment itself, including apparently that the federal government is one of limited, enumerated powers. *See also id.*, at 22 (discussing that the Necessary and Proper Clause is limited by both kinds of specific restraints on governmental power—the text of the enumerated powers being furthered, and specific prohibitions elsewhere in the Constitution and the Bill of Rights).

The *Reid* plurality did not itself apply that necessary conclusion to *Missouri* v. *Holland* because, at the time, the Court had so broadly interpreted the enumerated powers at issue as to amount to almost no limitation at all:

> To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

Id., at 18 and n. 35 (citing, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 124-125 (1941)). By citing *Darby*, however, the *Holland* Court indicated that it was addressing constitutional limits imposed by the scope of other enumerated powers, not asserting that the people had delegated an unlimited authority to the national government via the Treaty Power.

Hence the significance of *Lopez*. The *Reid* plurality's *obiter dictum* with respect to *Holland* must be read in light of *Lopez* and the doctrine of limited, enumerated powers that it confirms. The United States cannot "validly" make a treaty that ignores the structural limits on federal power, any more than it can "validly" make a treaty that ignores the express prohibitions on federal power. *See, e.g.*, Virgin-

ia Ratifying Convention (June 18, 1788), *in* 3 Elliot's Debates 504 (Gov. Randolph) ("When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place [by use of the treaty power]"); *id.* (June 19, 1788), in 3 Elliot's Debates 514-15 (Madison) (rejecting the claim that the Treaty Power "is absolute and unlimited," noting that "[t]he exercise of the power must be consistent with the object of the delegation," and that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external"). More to the point for this case, Congress cannot "validly" exceed its enumerated powers by the simple expedient of relying on a treaty rather than Article I. At least, not without altering the limited "nature of the government itself," *Geofroy*, 133 U.S., at 267, or removing the liberty-protecting "shield" that the structural parts of the Constitution provides, or acting "manifestly contrary to the objectives of those who created the Constitution, . . . let alone alien to our entire constitutional history and tradition," or permitting "amendment of [the Constitution] in a manner not sanctioned by Article V." *Reid*, 354 U.S., at 17, 33.

Thus far, the lower courts have been unwilling to follow the combined reasoning of *Reid* and *Lopez* to reject the broader interpretation that has been given to *Missouri* v. *Holland*. Rather, as manifested by the district court's perfunctory dismissal of the issue below, they apparently feel bound by the view that the entire matter must be dispensed with simply by noting that the challenged Act of Congress was enacted as a "necessary and proper" means of giving effect to a treaty, and therefore no further inquiry into constitutionality is required.

Such a view can yield some very absurd results. A treaty with Austria that included a provision assisting its native son, the naturalized (rather than native-born) citizen and soon-to-be ex-Governor of California, could allow the President, with the advice and consent of the Senate, to excise the native-born citizen eligibility requirement for the presidency, for example. U.S. Const. art. II, § 1, cl. 5. A multinational treaty on age discrimination could likewise excise the 35-year-old age requirement for the same office. *Id.* Another one, such as the Convention on the Elimination of All Forms of Discrimination Against Women, could authorize the provisions of the Violence Against Women Act already held to be unconstitutional in *United States v. Morrison*. Yet another, such as the Convention on the Rights of Children, could authorize the provisions of the Gun Free School Zones Act held constitutionally infirm in *Lopez*. The examples are as numerous as the imagination, and this small sampling should serve to demonstrate just how significant a threat to the notion of limited government there is from the pernicious doctrine that the treaty power is exempt from constitutional constraints on the power of government, or that, contrary to the understanding of the framers of a "treaty" as dealing only with relations between nations, the treaty power can instead be used to alter how a nation deals domestically with its own citizens. *See Geofroy*, 133 U.S., at 266 ("the treaty power of the United States extends to all *proper subjects* of negotiation between our government and the governments of other nations") (emphasis added); *id.* at 267 ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the gov-

ernment or in that of one of the states"); *see also, e.g.*, Virginia Ratifying Convention (June 19, 1788), in 3 Elliot's Debates 514-15 (Madison) (noting that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external").

Unless the district court's error is at least noted by this Court, a remand for further consideration of the merits by the Court of Appeals may be a colossal waste of judicial resources, yielding no more than a cursory merits determination that provides this Court little assistance in grappling with the very serious constitutional challenge presented by Mrs. Bond. The Third Circuit has already noted that Mrs. Bond has raised important constitutional issues that should require the court to "wade into the debate over the scope and persuasiveness of" *Missouri v. Holland*. Pet.App. 10. A slight nod from this Court would free the Third Circuit and other lower courts to begin that important work in earnest.

B. The Necessary and Proper Clause Does Not Give Congress Carte Blanche to Pass Domestic Legislation in Excess of Constitutional Authority Merely Because Action Was Promised in a Treaty.

Even if the treaty power is itself ultimately held to allow issues to be addressed by the federal government that are not otherwise within the federal government's constitutional powers, such a holding would not answer the analytically distinct question whether a treaty that is not self-executing could authorize Congress to act in excess of the legislative powers assigned to it. Professor Nicholas Rosenkranz's recent article in the Harvard Law Review persuasively argues that such a promise in a treaty

must be read as a commitment to push for a constitutional amendment that would authorize the promised legislation, not as authorization for Congress to adopt unconstitutional legislation. *See* Nicholas Quinn Rosenkranz, "Executing the Treaty Power," 118 Harv. L. Rev. 1867 (2005).

Textually, the Necessary and Proper Clause authorizes Congress:

> To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .

U.S. Const. art. I, § 8, cl. 18; art. II, § 2, cl. 2. Professor Rosenkranz carefully points out that, as a simple matter of grammatical construction, Congress has the power to make laws necessary and proper for the President "to make Treaties" (such as appropriating money for diplomats to travel to negotiate a treaty), not to make laws necessary and proper to implement non-self-executing treaties already made. Rosenkranz, *supra*, at 1882-84. As no less a Justice than Joseph Story recognized, "the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618-22 (1842).

Justice Holmes's *ipse dixit* in *Missouri v. Holland,* conclusorily stating the opposite, that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government," 252 U.S., at 432, warrants a more reasoned analysis that Justice Holmes provided. If Holmes

was correct, the treaty power can be used to undo the carefully-wrought edifice of a limited government assigned only certain enumerated powers. That those who drafted and ratified the Constitution intended to bury such a dormant time bomb in their handiwork is too much of a stretch to be seriously entertained. Yet that is precisely the path that the lower courts have embarked upon, via their broad interpretation of this Court's decision in *Missouri v. Holland*. Again, a nod from this Court will invite the lower courts to begin grappling with these constitutional issues in the serious manner they deserve, rather than via *ipse dixit*.

CONCLUSION

The judgment of the court below should be reversed and the matter remand for further consideration of the merits of Mrs. Bond's significant constitutional claims.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
DAVID L. LLEWELLYN, JR.
KAREN J. LUGO
Of Counsel, Center for
Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(877) 855-3330

Counsel for Amici Curiae
Center for Constitutional Jurisprudence
and Cato Institute