

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CAROL ANNE BOND, :

4 Petitioner : No. 12-158

5 v. :

6 UNITED STATES :

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8 Washington, D.C.

9 Tuesday, November 5, 2013

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

14 APPEARANCES:

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16 Petitioner.

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	DONALD B. VERRILLI, JR., ESQ.	
7	On behalf of the Respondent	27
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioner	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

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

6 Mr. Clement?

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

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

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

24 JUSTICE GINSBURG: But, Mr. Clement, you
25 said that -- that the treaty is valid and the

1 implementing legislation seems to largely copy the words
2 of the treaty without adding anything. So it's a puzzle
3 that the treaty could be constitutional, but the
4 implementing legislation that adds nothing is
5 unconstitutional.

6 MR. CLEMENT: Well, Justice Ginsburg, I
7 guess I would quarrel with your premise, which is, it is
8 true that the convention in the statute used similar
9 terms and terminology, but there's one very important
10 difference between the convention and the statute, and
11 that actually differentiates this case from Missouri v.
12 Holland.

13 And that difference is that the convention
14 itself doesn't directly regulate individual conduct at
15 all. And so all the -- all the convention does --

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

22 MR. CLEMENT: Well, Justice Kagan, to be
23 quite precise, though, what the convention says -- and
24 this is Article 7, Section 1, it's 33a of the Blue Brief
25 appendix. What it says is that each nation state that

1 signs the convention agrees, in accordance with its
2 constitutional processes, to pass penal laws that make
3 unlawful for individuals conduct that would violate the
4 convention, if undertaken by a nation state.

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

12 JUSTICE SOTOMAYOR: Why not?

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

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

24 Why is it -- if it's okay to regulate the
25 possession of marijuana, a purely local crime, why is it

1 unconstitutional to regulate the use of something that
2 can kill or maim another human being -- a chemical that
3 can kill or maim another human being?

4 MR. CLEMENT: Well, I think --

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

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

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

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

24 JUSTICE SOTOMAYOR: Now --

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

1 case to -- to decide the Commerce Clause question, did
2 we? The government didn't even assert it below. It
3 asserts it now, but as we took the case, the issue was
4 whether the treaty supported the -- the laws.

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

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

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

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

1 does. But I -- but I --

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

9 So where would you find that limitation in
10 the Constitution.

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

15 JUSTICE KAGAN: But this is an enumerated
16 power. The enumerated power is the treaty power. So
17 you have to find a constraint on the treaty power.
18 Where does it come from?

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

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

2 JUSTICE ALITO: Well, don't you think the
3 word "treaty" has some meaning? It is certainly true
4 that, going back to the beginning of the country, there
5 have been many treaties that have been implemented in
6 ways that affect matters that otherwise would be within
7 the province of the States.

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

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

23 MR. CLEMENT: I think that's right,
24 Justice Alito. And I didn't mean, in answering Justice
25 Kagan's question, to fully accept the premise that

1 there's no limit on the treaty power whatsoever. But I
2 do think that it's important to recognize that, in the
3 context of non-self-executing treaties, there's a real
4 opportunity to leave for another day the question of
5 whether the treaty itself is valid because, sometimes, a
6 treaty is non-self-executing precisely because the
7 Senate recognizes --

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

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

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

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

1 irony in what you just said, because the victim, many
2 times, went to the State police and said, please help
3 me. And they turned her away a dozen times. And
4 finally they said, go to the post office.

5 So this doesn't seem to be -- you're arguing
6 that this trenches on the State's domain. And, yet, in
7 this very case, it wasn't until the State referred her
8 to the post office, Federal officials, that she got any
9 action.

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

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

22 JUSTICE KAGAN: Mr. Clement, could I make
23 sure I understand your test? Your test is to say that
24 with respect to every prosecution under this -- under
25 this treaty, that a court has to ask whether the

1 prosecution has a sufficient nexus to national or
2 international concerns? Is that -- is that your test?

3 MR. CLEMENT: No, that's not my test,
4 Justice Kagan. I would actually come at it from the
5 other end of the stick, which is to say, that the one
6 thing I think I know from this Court's precedence is
7 that the Federal government doesn't have a general
8 police power.

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

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

23 MR. CLEMENT: It's whether the Federal
24 statute exercises a general police power. And if it
25 does --

1 JUSTICE KAGAN: That sounds like a facial
2 challenge. Now, I thought that you made very careful to
3 talk about that this was an as-applied challenge to this
4 particular prosecution.

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

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

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

24 JUSTICE KAGAN: Okay. Nexus -- nexus to a
25 national concern, again, is what I understood you to say

1 in your brief. But let me give you a hypothetical, and
2 you tell me whether your test meets it.

3 Let's say it's the same convention, except
4 it relates only to Sarin gas, and -- and there's a
5 chemist out there and -- you know, the -- the
6 implementing legislation mirrors the convention.
7 There's a chemist out there who manufactures Sarin
8 gas -- I take it it's pretty easy to manufacture -- and
9 sends it through the ducts of a house and kills
10 everybody in it.

11 Does that have a nexus to national concerns?

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

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

1 malicious way.

2 JUSTICE KAGAN: So -- but this is -- in my
3 hypothetical -- and you didn't run away from it at all;
4 I applaud that. In my hypothetical, it's a completely
5 domestic use -- you know, it's just this chemist didn't
6 like his neighbor and used Sarin gas. And you're saying
7 that the difference is, well, what the treaty makers did
8 was define the category of chemicals more broadly.

9 And I guess what I want to know is you are
10 imagining a world in which judges day to day try to get
11 inside the head of treaty makers to think about -- you
12 know, in this case, we understand that there's a
13 national interest in regulating Sarin gas, but we don't
14 think that there's a sufficient national interest in regulating
15 some other chemical or some other chemical or so on down
16 the line.

17 It seems to me a completely indeterminate
18 test and one that would have judges take the place of
19 treaty makers, in terms of deciding what is in the
20 national and international interest.

21 MR. CLEMENT: Well, Justice Kagan, I would
22 beg to differ. I actually think that our approach to
23 this case avoids judges being put in that difficult
24 position, precisely because we distinguish, unlike the
25 government, between the validity of the convention and

1 the validity of the implementing legislation.

2 And then, as to the implementing
3 legislation, we simply ask the courts to do what they do
4 in every other context, which is to check and see if
5 that implementing legislation is consistent with our
6 basic chartering document.

7 And it's the government's position, which I
8 don't really understand why this would work, but their
9 theory is that, if the non-self-executing treaty is
10 valid, then the implementing legislation is ipso facto
11 somehow valid.

12 JUSTICE ALITO: And do you think it would be
13 difficult --

14 MR. CLEMENT: And think about the convention
15 that was before this Court in the Medellin case, the
16 Vienna Convention on Consular Notification. It puts an
17 obligation on any arresting official to provide
18 notification to the consulate about an arrested foreign
19 national.

20 Now, I suppose it would be a perfectly
21 rational way to implement that convention to have a
22 national police force, and so every arresting officer is
23 a Federal officer who's fully apprised of the Vienna
24 Convention responsibilities. That would be a rational
25 way to implement the treaty, but it wouldn't be remotely

1 consistent with our Constitution.

2 On the other hand, that same valid
3 non-self-executing treaty can be validly implemented by
4 chartering the State Department to work with police
5 officers on a State and local level to understand their
6 obligations.

7 JUSTICE ALITO: Do you think it would be
8 difficult for a judge to ask, is there any possibility
9 that there is any other country in the world that has
10 the slightest interest in how the United States or any
11 of its subdivisions deals with the particular situation
12 that's involved in this case?

13 MR. CLEMENT: Justice Alito, I think that
14 would be one way of approaching the question. I think
15 that would be a --

16 JUSTICE ALITO: Do you think that would be
17 beyond the -- that would be beyond the ability of
18 Federal judges when they -- when a case like this comes
19 before them?

20 MR. CLEMENT: I don't think it would be
21 beyond their ability. I also don't think it would be
22 beyond -- beyond the ability of a Federal judge to say,
23 okay, let's hypothetically ask the question in the
24 absence of a non-self-executing treaty, would Congress
25 have the power to pass this statute?

1 And if the answer to that is no, then I
2 think the burden sort of shifts to figure out why it is
3 that the treaty adds something to the powers of the
4 Federal government.

5 And I think this, just to make clear, I
6 think this is a very different context from what the
7 Court had in *Missouri v. Holland* because, there, the
8 treaty itself prohibited individual action. An
9 individual violated the treaty if they took a migratory
10 bird out of season.

11 And so in that sense, the enforcement
12 statute did nothing more than put a criminal penalty on
13 violating conduct that was already prohibited to the
14 individual. And in that --

15 JUSTICE KENNEDY: Is it -- is it one way to
16 characterize your argument or is it too unfairly
17 confining to your argument to say that what you're
18 suggesting is something like a clear statement rule,
19 that, if the treaty intends nation states to have their
20 own constitutional structure superseded at a minimum, it
21 has to say so, and then we will come to the question of
22 whether or not they can do it?

23 MR. CLEMENT: I think that would be a fair
24 characterization of our argument, but only to add that
25 this would be the anti-clear statement case. Because

1 the one place that this convention talks about imposing
2 obligations on individuals, it's a promise by the nation
3 state to pass penal legislation that is in accordance
4 with their constitutional systems.

5 So it's very bizarre -- that's Article VII,
6 Section 1, it's, I think, 33a. And so it's very bizarre
7 when the only way we're reaching individual conduct
8 here, unlike the treaty in Holland, is a United States
9 promise to pass legislation that comports with our
10 constitutional process, to say that the convention,
11 therefore, allow us to pass legislation that doesn't
12 comport with our constitutional process.

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

16 MR. CLEMENT: Because Sarin gas is, I think,
17 more equivalent to something that the Congress would try
18 to deal with like the way it dealt with marijuana in
19 Raich. I think -- it's just a reflection of the idea
20 that, when you're talking about things where the Federal
21 Government is trying to prohibit it, then there's a
22 greater Federal power to do that.

23 And I think, with Sarin gas, you could
24 imagine -- put aside the commerce power for a second,
25 put aside the treaty power -- it may be that, with Sarin

1 gas, even under the war powers, the Federal Congress can
2 say, look, that's something that's -- you know, it's
3 sort of inherently a chemical weapon, and we're going to
4 prohibit people from having that.

5 That's very different from these situations
6 where, if you think about it, the only thing that makes
7 these chemicals chemical weapons instead of chemicals is
8 their internal, intrastate use in a malicious way. And
9 that's different, I think, from at least a hypothetical
10 statute that says, look, here are -- I mean, there's
11 three schedules in the statute, 43 different chemicals
12 that are particularly problematic.

13 If the Federal government wants to regulate
14 those and prohibit the unauthorized possession of those,
15 I don't see why they couldn't do that with or without
16 the treaty. But when -- what is so anomalous here is
17 the idea that these chemicals, everything, rat poison,
18 vinegar, whatever it is, these things are perfectly
19 lawful, we don't think of them as chemical weapons,
20 unless and until they're used in a malicious way, and
21 then all of a sudden, they become classified as chemical
22 weapons.

23 That's a very odd statute. But it does, I
24 think, operate in a way that is just inconsistent with
25 the bedrock principle that the Federal Congress just

1 doesn't have this kind of police power.

2 JUSTICE BREYER: Is the chemical used here
3 one of the chemicals that's listed in the annex to the
4 treaty?

5 MR. CLEMENT: I don't believe so. It's
6 certainly not one that is listed on the three schedules.
7 There are 43 chemicals. Neither of these are on there.
8 And I do think there is an important difference
9 because -- this is perhaps an odd way to think about it,
10 but -- you know, this is a statute that's really trying
11 to regulate nouns, chemical weapons. And with respect
12 to something like weaponized chemicals or Sarin gas, it
13 makes sense to say those are chemical weapons.

14 But with respect to otherwise harmless
15 chemicals, the only thing that under the government's
16 theory turns them from chemical weapons -- I'm sorry --
17 from chemicals into chemical weapons isn't a noun, it's
18 a verb. It's their malicious use. And that puts you in
19 a very odd sort of situation.

20 And I think that -- you know, if Congress
21 had come in and said, look, there are certain chemicals
22 that, by their very nature, are almost inherently
23 weaponized, I think Congress would have a lot more
24 authority to proceed in that kind of situation.

25 JUSTICE SOTOMAYOR: Counsel -- counsel, we

1 permit that in all sorts of definitional sections of the
2 criminal code. We call a dangerous weapon anything that
3 you use to inflict serious injury on someone. I don't
4 think of a car as, necessarily, a dangerous weapon. It
5 is something I use to transport myself.

6 It's only when I'm using it for a prohibited
7 purpose that it turns itself into a dangerous weapon.

8 MR. CLEMENT: Well --

9 JUSTICE SOTOMAYOR: So I'm -- I'm having a
10 problem with this noun-verb distinction. Why isn't the
11 intentional burning, killing of another human being
12 using chemicals the essence of what this treaty is
13 trying to stop? I thought that's what it was trying to
14 do.

15 MR. CLEMENT: A couple points --

16 JUSTICE SOTOMAYOR: You want to add on the
17 war-like purposes, but the -- the treaty permits
18 exceptions for any peaceful purpose.

19 MR. CLEMENT: Justice Sotomayor, a couple of
20 points. First of all, generally, you might be right
21 that -- that the criminal law takes objects that are
22 otherwise innocent and say -- say they can be used in a
23 malicious way and criminalizes it.

24 But most of that work is done by State and
25 local criminal law, and at the Federal level, you need

1 something else. You need a jurisdictional element,
2 something that has a distinct Federal concern.

3 Second, as to the concerns about this
4 convention --

5 JUSTICE SOTOMAYOR: The treaty power.

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

8 JUSTICE SOTOMAYOR: That's what was said in
9 the --

10 MR. CLEMENT: -- especially when there's
11 this much of a disconnect between what the treaty power
12 does and what the statute does, which is the treaty,
13 again, does not directly regulate at all individual
14 conduct. It is regulated at nation state conduct.

15 Now, with all due respect, I don't think
16 that nation states poison romantic rivals, attempt to
17 commit suicide, or try to get rodents out of their
18 houses. And so, when individuals do those things, I
19 think it's -- it's hard to draw an analogy between
20 what's forbidden to a nation state and the individual
21 action.

22 But any work that is done in the statute by
23 drawing that analogy is done by the statute and not by
24 the convention. So I don't --

25 JUSTICE SOTOMAYOR: So if a terrorist took

1 these chemicals and put it on every doorknob in Boston,
2 that wouldn't be regulated by this or -- the very exact
3 same chemicals.

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

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

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

9 JUSTICE SOTOMAYOR: All right. Now, we
10 have -- we have --

11 MR. CLEMENT: We would also point out for
12 the record that that same conduct would obviously be
13 covered directly by Federal statutes that target
14 terrorism directly. So no matter how you decide that
15 case, whether you accept our narrowing -- if you accept
16 our narrowing construction, that conduct will be covered
17 by two Federal statutes. If you don't accept our
18 narrowing construction, but hold this statute
19 unconstitutional, then that conduct is still going to be
20 covered.

21 And I just think, when you are trying again
22 to think about what the convention is after, it is not
23 really after Ms. Bond's conduct. I don't think any one
24 of our treaty partners said, oh, my goodness, there's
25 been a deployment of chemical weapons in Norristown,

1 Pennsylvania; I sure hope the United States steps up to
2 its treaty obligations and prosecutes this horrible
3 deployment of chemical weapons.

4 Nobody would say that because nobody
5 speaking normal English would identify this as a
6 deployment of chemical weapons at all.

7 JUSTICE KAGAN: Well, but, Mr. Clement, it's
8 absolutely clear that the treaty was after enforcement
9 as to individuals with respect to all the prohibitions,
10 that the treaty said, go enforce this as to individuals
11 and do it consistent with your constitutional processes.

12 And then Congress passes a law that is
13 consistent with its constitutional processes, and it
14 completely mirrors the treaty.

15 MR. CLEMENT: Two things, Justice Kagan,
16 neither of which will surprise you, I suppose. One is I
17 don't think this is consistent with our constitutional
18 processes --

19 JUSTICE KAGAN: I guess I'm still trying to
20 figure out why. I mean, Holmes dealt with this in
21 Missouri v. Holland. He says there's a treaty power,
22 it's an enumerated power, there's a Necessary and Proper
23 Clause that functions to -- to allow Congress to give
24 effect to that treaty power. It's -- you know, this is
25 a -- a situation where there's a prohibition on the

1 States in terms of entering into treaties or in terms of
2 sharing that power in any way.

3 And he says -- you know, it's just these
4 invisible radiations that you think come from the
5 structure of the Constitution. And he specifically
6 rejected this argument, the same argument that you're
7 making, the penumbras and emanations of the
8 Constitution.

9 MR. CLEMENT: Justice Kagan, I think you
10 have to read Missouri v. Holland both in the context of
11 the treaty that the Court had before it and the argument
12 that it had before it. Missouri made a very strange
13 argument in Missouri v. Holland, one that no modern
14 litigant would make. They made an argument that -- they
15 went out of their way to identify a conflict between the
16 Federal treaty and State law and said, therefore, we win
17 under the Supremacy Clause.

18 And Holmes scratched his head and said no.
19 The treaty under -- under Article 6 is supreme to both
20 State law and not the other way around. But he also
21 said this one sentence that sort of bedeviled the lower
22 courts here, which says, well, and if the treaty's
23 valid, of course, the legislation is valid.

24 That made sense in the context of the treaty
25 he had before him because he had a treaty that directly

1 prohibited individual conduct and a statute that
2 enforced that individualized prohibition with criminal
3 penalties.

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

7 If I could reserve my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 General Verrilli.

10 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.,
11 ON BEHALF OF THE RESPONDENT

12 GENERAL VERRILLI: Mr. Chief Justice, and
13 may it please the Court:

14 The framers gave the Federal Government
15 exclusive control over the treaty function to ensure
16 that it could knit the nation together as one and allow
17 it to be fully sovereign in the conduct of foreign
18 affairs.

19 Petitioner's ad hoc "too local" limit on the
20 treaty power can't be squared with a judgment the
21 framers made, this Court's precedent, or consistent
22 historical practice since the time of the founding, and
23 it would compromise foreign affairs and national
24 security interests of the first order.

25 CHIEF JUSTICE ROBERTS: General, let's

1 suppose there's a multilateral treaty, the -- the
2 international convention to ensure that national
3 legislatures have full authority to carry out their
4 obligations, i.e., that the national legislature has the
5 police power.

6 And Congress passes a statute saying we have
7 the authority to prosecute purely local crimes pursuant
8 to this international convention that the President has
9 signed. Any problem with that?

10 GENERAL VERRILLI: There may well be. Let
11 me walk through the analysis that I think you'd have to
12 go through. First, I would make the point,
13 Mr. Chief Justice, that it seems unimaginable that a
14 convention of that kind would be ratified by two-thirds
15 of the Senate, which it would have to be --

16 CHIEF JUSTICE ROBERTS: Why?

17 JUSTICE KENNEDY: It also seems
18 unimaginable that you would bring this prosecution. But
19 let's leave that.

20 (Laughter.)

21 GENERAL VERRILLI: And that does go to the
22 point --

23 CHIEF JUSTICE ROBERTS: And just to press it
24 further, the -- the point is that it's a transfer of
25 authority from the States to the national legislature.
26 I don't know why you'd look to the national legislature

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

2 GENERAL VERRILLI: Well, the framers thought
3 that the two-thirds guarantee -- the two-thirds
4 ratification requirement, was an important structural
5 guarantee to protect the interests of the States.

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

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

11 But beyond that, this Court has said that --
12 that there is an inquiry. It said in dictum. It has
13 never held that a ratified treaty exceeds -- exceeds the
14 Federal government's constitutional authority. It's
15 never held that a provision implementing a ratified
16 treaty exceeds the Federal government's constitutional
17 authority.

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

20 GENERAL VERRILLI: No.

21 JUSTICE SCALIA: All right.

22 GENERAL VERRILLI: My answer is this: That
23 the Court has said that there is an inquiry into whether
24 the -- it is a proper subject of a treaty and that that
25 inquiry could take into account whether it is imposing a

1 fundamental change in the character of the government.

2 But that's not a question the Court needs to
3 answer here because this treaty, the -- the Petitioner
4 concedes, is a valid exercise of the treaty power, and
5 the legislation implementing this treaty is coextensive
6 with the obligations of the treaty. There is no --

7 CHIEF JUSTICE ROBERTS: Well, I don't know
8 why it would not be a valid exercise of the treaty
9 power. A case like Medellin caused serious conflict
10 with our international obligations because we held,
11 look, the Federal government does not have the authority
12 to tell the sheriff in Texas what to do. That caused a
13 great deal of strain in -- in our international
14 relations.

15 And I think the United Nations could well
16 say, look, we don't want treaty parties to have to deal
17 with whether it's somebody in this State or somebody in
18 that province who has the authority, so every signatory
19 must have the authority. It doesn't strike me as not
20 reasonably related to international obligations.

21 GENERAL VERRILLI: All right. But -- but
22 here, Mr. Chief Justice, this is a valid exercise of the
23 treaty power, and there is no daylight between the
24 implementing legislation and the obligations that the
25 Petitioner concedes are valid.

1 CHIEF JUSTICE ROBERTS: No, no. I know
2 your -- I know the case --

3 GENERAL VERRILLI: And therefore -- and
4 therefore, that may be a question that the Court would
5 have to answer in a different case. But this case
6 doesn't present the opportunity to answer that question.

7 CHIEF JUSTICE ROBERTS: So the -- the
8 purpose of my hypothetical was try to find out if
9 there's any situation in which you believe an erosion or
10 intrusion by the Federal government on the police power
11 could be a constraint against an international treaty.

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

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

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

25 The treaty is concededly valid. The

1 legislation is concededly valid on its face.

2 JUSTICE SCALIA: I'd like to -- I'd like to
3 explore that, your proposition that there's no daylight
4 between the treaty itself and the implementing
5 legislation.

6 It seems to me there -- there's a lot of
7 daylight between the two. Let's take -- and I pick this
8 example, not because it's controversial, but because it
9 relates to an area where the Federal government has
10 never been thought to have authority, namely family law.

11 There are no -- you know, Federal marriage,
12 Federal divorce, Federal adoption. It's all been State
13 law. Let's assume that an international treaty is
14 approved by two-thirds of the Senate and the president
15 which requires States to -- to approve same-sex
16 marriage. All right?

17 Now, if -- if that were a self-executing
18 treaty, same-sex marriage would have to be approved by
19 every State. If it is not self-executing, however, it
20 will be up to Congress to produce that result, and
21 Congress would do it or could do it at least by having a
22 Federal marriage law. And then you would have to have a
23 Federal divorce law and, I suppose, a Federal adoption
24 law.

25 I think there is a big difference between

1 just doing it through a self-executing treaty and
2 dragging the Congress into -- into areas where it has
3 never been before.

4 I think there is daylight between the treaty
5 and requiring the treaty to be implemented in the
6 fashion that -- that you assert is necessary here.

7 GENERAL VERRILLI: Your Honor, I'd like to
8 make a structural point and then a specific point about
9 this case. The structural point, Justice Scalia, is
10 this: If it is the case, as -- as Your Honor's
11 hypothetical seems to concede and as I believe
12 Petitioner concedes, that a self-executing treaty that
13 requires the President to negotiate and two-thirds of
14 the Senate to ratify it, can impose an obligation of
15 that kind, then it has to be the case that a
16 non-self-executing treaty that is -- that has the same
17 approval of the President, the same two-thirds
18 ratification, and the additional structural protection
19 of passage of legislation by the Senate and the House
20 and being signed into law by the President, can do what
21 the self-executing treaty can do. It has to be the
22 case.

23 The power, if the --

24 JUSTICE SCALIA: I don't think it has to be
25 the case. I think there -- there's a great difference

1 between requiring the states, by a self-executing
2 treaty, to permit same-sex marriage and dragging the
3 Federal government or allowing the Federal government to
4 enter into this whole field of marriage, divorce,
5 adoption, family law, where the Federal government has
6 never been.

7 GENERAL VERRILLI: Well, with respect --
8 now, the point, with respect to this treaty, I don't
9 think that, with all due respect, there is any daylight
10 here with respect to this treaty.

11 Section 229(a) does precisely what the
12 treaty obligates the United States government to do, and
13 I think the notion that the treaty obligation can be
14 satisfied by relying on the States to enforce their
15 assault laws, which I think is the core of my friend's
16 argument here, is directly contrary to the history of
17 the framing --

18 JUSTICE BREYER: It is? It is? It is?
19 That's the part that I can't yet get my mind to these
20 dramatic questions of whether, here, the local police
21 power or, in some other case, some other inherently
22 State power make a treaty beyond the power of the
23 Federal government to enter into. It's a very big
24 question.

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

1 not there is because there's some words in this treaty
2 called "other peaceful purpose," and we have to
3 interpret those words, and the same words are in the
4 statute.

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

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

15 He talks about a case involving somebody
16 else trying to light a match, which is a chemical, and
17 setting fire to a haystack.

18 We can all think, sadly, of athletes, Lance
19 Armstrong, at least accused of unlawfully taking drugs.
20 I mean, why do we think matters of List A fall within
21 those words, outside the words "other peaceful purpose,"
22 even though they're unlawful?

23 And by the way, did anyone say to the
24 drafters of the convention -- I found nothing in this
25 brief on the point -- or did anyone tell Congress that

1 poison potatoes, drug-enhancing -- performance-enhancing
2 drugs, the example that Justice Alito used last time,
3 you give vinegar to a goldfish -- I mean, these are all
4 chemicals not in the annex, but they are chemicals.

5 And they are absolutely nothing to do with
6 chemical weapons. And why do we think that we have to
7 get beyond that fact?

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

13 What the Petitioner is asking as a rule of
14 either constitutional law or statutory construction is
15 that courts, on a case-by-case basis, after the fact
16 make ad hoc judgments about whether they --

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

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

22 JUSTICE BREYER: Okay. Now, we're outside
23 the annex. And I guess once we get outside the annex,
24 we either have to draw lines or we have to say, well,
25 this encompasses the poison potato, the poisoned

1 goldfish, the small boy with the candle, the -- for
2 performance-enhancing drugs.

3 I would say judges are here to draw lines,
4 and between throwing all those things into it or drawing
5 lines, it's better to draw a few lines.

6 GENERAL VERRILLI: We can -- we can talk
7 about hypotheticals, but the key point about them is
8 that they're hypothetical.

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

11 GENERAL VERRILLI: The vinegar and the
12 goldfish is not a real case, and I would submit that de
13 minimis non curat lex --

14 JUSTICE ALITO: They're not real -- they're
15 not real cases because you haven't prosecuted them yet.
16 If you told --

17 (Laughter.)

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

23 JUSTICE SOTOMAYOR: If her child had died --
24 excuse me.

25 JUSTICE ALITO: This statute has an

1 enormous -- an enormous breadth, anything that can cause
2 death or injury to a person or an animal.

3 Would it shock you if I told you that a few
4 days ago, my wife and I distributed toxic chemicals to a
5 great number of children?

6 (Laughter.)

7 GENERAL VERRILLI: Your Honor, I understand
8 the point.

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

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

15 JUSTICE BREYER: There's chocolate all over
16 the place.

17 (Laughter.)

18 JUSTICE SCALIA: Do horses eat potatoes? I
19 didn't know horses ate potatoes.

20 GENERAL VERRILLI: With all due respect --
21 this is serious business. With all due respect, the
22 line that the Petitioner is asking --

23 JUSTICE BREYER: No, I'm not -- I want your
24 answer to the line -- my question was a question to get
25 your answer. And the answer that I wanted you to

1 address yourself to is the problem of, once you depart
2 from the annexes in defining the chemicals, you throw
3 into it a list a thousand miles long.

4 And we can tell joke after joke, but it's
5 not a joke that it's so easy to make up examples that
6 seem to have nothing to do with the problem of chemical
7 weapons, like the Syrian problem, nothing to do with
8 that.

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

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

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

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

1 now under the Nuclear Nonproliferation Treaty, trying to
2 draw exactly the same line.

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

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

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

16 JUSTICE KAGAN: Well, General, could I ask
17 why that is? I mean, because this -- this Convention
18 and the implementing legislation is very broad, and it's
19 broad because it applies to a very large category of
20 weapons and it applies to a very large category of
21 uses -- of conduct.

22 So what were they thinking about, about why
23 they wanted these very broad categories, why it's not
24 more limited with respect either to the chemicals or to
25 the conduct?

1 GENERAL VERRILLI: Well, with respect to the
2 chemicals, I think they made the judgment because you
3 can't predict in advance how chemicals are going to be
4 used and how toxic they will be in particular
5 combinations and how dangerous they will be in
6 particular combinations, and therefore, you need a
7 comprehensive definition.

8 JUSTICE BREYER: Well, look, also, if you're
9 telling me -- I am attempting to draw the line, that's
10 just what I was going to do.

11 And if you're saying it's against the
12 national security interest, which is the first time I've
13 heard that, that it is the national interests -- against
14 the national interests of the United States for me to
15 attempt to draw such a line, then I guess the State
16 Department better file a brief explaining why or you
17 ought -- or why you -- why you want to push this case
18 or -- I mean, I'm -- is that what you're telling me,
19 that if I write the opinion that I think the law
20 requires me to write, that I somehow am hurting the
21 national security interests of the United States.

22 GENERAL VERRILLI: Well, I think there is
23 a -- I think there is a real risk in courts getting
24 involved in defining the line between warlike and
25 peaceful purposes --

1 JUSTICE BREYER: You're the one --

2 GENERAL VERRILLI: -- and the meaning of the
3 convention when the -- when the convention is purposely
4 drafted broadly.

5 And there -- there are additional risks in
6 terms of this -- the very act of bringing this process
7 of line-drawing to bear; case-by-case, ad hoc judgments
8 about what constitutes a violation and what doesn't is
9 going to undermine the ability of our negotiators
10 into -- to make treaties in the future because they
11 are --

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

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

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

1 because, if you go back to the framers, it is clear from
2 the era of the framing that the framers intended to give
3 the national government the power using --

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

7 GENERAL VERRILLI: This Court has said that
8 the -- this Court has said that, in dictum, repeatedly,
9 but it has said that the -- the treaty -- there's a
10 question in a treaty power case of whether the subject
11 matter of the treaty is a proper subject for a treaty.

12 That's a question the Court can ask. And --
13 and although I'm not prepared to draw a specific line
14 here today, there -- there may well be a line to be
15 drawn. But here, the Petitioner has conceded, and I
16 think all of us would agree, this is the proper subject
17 of the treaty.

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

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

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

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Okay.

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

1 implements the treaty -- word-for-word implementation of
2 the obligations that --

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

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

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

25 GENERAL VERRILLI: So there is a structure

1 of limitations -- you know, as I said earlier. The
2 two-thirds ratification requirement is real with respect
3 to this. One of the treaties Your Honor just referred
4 to, the U.N. Convention on Civil and Political Rights,
5 of course, when the Senate ratified it, it did use its
6 power to make reservations to preserve our Federal
7 system.

8 So that operated in exactly the manner that
9 the framers intended there to protect, to safeguard the
10 interests of federalism. And there are -- you know,
11 there are about 1,000 ratified treaties on the books
12 right now, and we don't have the Congress using the
13 treaty power to -- to usurp the role of the States --

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

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

22 Is -- is there any concern that's been
23 expressed in any concrete way by them about whether
24 Mrs. Bond is prosecuted?

25 GENERAL VERRILLI: I doubt that, Your Honor,

1 because --

2 CHIEF JUSTICE ROBERTS: No, no. Yes. So
3 nothing in --

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

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

15 JUSTICE BREYER: That is the question --

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

22 GENERAL VERRILLI: That's right. And
23 that -- and that's true, it's -- and that's certainly
24 true.

25 CHIEF JUSTICE ROBERTS: I'm sure that the

1 people who've worked in the national branch of
2 government, particularly for the State Department, would
3 like to have as much authority as they can get to
4 negotiate treaties. We're concerned about limitations
5 on other.

6 Do we have any briefs from State
7 legislatures, State authorities, concerning intrusion on
8 their prerogatives?

9 GENERAL VERRILLI: Your Honor, this
10 convention is a convention that all, but four nations on
11 Earth, have signed. The legislation that we have
12 enacted is a model legislation that over 120 other
13 nations have enacted as well.

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

21 GENERAL VERRILLI: I don't think there's a
22 yes-or-no answer to that. I think that -- because I
23 don't think it would be -- the question would be: What
24 does the treaty power encompass? It wouldn't be a
25 circumvention if this is something that could be

1 constitutionally done under the treaty power, but --

2 JUSTICE ALITO: Could you -- all right.

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

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

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

6 entering into a treaty that authorizes such legislation?

7 GENERAL VERRILLI: I think the question in

8 that case would be whether the treaty is a valid

9 exercise of the treaty power.

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

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

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

13 problem that I think I see.

14 And the problem underlying it, if you get

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

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

17 self-executing treaties, in principle, your position

18 constitutionally would allow the President and the

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

20 that is not specifically within the prohibitions of the

21 rights protections of the Constitution.

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

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

24 the President and the Senate to do anything.

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

1 answer to that question is yes or no. We still have a
2 democracy, in other words, of which the House is part.
3 Now, if you carry it to an extreme, that's what you
4 are -- that's where you are, and I am worried about
5 that, and I think others are, too.

6 So I had asked you, isn't there an easier
7 way to deal with this case? And you tell me, no, no,
8 because it will interfere with some problem of foreign
9 affairs that was never mentioned in any brief -- or at
10 least hit me for the first time when you said it.

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

14 GENERAL VERRILLI: I understand the point,
15 Justice Breyer, I do. I understand that there is
16 something that seemed attractive in trying think about
17 this as a question of statutory construction. What I'm
18 trying to point out is that it's not as easy as it
19 seems, that there are real risks to trying to draw a
20 line of that kind. And, yes, that does -- I understand
21 that.

22 That -- that does raise the stakes some, I
23 understand that. But I think that risk is real, and I
24 think it -- that risk is real, the risk that the State
25 Department legal advisor's brief pointed out is real of

1 undermining our ability --

2 JUSTICE GINSBURG: General Verrilli, before
3 your time is out, you haven't answered directly why the
4 Bill of Rights does constrain the treaty power, the
5 implementation of it, Reid v. Colbert?

6 Why is the Bill of Rights different from the
7 federalism concern that the Court has expressed in many
8 cases, when you say, yes, there is a check, the Bill of
9 Rights is a check, but not the Tenth Amendment.

10 GENERAL VERRILLI: There is a historical
11 answer to that question, Justice Ginsburg, which is that
12 that's how the framers understood it. I think that's
13 clear from what Hamilton said in the -- in the quotes
14 that we have in our brief, and others of the Framers
15 understood that that's where the line would be.

16 And I think the reason for that is that the
17 treaty power is, itself, a great and substantial
18 independent power of the national government. And it is
19 not constrained by a "too local" limitation. That is
20 the lesson of the era of the framing, that there is a
21 not a "too local" limitation on the exercise of the
22 treaty power.

23 And, therefore, while --

24 JUSTICE SCALIA: Well, all of those quotes
25 pertain to self-executing treaties. Yes, there is no

1 limitation on what -- what the President and the Senate
2 can impose as a self-executing requirement, namely, that
3 the States must give back to British citizens property
4 that they confiscated or whatever else.

5 But it's a different question whether a
6 treaty can expand the power of the Federal Congress into
7 areas that it has never been before. That's a separate
8 question. And neither Hamilton, nor any of the other
9 quotes that you refer to, address that question.

10 GENERAL VERRILLI: Your Honor, so long as
11 the treaty -- it's a valid exercise of the treaty power,
12 I think a fortiori, if all you do is implement the
13 treaty in haec verba, it's a valid exercise of Congress'
14 power.

15 And I will say, I said, earlier, that this
16 is serious business. I understand that principles of
17 federalism are serious business also, but federalism is
18 a two-way street. And with respect to the exercise of
19 the treaty power, the framers made a judgment that --
20 that this power was going to be exclusively in the hands
21 of the national government.

22 And it needed to be exclusively in the hands
23 of the national government, in order to ensure that the
24 United States could be a full sovereign on the world
25 stage.

1 Now, it is true that the subject matter of
2 treaties is different now than it was at the time of the
3 founding, but the -- but the framers understood that.
4 They were careful not to impose subject matter
5 limitations on the treaty power because they were wise
6 enough to know they could not foresee what might be
7 important for the United States to be able to negotiate
8 about on a world stage in order to participate fully as
9 a sovereign.

10 That -- and the Chemical Weapons Convention
11 is a deeply apt illustration of exactly why the framers
12 were wise in ensuring that there were not subject matter
13 limitations on the exercise of the treaty power.

14 The Chemical Weapons Convention -- the
15 United States' leadership in the Chemical Weapons
16 Convention has made a big difference in ensuring that
17 this norm, which is in our national interests, our
18 foreign relations interests, and our national security
19 interest, is a norm that the -- that the nations of the
20 world have agreed to and that we are then in a position
21 to have leverage to insist that the nations of the world
22 abide by it.

23 It is leverage we are trying to exercise
24 right now. It is critically important, and I
25 respectfully submit that the line that the Petitioner is

1 asking this Court to draw is not consistent with the
2 intent of the framers, with this Court's precedent or
3 with the national interests that I have described.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, General.

6 Mr. Clement, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Thank you, Mr. Chief Justice.
10 Just a few points in rebuttal.

11 First of all, the Senate's role in the
12 ratification of treaties cannot be a sufficient
13 political check, and one reason is that, sometimes, the
14 precise role they play as a check is to make a treaty
15 non-self-executing.

16 And so, to take Justice Scalia's
17 hypothetical example of an international treaty that
18 purported to regulate marriage rights, one thing that
19 the Senate very well might do in that case is to say,
20 well, we will ratify it, but we're going to make sure
21 it's non-self-executing, and maybe we will use our
22 spending power or something to get the States on board,
23 but we are not just going to impose a national solution.

24 So it doesn't make any sense to say that a
25 non-self-executing treaty necessarily, even if it's

1 valid, guarantees the validity of the enacting
2 legislation, because some of the reason that you make a
3 treaty non-self-executing is to preserve federalism.

4 A second point is to respond to the
5 argument, which I think I've already explained why it's
6 not correct, but it is the suggestion that there is no
7 daylight between the convention and the statute. There
8 is huge daylight, and the daylight is precisely whether
9 it affects individual conduct and how it affects
10 individual conduct.

11 With all respect, everything on
12 Justice Breyer's List A is not stuff that I think
13 implicates the convention at all. But, yet, under the
14 government's unwavering theory that you can't make any
15 limitations on the statute, that's all covered by the
16 statute. There's your daylight.

17 Now, I would respectfully suggest that our
18 statutory construction argument is one way out of this.
19 I think that you have to understand the way that
20 "peaceful" is used in the statute is, essentially, a
21 term of art. I would analogize it to a situation where
22 two scientists in Antarctica get in a fistfight.

23 Okay. That's not conduct we would condone,
24 but I don't think we've violated our pledge to reserve
25 Antarctica for only peaceful purposes. And that's the

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

2 Now, the government says you can't do that
3 because that's going to mess up what's going on in
4 Syria. With all due respect, I assume that the issue in
5 Syria is whether or not the nation state of Syria is
6 doing something that would violate the convention if,
7 contrary to fact, they were signatory to this
8 convention.

9 So if you want to make clear that you're
10 only talking about individual conduct, I think you can
11 solve that whole problem right there. But if I'm wrong
12 and the only way, as the government assures you that you
13 can make this legislation work is to have it be an
14 exercise of the police power, well, then the answer is
15 that the legislation is simply unconstitutional.

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

20 Suppose that Ms. Bond used Sarin gas and
21 sent it through the ducts of Haynes' house; would you
22 say that that's a peaceful purpose?

23 MR. CLEMENT: I would say it's not, but I
24 think it has to do more with the particular qualities of
25 Sarin gas, the fact that it's on Schedule A, the fact

1 that nobody can possess that for any lawful use.

2 And what makes something like vinegar or
3 even potassium dichromate different is what puts it over
4 the ledge from being an ordinary chemical to a chemical
5 weapon is precisely its use and its use alone.

6 Now, Justice Kagan, you asked a great
7 question. What was Congress thinking when they did
8 this? I think, with respect, the Congress wasn't
9 focused on this issue at all.

10 If you look at the legislation they passed
11 to implement this, the chemical industry and others put
12 in front of them the possibility that there was a Fourth
13 Amendment problem with the inspections of chemical
14 production facilities that were authorized under the
15 convention. When Congress had the constitutional
16 problem in front of it, they had all sorts of provisions
17 to deal with that constitutional concern.

18 Now, the future Ms. Bonds of the world
19 didn't have quite the same lobbying resources as the
20 chemist -- the chemical industry, so they didn't avert
21 to this problem. And that's precisely why some kind of
22 clear statement rule or the like would make perfect
23 sense in this, to make sure Congress doesn't exercise
24 the police power, when all it thinks it's doing is
25 implementing a treaty.

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

3 JUSTICE SOTOMAYOR: A clear statement
4 about -- about the treaty or -- I'm sorry.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 General.

7 The case is submitted.

8 (Whereupon, at 11:05 a.m., the case in the
9 above-entitled matter was submitted.)

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<p>A</p> <p>abduction 43:22</p> <p>abide 53:22</p> <p>ability 17:17,21,22 42:9 47:20 51:1</p> <p>able 10:20 53:7</p> <p>aboveentitled 1:11 58:9</p> <p>absence 17:24</p> <p>absolutely 10:11,20 25:8 36:5</p> <p>accept 9:25 13:22 24:15,15,17</p> <p>accepted 47:19</p> <p>account 29:25</p> <p>accused 35:19</p> <p>act 42:6</p> <p>action 11:9 18:8 23:21</p> <p>ad 27:19 36:16 42:7</p> <p>add 18:24 22:16</p> <p>adding 4:2</p> <p>additional 33:18 42:5</p> <p>address 39:1 52:9</p> <p>addresses 44:19</p> <p>adds 4:4 18:3</p> <p>adopted 9:22</p> <p>adoption 32:12,23 34:5</p> <p>advance 41:3 47:11</p> <p>advised 10:9</p> <p>advisors 50:25 58:2</p> <p>advocating 42:23</p> <p>affairs 27:18,23 50:9</p> <p>affect 9:6</p> <p>ago 38:4</p> <p>agree 43:16 48:20</p> <p>agreed 53:20</p> <p>agrees 5:1</p> <p>alit 35:11</p> <p>alito 9:2,24 16:12 17:7,13,16 36:2 37:14,18,25 38:9 43:19 48:14 49:2</p>	<p>allow 19:11 25:23 27:16 45:11 49:18 49:23</p> <p>allowing 34:3</p> <p>amendment 8:24 51:9 57:13</p> <p>amicus 47:17</p> <p>analogize 55:21</p> <p>analogy 23:19,23</p> <p>analysis 28:11</p> <p>animal 38:2</p> <p>anne 1:3</p> <p>annex 21:3 36:4,19 36:23,23</p> <p>annexes 39:2</p> <p>announce 40:4</p> <p>anomalous 20:16</p> <p>answer 7:20 18:1 29:18,22 30:3 31:5,6 38:24,25 38:25 39:11,14 44:7,13 48:22 50:1 51:11 56:14</p> <p>answered 51:3</p> <p>answering 9:24</p> <p>antarctica 55:22,25</p> <p>anticlear 18:25</p> <p>anybody 47:5</p> <p>appearances 1:14</p> <p>appendix 4:25</p> <p>applaud 15:4</p> <p>applicable 6:23</p> <p>application 14:21</p> <p>applications 13:11 47:10</p> <p>applied 12:13,15</p> <p>applies 10:18 14:15 40:19,20</p> <p>apprised 16:23</p> <p>approach 15:22</p> <p>approaching 17:14</p> <p>appropriate 44:4</p> <p>approval 33:17</p> <p>approve 32:15</p> <p>approved 32:14,18</p> <p>apt 53:11</p>	<p>arbitrary 44:3</p> <p>area 32:9 49:15</p> <p>areas 33:2 52:7</p> <p>argue 31:15</p> <p>arguing 11:5</p> <p>argument 1:12 2:2 2:5,8 3:4,7 7:7,10 7:10,11 18:16,17 18:24 26:6,6,11 26:13,14 27:10 34:16 45:11 47:19 54:7 55:5,18</p> <p>armstrong 35:19</p> <p>arrested 16:18</p> <p>arresting 16:17,22</p> <p>art 55:21</p> <p>article 4:24 19:5 26:19</p> <p>articles 48:18</p> <p>articulated 12:18</p> <p>asapplied 13:3,7,9 42:24</p> <p>aside 5:22 19:24,25 42:16</p> <p>asked 50:6 57:6</p> <p>asking 36:13 38:22 39:15 40:5 44:4 54:1</p> <p>assault 10:22 34:15</p> <p>assaults 10:18</p> <p>assert 7:2 33:6</p> <p>asserted 44:9</p> <p>asserts 7:3</p> <p>assume 32:13 56:4</p> <p>assures 56:12</p> <p>ate 38:19</p> <p>athletes 35:18</p> <p>attempt 23:16 41:15</p> <p>attempted 35:9</p> <p>attempting 41:9</p> <p>attractive 50:16</p> <p>authorities 48:7</p> <p>authority 21:24 28:3,7,25 29:14 29:17 30:11,18,19</p>	<p>32:10 44:9 45:24 47:8 48:3</p> <p>authorized 57:14</p> <p>authorizes 49:6</p> <p>avert 57:20</p> <p>avoids 15:23</p> <p>B</p> <p>b 1:17 2:6 27:10</p> <p>back 7:14 8:5 9:4 43:1 49:3 52:3</p> <p>ban 40:14 47:9,11 47:14</p> <p>barn 35:11</p> <p>barrel 35:10</p> <p>bars 38:10</p> <p>basic 7:11,25 16:6</p> <p>basically 6:12</p> <p>basis 36:15</p> <p>bear 42:7</p> <p>bearing 40:7</p> <p>bedeviled 26:21</p> <p>bedrock 3:15,22 20:25</p> <p>beg 15:22</p> <p>begging 46:17</p> <p>beginning 9:4</p> <p>behalf 1:15,18 2:4 2:7,10 3:8 27:11 54:8</p> <p>believe 21:5 31:9 33:11</p> <p>better 37:5 41:16</p> <p>beyond 17:17,17,21 17:22,22 29:11 34:22 36:7 44:18</p> <p>big 32:25 34:23 53:16</p> <p>bilateral 46:20</p> <p>bill 51:4,6,8</p> <p>bird 18:10</p> <p>bizarre 19:5,6</p> <p>blue 4:24</p> <p>board 54:22</p> <p>boerne 48:17</p> <p>bond 1:3 3:5 37:19</p>	<p>46:24 47:6 56:20</p> <p>bonds 24:23 57:18</p> <p>books 46:11</p> <p>borders 9:14</p> <p>boston 24:1</p> <p>bound 31:13,17</p> <p>boy 35:10 37:1</p> <p>branch 48:1</p> <p>breadth 38:1</p> <p>breyer 21:2 34:18 36:17,22 37:9 38:15,23 39:11 40:8 41:8 42:1 46:14 47:15 49:10 50:15</p> <p>breyers 55:12</p> <p>brief 4:24 14:1 35:25 41:16 47:17 50:9,25 51:14</p> <p>briefs 12:18 46:20 48:6</p> <p>bring 28:18</p> <p>bringing 42:6</p> <p>british 9:11 52:3</p> <p>broad 40:18,19,23</p> <p>broadly 15:8 42:4</p> <p>burden 18:2</p> <p>burn 35:11</p> <p>burning 22:11</p> <p>business 38:21 52:16,17</p> <p>C</p> <p>c 1:8,15,18 2:1 3:1</p> <p>call 8:24,25 22:2</p> <p>called 35:2</p> <p>candle 35:11 37:1</p> <p>cant 9:20 12:15 27:20 31:14 34:19 40:14,15 41:3 55:14 56:2</p> <p>car 22:4</p> <p>care 38:13</p> <p>careful 13:2 53:4</p> <p>carol 1:3</p> <p>carry 28:3 50:3</p>
--	--	--	---	---

case 3:4 4:11 6:17 7:1,3 11:7 12:21 13:21,21,23 15:12 15:23 16:15 17:12 17:18 18:25 24:15 27:4,6 30:9 31:2,5 31:5,13,18 33:9 33:10,15,22,25 34:21 35:9,13,15 36:10 37:12 40:5 41:17 42:22 43:10 44:23 45:9,14,16 46:18,19 49:8 50:7 54:19 58:7,8 casebycase 31:20 36:15 42:7,24 cases 3:15 9:11 37:10,15 48:16 51:8 categories 40:23 category 15:8 40:19,20 cause 38:1 caused 30:9,12 certain 6:12 21:21 certainly 9:3,17 11:19 14:16 21:6 47:23 challenge 13:2,3,7 13:9 change 3:22 30:1 character 12:13 30:1 characterization 18:24 characterize 18:16 chartering 16:6 17:4 check 16:4 51:8,9 54:13,14 chemical 5:15 6:2 14:24 15:15,15 20:3,7,19,21 21:2 21:11,13,16,17 24:25 25:3,6 35:12,16 36:6	37:20 38:11,11 39:6,21,23 53:10 53:14,15 57:4,4 57:11,13,20 chemicals 3:12 6:15 10:18 11:20 12:14,14 15:8 20:7,7,11,17 21:3 21:7,12,15,17,21 22:12 24:1,3,8 36:4,4,18,19 38:4 39:2 40:24 41:2,3 chemist 14:5,7 15:5 57:20 chief 3:3,9 27:8,12 27:25 28:13,16,23 29:6,8 30:7,22 31:1,7,16 42:13 43:18 44:14,15,21 45:3,16 46:16 47:2,25 54:5,9 58:5 child 37:23 children 38:5 43:22 chocolate 38:10,10 38:15 circumvented 48:19 circumvention 48:25 49:3 citizens 52:3 city 48:17 civil 46:4 claim 13:11 classic 6:11 13:7 classified 20:21 clause 7:1,9,10 25:23 26:17 clear 3:15 8:6 18:5 18:18 25:8 43:1 51:13 56:9 57:22 58:3 clearly 3:13 8:3 14:14 clement 1:15 2:3,9 3:6,7,9,24 4:6,22	5:13,14 6:4,8,18 7:5,14,18 8:11,19 9:23 10:11,25 11:10,22 12:3,23 13:5,16 14:12 15:21 16:14 17:13 17:20 18:23 19:13 19:16 21:5 22:8 22:15,19 23:6,10 24:4,7,11 25:7,15 26:9 54:6,7,9 56:17,23 clients 13:6 close 31:13 code 22:2 coextensive 30:5 colbert 51:5 combinations 41:5 41:6 come 8:18,20 12:4 18:21 21:21 26:4 comes 17:18 commandeer 8:22 commentators 48:18 commerce 6:12,13 7:1,9,10 19:24 commit 23:17 comparable 5:8 completely 15:4,17 25:14 comply 5:11 comport 19:12 comports 19:9 comprehensive 40:14 41:7 47:9 47:11,14 compromise 27:23 concede 33:11 44:25 conceded 43:15 45:9 concededly 31:25 32:1 concedes 30:4,25 33:12	concern 3:19 9:18 13:20,25 23:2 46:22 51:7 57:17 concerned 7:9 9:18 45:4 48:4 concerning 48:7 concerns 12:2 14:11 23:3 46:20 conclude 42:22 concrete 46:23 condone 55:23 conduct 3:17 4:14 4:18 5:3,8 7:16 10:15,23,24 11:18 13:18 18:13 19:7 23:14,14 24:12,16 24:19,23 27:1,17 40:21,25 55:9,10 55:23 56:10 confining 18:17 confiscated 52:4 conflict 26:15 30:9 congress 3:14,16 8:13 13:20 14:14 17:24 19:17 20:1 20:25 21:20,23 25:12,23 28:6 32:20,21 33:2 35:25 40:12 44:8 45:23 46:12 47:8 47:13 48:16 49:4 52:6,13 57:7,8,15 57:23 consistent 16:5 17:1 25:11,13,17 27:21 54:1 constitutes 39:16 40:6 42:8 constitution 7:24 8:3,10,12,21 9:9 9:22 17:1 26:5,8 49:21 constitutional 3:22 4:3 5:2 7:7 18:20 19:4,10,12 25:11 25:13,17 29:14,16	36:14 42:25 43:6 57:15,17 constitutionally 12:15 49:1,18 constrain 51:4 constrained 51:19 constraint 8:17 31:11 construction 13:23 24:5,16,18 36:14 50:17 55:18 consular 16:16 consulate 16:18 contemplated 4:21 context 10:3 16:4 18:6 26:10,24 40:5 contrary 34:16 56:7 contravenes 42:16 control 27:15 controversial 32:8 convention 4:8,10 4:13,15,16,17,19 4:21,21,23 5:1,4,7 14:3,6,18 15:25 16:14,16,21,24 19:1,10 23:4,24 24:22 28:2,8,14 35:24 39:17,21,24 40:12,13,17 42:3 42:3 46:4 48:10 48:10 53:10,14,16 55:7,13 56:6,8 57:15 conventions 43:21 43:22,23 conviction 13:6 copy 4:1 core 34:15 correct 55:6 couldnt 20:15 counsel 10:9,16 21:25,25 27:8 58:5 counsels 47:17
---	---	---	---	--

country 9:4 10:21 17:9 couple 22:15,19 course 26:23 46:5 47:10 court 1:1,12 3:10 5:19 6:11 7:19 11:25 13:8 16:15 18:7 26:11 27:13 29:11,23 30:2 31:4 40:4 42:22 43:7,8,12 45:4,12 48:14 51:7 54:1 courts 3:15 12:6 16:3 26:22 27:21 36:15 39:15 41:23 54:2 cover 10:24 43:24 covered 10:23 24:5 24:13,16,20 55:15 creating 5:20 12:10 creditors 9:11 crime 5:25 crimes 28:7 criminal 7:22 18:12 22:2,21,25 27:2 criminalize 3:17 criminalizes 13:18 22:23 critically 53:24 criticisms 31:19 criticizing 5:19 cross 6:20 curat 37:13 38:13 cut 49:11	days 38:4 de 37:12 38:12 deal 9:9,10 19:18 30:13,16 50:7 57:17 deals 17:11 dealt 19:18 25:20 death 38:2 debts 9:10 decide 7:1 24:14 42:21 decided 8:8 deciding 15:19 decisions 48:15 declare 5:20 deeply 5:18 53:11 defect 7:11 define 15:8 defining 39:2 41:24 definition 40:6 41:7 definitional 22:1 democracy 50:2 democrat 47:18 depart 39:1 department 1:18 17:4 41:16 47:18 48:2 50:25 58:2 deployment 24:25 25:3,6 described 54:3 determination 44:2 determine 45:4,6 dichromate 14:22 57:3 dictum 29:12 43:8 didnt 6:25 7:2 9:24 15:3,5 38:19 57:19,20 died 37:23 differ 15:22 difference 4:10,13 6:9 15:7 21:8 32:25 33:25 53:16 different 13:10 18:6 19:15 20:5,9	20:11 31:5 51:6 52:5 53:2 57:3 differentiates 4:11 difficult 15:23 16:13 17:8 direct 10:14 directly 4:14 10:14 12:18 23:13 24:13 24:14 26:25 34:16 51:3 discharge 10:19 disconnect 6:6 23:11 discretion 11:12,15 dispute 6:15 disputed 6:17,19 distinct 23:2 distinction 22:10 distinctly 3:19 13:19 distinguish 15:24 19:14 distributed 38:4 divorce 32:12,23 34:4 document 16:6 49:23 doesnt 4:14 10:14 10:22,24 11:5 12:7 19:11 21:1 30:19 31:6 42:8 44:18 54:24 57:23 dogs 38:10 doing 33:1 56:6 57:24 domain 11:6 domestic 15:5 donald 1:17 2:6 27:10 dont 6:5,18 7:19,22 9:2 10:17 11:13 11:13 15:13 16:8 17:20,21 19:13 20:15,19 21:5 22:3 23:6,15,24 24:17,23 25:17	28:26 30:7,16 33:24 34:8 40:8 46:12 47:5,11,16 48:21,23 49:11 55:24 doorknob 24:1 doubt 5:15 29:9 46:25 49:22 dozen 11:3 drafted 42:4 drafters 35:24 dragging 33:2 34:2 dramatic 34:20 draw 23:19 36:24 37:3,5 39:15 40:2 40:10 41:9,15 43:13 44:4 50:19 54:1 drawing 23:23 36:12 37:4 40:14 drawn 43:15 drugenhancing 36:1 drugs 35:19 36:2 37:2 dual 12:14 ducts 14:9 56:21 due 23:15 34:9 38:20,21 56:4	emanations 26:7 employ 13:8 enacted 48:12,13 enacting 55:1 encompass 48:24 encompasses 36:25 energy 5:19 enforce 25:10 34:14 enforced 27:2 enforcement 18:11 25:8 engaged 39:25 english 25:5 enormous 38:1,1 ensure 27:15 28:2 52:23 ensuring 53:12,16 enter 34:4,23 47:21 entering 26:1 49:6 enumerated 3:14 8:13,15,16,25 25:22 equating 12:11 equivalent 19:17 era 43:2,20 45:20 51:20 erosion 31:9 especially 23:10 esq 1:15,17 2:3,6,9 essence 22:12 essentially 12:10 55:20 evaluation 31:21 everybody 14:10 exact 24:2 exactly 4:18 40:2 46:8,18 53:11 example 32:8 36:2 54:17 examples 39:5 exceeds 3:14 13:20 29:13,13,16 exception 31:15 exceptions 22:18 exclusive 27:15
---	---	---	---	--

exclusively 52:20 52:22 excuse 37:24 exercise 11:14 30:4 30:8,22 45:12 49:9 51:21 52:11 52:13,18 53:13,23 56:14 57:23 exercised 11:12 exercises 12:24 13:17 expand 52:6 expended 5:18 explained 55:5 explaining 41:16 explore 32:3 expressed 46:23 51:7 expression 50:11 extends 13:14 extradition 9:15 extraordinary 45:22 extreme 50:3	30:11 31:10 32:9 32:11,12,12,22,23 32:23 34:3,3,5,23 42:14 46:6 52:6 federalism 46:10 51:7 52:17,17 55:3 federalist 3:16 fell 27:6 field 34:4 figure 18:2 25:20 file 41:16 finally 11:4 find 8:2,9,11,17 31:8 fire 35:17 firearm 6:19 first 3:4 22:20 27:24 28:12 41:12 50:10 54:11 fistfight 55:22 flabbergasted 37:20 focused 57:9 focuses 56:18 forbidden 23:20 force 16:22 forefront 5:16 foreign 3:21 5:16 5:22 9:12,13,19 16:18 27:17,23 50:8 53:18 foresee 53:6 fortiori 52:12 found 35:24 founding 8:5 27:22 53:3 four 48:10 fourth 57:12 framers 27:14,21 29:2,9 40:12 43:1 43:2 44:23 45:23 46:9 49:23 51:12 51:14 52:19 53:3 53:11 54:2 framing 34:17 43:2	51:20 friends 34:15 front 57:12,16 full 28:3 52:24 fully 9:25 16:23 27:17 53:8 function 27:15 functions 25:23 fundamental 30:1 further 28:24 future 42:10 57:18	given 42:18 45:14 49:15 go 4:17 8:5 11:4 25:10 28:12,21 43:1 44:18 goes 7:14 going 9:4 20:3 24:19 37:19 41:3 41:10 42:9 52:20 54:20,23 56:3,3 goldfish 36:3 37:1 37:12 goodness 24:24 government 3:13 5:9 7:2,6 11:14 12:7 15:25 18:4 19:21 20:13 27:14 30:1,11 31:10 32:9 34:3,3,5,12 34:23 43:3 48:2 51:18 52:21,23 56:2,12 governments 14:24 16:7 21:15 29:14 29:16 55:14 great 30:13 33:25 35:9 38:5 51:17 57:6 greater 19:22 guarantee 29:3,5 36:20 guarantees 55:1 guess 4:7 12:16 15:9 25:19 36:23 41:15 gun 49:5	harm 36:12 harmless 21:14 hasnt 45:10 havent 37:15 51:3 haynes 56:21 haystack 35:17 head 15:11 26:18 hear 3:3 heard 41:13 heart 36:9 held 6:11 29:13,15 30:10 help 11:2 helpful 50:13 historical 27:22 51:10 history 8:5 34:16 hit 50:10 hoc 27:19 36:16 42:7 hold 24:18 holding 48:15 holland 4:12 18:7 19:8 25:21 26:10 26:13 49:22 holmes 25:20 26:18 35:8 honestly 10:16 honor 14:12 31:22 33:7 38:7 39:10 45:8 46:3,25 48:9 52:10 honors 33:10 hope 25:1 horrible 25:2 horse 35:14 horses 38:18,19 hours 35:12 house 14:9 33:19 49:19 50:2 56:21 houses 23:18 huge 55:8 human 6:2,3 22:11 43:23 hurting 41:20 hypothetical 14:1
F		G		H
face 32:1 facial 13:1 facilities 57:14 fact 11:21 36:7,15 37:10 56:7,25,25 facto 16:10 fair 18:23 fairly 9:16 44:6 fall 35:6,20 family 32:10 34:5 far 37:21 fashion 33:6 federal 3:19 6:6,21 11:8 12:7,23 13:16,19 16:23 17:18,22 18:4 19:20,22 20:1,13 20:25 22:25 23:2 24:13,17 26:16 27:14 29:14,16		g 3:1 garden 10:18 gas 14:4,8,16 15:6 15:13 19:14,15,16 19:23 20:1 21:12 56:20,25 general 1:17 3:17 10:22 12:7,13,24 27:9,10,12,25 28:10,21 29:2,8 29:20,22 30:21 31:3,12,22 33:7 34:7 36:8,21 37:6 37:11 38:7,12,20 39:9,13 40:11,16 41:1,22 42:2,20 43:7 44:12,17,22 45:8,18,25 46:25 47:4,16,22 48:9 48:21 49:7 50:14 51:2,10 52:10 54:5 58:6 generally 9:17 13:14 22:20 getting 41:23 ginsburg 3:24 4:6 4:20 10:25 11:10 51:2,11 ginsburgs 7:15 give 12:20 14:1 25:23 36:3 42:12 43:2 45:21 47:7 52:3		haec 52:13 halloween 38:9 hamilton 51:13 52:8 hand 6:10 7:8 17:2 hands 52:20,22 happen 29:19 hard 23:19

15:3,4 20:9 31:8 33:11 37:8 45:17 54:17 56:17 hypothetically 17:23 hypotheticals 37:7	33:14 52:2 53:4 54:23 imposing 19:1 29:25 incident 47:7 inconsistent 20:24 42:25 43:5 independent 51:18 indeterminate 15:17 individual 4:14,18 5:8 7:16 10:15 18:8,9,14 19:7 23:13,20 27:1 55:9,10 56:10 individualized 27:2 individuals 5:3 19:2 23:18 25:9 25:10 industry 57:11,20 infinitely 35:7 inflict 22:3 inherently 20:3 21:22 34:21 inheres 36:12 injury 22:3 38:2 innocent 22:22 inquiry 29:12,23 29:25 inside 15:11 insist 53:21 insists 3:13 inspections 57:13 intended 43:2 46:9 49:23 intends 18:19 intent 54:2 intentional 22:11 interest 15:13,14 15:20 17:10 36:10 41:12 42:17 47:12 53:19 interesting 7:19 interests 27:24 29:5 41:13,14,21 46:10 53:17,18 54:3	interfere 50:8 internal 20:8 international 9:14 12:2 15:20 28:2,8 30:10,13,20 31:11 32:13 43:21,22,23 47:7 54:17 interpret 35:3 56:1 interstate 6:16 intrastate 14:25 20:8 intrude 44:10 45:23 intruded 42:14 intrusion 31:10 45:5 48:7 invisible 26:4 involved 17:12 36:19 41:24 involving 35:15 ipso 16:10 ironic 5:18 irony 11:1 isnt 6:14 21:17 22:10 31:14,18 45:13 46:14 50:6 issue 3:11 7:3 9:10 56:4 57:9 issued 48:15 items 6:13 ive 41:12 55:5	6:22 12:10 13:18 23:1 justice 1:18 3:3,9 3:24 4:6,16,20,22 5:12,14 6:5,8,14 6:24,25 7:5,13,14 8:2,15 9:2,24,24 10:8,12,25 11:10 11:22 12:4,16 13:1,13,24 15:2 15:21 16:12 17:7 17:13,16 18:15 19:13 21:2,25 22:9,16,19 23:5,8 23:25 24:6,9 25:7 25:15,19 26:9 27:8,12,25 28:13 28:16,17,23 29:6 29:8,18,21 30:7 30:22 31:1,7,16 32:2 33:9,24 34:18 36:2,17,22 37:9,14,18,23,25 38:9,15,18,23 39:11 40:8,16 41:8 42:1,12,21 43:4,18,19 44:14 44:15,21 45:3,16 46:14,16 47:2,15 47:16,25 48:14 49:2,10 50:15 51:2,11,24 54:5,9 54:16 55:12 56:16 57:6 58:3,5 justices 42:13	42:21 43:4 kerosene 35:10,12 key 37:7 kill 6:2,3 killing 22:11 kills 14:9 kind 21:1,24 28:14 33:15 46:16 50:20 57:21 kinds 8:6 40:15 knit 27:16 know 12:6 14:5 15:5,9,12 20:2 21:10,20 25:24 26:3 28:26 30:7 31:1,2 32:11 38:19 39:12 45:16 46:1,10 53:6
I id 32:2,2 33:7 idea 19:19 20:17 identify 25:5 26:15 ii 9:17 43:20 45:20 ill 49:3 illustration 53:11 im 12:16 13:6 21:16 22:6,9,9 25:19 34:25,25 36:21 38:23 41:18 43:13 45:17 47:25 50:17 56:11 58:4 imagine 19:24 45:18 imagining 15:10 impact 5:22 implement 5:21 16:21,25 52:12 57:11 implementation 45:1 51:5 implemented 9:5 17:3 33:5 implementing 4:1,4 7:25 14:6 16:1,2,5 16:10 27:5 29:15 30:5,24 32:4 36:11 39:18 40:12 40:18 44:17 45:7 45:21 47:14 57:25 implements 31:24 45:1 implicates 46:19 55:13 important 4:9 10:2 21:8 29:4,10 36:8 53:7,24 impose 7:22 8:8	insists 3:13 inspections 57:13 intended 43:2 46:9 49:23 intends 18:19 intent 54:2 intentional 22:11 interest 15:13,14 15:20 17:10 36:10 41:12 42:17 47:12 53:19 interesting 7:19 interests 27:24 29:5 41:13,14,21 46:10 53:17,18 54:3	J james 8:7 joining 5:20 joke 39:4,4,5 jr 1:17 2:6 27:10 judge 17:8,22 judges 15:10,18,23 17:18 37:3 judgment 27:20 40:13 41:2 44:22 45:12 52:19 judgments 36:16 42:7 jurisdictional 3:18	K kagan 4:16,22 7:13 8:2,15 11:22 12:4 12:16 13:1,13,24 15:2,21 25:7,15 25:19 26:9 40:16 47:16 56:16 57:6 kagans 9:25 kennedy 10:8,12 18:15 28:17 42:12	L lacks 3:16 lance 35:18 large 40:19,20 largely 4:1 laughter 28:20 37:17 38:6,17 law 10:17 11:18 22:21,25 25:12 26:16,20 32:10,13 32:22,23,24 33:20 34:5 36:14 39:10 41:19 42:16 lawful 14:23 20:19 57:1 laws 5:2 7:4 34:15 leadership 53:15 leave 10:4 28:19 ledge 57:4 legal 47:17 48:17 50:25 58:2 legislation 4:1,4,20 5:9,10,20 7:25 14:6,13 16:1,3,5 16:10 19:3,9,11 26:23 27:5 30:5 30:24 31:23 32:1

32:5 33:19 36:11 40:18 44:18 45:7 45:21 48:11,12 49:6 55:2 56:13 56:15 57:10 legislature 28:4,25 28:26 legislatures 28:3 29:7 48:7 legitimate 9:18 lesson 51:20 level 8:22 17:5 22:25 leveled 31:19 leverage 53:21,23 lex 37:13 38:13 light 35:16 limit 10:1 27:19 42:23,24 44:1 limitation 8:9,11 51:19,21 52:1 limitations 8:4,7 44:7 46:1 48:4 53:5,13 55:15 limited 3:14 40:24 limits 48:16 line 15:16 36:12 38:22,24 39:14,21 40:2,9 41:9,15,24 42:13 43:13,14 50:20 51:15 53:25 linedrawing 42:7 lines 6:16,20 36:24 37:3,5,5 40:15 44:3 list 35:6,7,20 39:3 55:12 listed 21:3,6 litigant 26:14 lobbying 57:19 local 5:25 8:23 11:21 17:5 22:25 27:19 28:7 31:14 34:20 42:22,24 51:19,21 long 35:7 39:3	52:10 look 5:17 12:9 20:2 20:10 21:21 28:26 30:11,16 41:8 57:10 looking 12:17 lopez 6:10,19,20 13:21 48:16 lot 21:23 32:6 43:18 46:20 lower 26:21 <hr/> M <hr/> m 1:13 3:2 58:8 madison 8:7 maim 6:2,3 majority 49:16 makers 15:7,11,19 making 5:5 26:7 malicious 3:12 11:20 15:1 20:8 20:20 21:18 22:23 manner 46:8 manufacture 14:8 manufactures 14:7 marijuana 5:25 19:18 marriage 32:11,16 32:18,22 34:2,4 54:18 match 35:16 matter 1:11 3:19 8:4,7 11:13 13:19 24:14 43:11,24 53:1,4,12 58:9 matters 9:6,18 35:6 35:20 mean 7:20 9:21,24 13:17 20:10 25:20 35:20 36:3 40:17 41:18 46:17 49:11 meaning 5:15 9:3 9:20 37:21 42:2 medellin 16:15 30:9 medellins 49:16	meets 14:2 mentioned 50:9 mess 56:3 migratory 18:9 miles 39:3 mind 34:19 minimis 37:13 38:12 minimum 18:20 minutes 54:6 mirror 4:21 mirrors 14:6 25:14 missouri 4:11 18:7 25:21 26:10,12,13 49:22 model 48:12 modern 26:13 moment 50:12 morning 3:4 morrison 13:22 48:17 move 35:10 moving 9:14 multilateral 28:1 murder 10:24 35:9 <hr/> N <hr/> n 2:1,1 3:1 46:4 narrowing 13:22 24:5,15,16,18 nation 3:13,21 4:25 5:4,7 18:19 19:2 23:14,16,20 27:16 56:5 national 8:22 12:1 13:25 14:11 15:13 15:14,20 16:19,22 27:23 28:2,4,25 28:26 36:10 41:12 41:13,14,21 42:17 43:3 47:12 48:1 51:18 52:21,23 53:17,18 54:3,23 nations 30:15 48:10 48:13 53:19,21 nature 21:22	necessarily 22:4 54:25 necessary 25:22 33:6 need 10:19 22:25 23:1 41:6 needed 52:22 needs 7:19 30:2 40:13 negotiate 33:13 47:21 48:4 53:7 negotiation 3:20 negotiations 39:25 negotiators 42:9 neighbor 15:6 neither 21:7 25:16 52:8 never 29:1,13,15 32:10 33:3 34:6 50:9 52:7 nexus 3:18 6:22 12:1 13:19,24,24 14:11 non 37:13 38:12 nonproliferation 39:24 40:1 nonselfexecuting 10:3,6,13 16:9 17:3,24 33:16 54:15,21,25 55:3 nonwarlike 12:12 norm 53:17,19 normal 25:5 norristown 24:25 notification 16:16 16:18 notion 34:13 noun 21:17 nouns 21:11 nounverb 22:10 november 1:9 nuclear 39:24 40:1 number 38:5 <hr/> O <hr/> o 2:1 3:1	objection 8:25 9:1 9:1 objectives 9:9 objects 22:21 obligates 34:12 obligation 11:17,19 16:17 33:14 34:13 obligations 10:20 11:16 17:6 19:2 25:2 28:4 30:6,10 30:20,24 45:2 obvious 5:8 obviously 24:12 odd 20:23 21:9,19 office 11:4,8 officer 16:22,23 officers 8:23 17:5 official 16:17 officials 11:8,21 oh 24:24 46:14 49:10 okay 5:24 13:24 17:23 29:19 36:22 44:15,21 55:23 once 36:23 39:1 operate 20:24 operated 46:8 opinion 35:8 41:19 opportunity 10:4 31:6 opposite 49:4 oral 1:11 2:2,5 3:7 27:10 order 27:24 52:23 53:8 ordinary 37:18,21 57:4 original 9:8 ought 41:17 outer 31:13,17 outside 35:21 36:22 36:23 37:21 owed 9:10 <hr/> P <hr/> p 3:1
---	---	--	--	--

<p>page 2:2</p> <p>part 13:15 34:19 50:2</p> <p>participate 53:8</p> <p>particular 13:4 17:11 39:16 41:4 41:6 45:7 56:24</p> <p>particularly 7:9 14:20 20:12 43:19 45:20 48:2</p> <p>parties 4:17,19 30:16</p> <p>partners 24:24 46:21</p> <p>party 7:7</p> <p>pass 5:2 17:25 19:3 19:9,11 47:9,14</p> <p>passage 33:19</p> <p>passed 57:10</p> <p>passes 25:12 28:6</p> <p>paul 1:15 2:3,9 3:7 54:7</p> <p>paying 35:10</p> <p>peaceful 12:11 22:18 35:2,21 39:17,22,23 41:25 55:20,25 56:19,22</p> <p>peasley 35:8</p> <p>penal 5:2,9,10 19:3</p> <p>penalties 27:3</p> <p>penalty 18:12</p> <p>pennsylvania 11:11 25:1</p> <p>penumbras 26:7</p> <p>people 20:4 37:18 44:3 46:18 48:1</p> <p>perfect 57:22</p> <p>perfectly 14:23 16:20 20:18</p> <p>performanceenh... 36:1 37:2</p> <p>permit 22:1 34:2 39:13</p> <p>permits 22:17</p> <p>person 35:13 38:2</p> <p>pertain 51:25</p>	<p>petitioner 1:4,16 2:4,10 3:8 30:3,25 33:12 36:13 38:22 39:15 40:5 42:23 43:15 45:10 53:25 54:8</p> <p>petitioners 27:19 31:15 44:24 47:19</p> <p>phrase 12:11 39:22</p> <p>pick 32:7</p> <p>place 15:18 19:1 38:16</p> <p>play 54:14</p> <p>please 3:10 11:2 27:13</p> <p>pledge 55:24</p> <p>poignant 47:12</p> <p>point 24:11 28:12 28:22,24 33:8,8,9 34:8 35:25 36:9 37:7 38:8 45:17 45:22 46:17 49:12 50:14,18 55:4 56:19</p> <p>pointed 43:19 50:25</p> <p>points 22:15,20 54:10</p> <p>poison 20:17 23:16 35:14 36:1,25 37:10 38:10</p> <p>poisoned 36:25</p> <p>police 3:17 7:12 8:23 11:2 12:8,24 13:15,17 16:22 17:4 21:1 28:5 31:10 34:20 44:8 44:10,20 45:5 56:14 57:24</p> <p>policy 5:16</p> <p>political 46:4 54:13</p> <p>position 7:20 15:24 16:7 49:17 53:20</p> <p>possess 57:1</p> <p>possession 5:25 14:23 20:14 49:5</p>	<p>possibility 17:8 57:12</p> <p>post 11:4,8</p> <p>postworld 45:20</p> <p>potassium 14:21 57:3</p> <p>potato 35:14 36:25 37:10</p> <p>potatoes 36:1 38:18 38:19</p> <p>power 3:17 7:11 8:4,16,16,16,17 8:25 9:10 10:1 12:8,24 13:15,17 13:20 17:25 19:22 19:24,25 21:1 23:5,7,11 25:21 25:22,24 26:2 27:20 28:5 30:4,9 30:23 31:10,15 33:23 34:21,22,22 43:3,10 44:1,5,8 44:10,10,20 45:5 45:13,19,23 46:6 46:13 48:16,20,24 49:1,9,15 51:4,17 51:18,22 52:6,11 52:14,19,20 53:5 53:13 54:22 56:14 57:24</p> <p>powers 3:14 8:13 18:3 20:1</p> <p>practice 27:22</p> <p>precedence 12:6</p> <p>precedent 27:21 54:2</p> <p>precept 43:4</p> <p>precise 4:23 44:6 54:14</p> <p>precisely 10:6,12 14:13 15:24 34:11 55:8 57:5,21</p> <p>predict 41:3</p> <p>premise 4:7 9:25</p> <p>prepared 36:20 43:13</p>	<p>prerogatives 48:8</p> <p>present 31:6</p> <p>preserve 46:6 55:3</p> <p>president 10:16 28:8 32:14 33:13 33:17,20 42:15 49:18,24 52:1</p> <p>presidents 3:20 10:9,15</p> <p>press 28:23</p> <p>pretty 14:8</p> <p>principle 3:16,22 20:25 42:18 45:11 45:18 49:17</p> <p>principles 52:16</p> <p>private 7:6</p> <p>problem 6:20 22:10 28:9 39:1,6,7 42:17 46:15 49:11 49:13,14 50:8 56:11 57:13,16,21</p> <p>problematic 20:12</p> <p>proceed 21:24</p> <p>process 19:10,12 36:12 42:6</p> <p>processes 5:2 25:11 25:13,18</p> <p>produce 32:20</p> <p>production 57:14</p> <p>profound 47:12</p> <p>prohibit 6:12 14:14 19:21 20:4,14</p> <p>prohibited 18:8,13 22:6 27:1</p> <p>prohibition 25:25 27:2</p> <p>prohibitions 7:22 25:9 49:20</p> <p>prohibits 11:18</p> <p>promise 19:2,9</p> <p>promised 5:13</p> <p>proper 25:22 29:24 43:11,16</p> <p>property 9:12 52:3</p> <p>proposing 31:20</p> <p>proposition 32:3</p>	<p>prosecute 28:7 37:19</p> <p>prosecuted 11:21 37:15 46:24 47:7</p> <p>prosecutes 25:2</p> <p>prosecution 11:24 12:1,22 13:4 28:18</p> <p>prosecutorial 11:12,14</p> <p>protect 29:5 46:9</p> <p>protection 29:10 33:18</p> <p>protections 49:21</p> <p>provide 16:17</p> <p>province 9:7 30:18</p> <p>provision 29:15</p> <p>provisions 8:12,20 57:16</p> <p>pure 12:14</p> <p>purely 5:25 14:25 28:7</p> <p>purported 8:22 54:18</p> <p>purpose 9:19 22:7 22:18 31:8 35:2 35:21 39:17 56:22</p> <p>purposely 42:3</p> <p>purposes 9:8 22:17 41:25 55:25 56:19</p> <p>pursuant 28:7</p> <p>pursue 11:12</p> <p>push 41:17</p> <p>put 11:15 15:23 18:12 19:24,25 24:1 57:11</p> <p>puts 16:16 21:18 57:3</p> <p>putting 5:22</p> <p>puzzle 4:2</p>
<p style="text-align: center;">Q</p>				
				<p>qualities 56:24</p> <p>quarrel 4:7</p> <p>question 7:1,15,19 9:25 10:4 17:14</p>

17:23 18:21 30:2 31:4,6,23 34:24 35:5 38:24,24 39:14 42:13 43:10 43:12 46:17 47:8 47:13,15 48:23 49:7 50:1,17 51:11 52:5,8,9 57:7 questions 34:20 quite 4:23 8:8 57:19 quotes 51:13,24 52:9	reasons 7:25 rebuttal 2:8 54:7 54:10 recognize 10:2 recognizes 10:7 record 24:12 refer 52:9 referred 11:7 46:3 reflection 19:19 regard 3:18 13:18 regulate 4:14,17 5:24 6:1,12 10:14 20:13 21:11 23:13 49:5 54:18 regulated 7:16 23:14 24:2 regulates 4:19 regulating 15:13,14 regulation 6:23 reid 51:5 rejected 26:6 related 30:20 relates 14:4 32:9 relations 5:23 30:14 53:18 relief 13:6 relying 34:14 remaining 54:6 remotely 16:25 repeatedly 43:8 reply 50:13 republican 47:18 required 42:15 requirement 29:4 46:2 52:2 requires 10:17 32:15 33:13 41:20 requiring 33:5 34:1 reservations 46:6 reserve 27:7 55:24 resources 57:19 respect 11:24 12:21 21:11,14 23:15 25:9 31:21 34:7,8 34:9,10 36:10 38:20,21 40:24	41:1 44:8 46:2 52:18 55:11 56:4 57:8 respectfully 5:5 53:25 55:17 respond 55:4 respondent 1:19 2:7 27:11 responsibilities 16:24 result 32:20 49:4 right 5:17 7:5 9:23 22:20 24:4,9 27:4 29:21 30:21 32:16 39:20,25 46:12 47:22 49:2 53:24 56:11 rights 9:12 43:23 46:4 49:21 51:4,6 51:9 54:18 rise 45:21 47:7 risk 41:23 50:23,24 50:24 risks 42:5 50:19 rivals 23:16 roberts 3:3 27:8,25 28:16,23 29:6 30:7 31:1,7,16 43:18 44:15,21 45:3,16 46:16 47:2,25 54:5 58:5 rodents 23:17 role 46:13 54:11,14 romantic 23:16 rule 18:18 36:13 57:22 run 15:3	19:16,23,25 21:12 56:20,25 satisfied 34:14 saved 12:10 saying 6:15 13:13 15:6 28:6 41:11 44:1 47:5 48:18 says 4:23,25 11:14 20:10 25:21 26:3 26:22 56:2 scalia 6:25 7:5 19:13 29:18,21 32:2 33:9,24 38:18 51:24 scalias 54:16 schedule 14:16,17 56:25 schedules 20:11 21:6 school 49:5 scientists 55:22 scratched 26:18 season 18:10 second 19:24 23:3 55:4 section 4:24 19:6 34:11 sections 22:1 security 27:24 41:12,21 53:18 see 9:20 16:4 20:15 49:12,13 seeking 13:6 selfconsciously 8:8 selfexecuting 7:17 7:21 8:21 32:17 32:19 33:1,12,21 34:1 49:17 51:25 52:2 senate 10:7 28:15 29:7 32:14 33:14 33:19 46:5 49:19 49:24 52:1 54:19 senates 3:20 54:11 sends 14:9 sense 18:11 21:13	26:24 54:24 57:23 sensitive 39:25 sent 56:21 sentence 26:21 separate 52:7 serious 22:3 30:9 38:14,21 46:20 52:16,17 set 42:15 setting 35:17 severely 47:20 sharing 26:2 sheriff 30:12 shifts 18:2 shock 38:3 shoulder 10:21 shouldnt 5:10 side 31:20 sign 10:10 signatory 30:18 56:7 signed 28:9 33:20 48:11 significant 46:19 signs 5:1 similar 4:8 simply 16:3 56:15 single 11:20 situation 5:17 17:11 21:19,24 25:25 31:9 55:21 situations 20:5 slightest 17:10 small 35:10 37:1 solicitor 1:17 solution 54:23 solve 56:11 somebody 30:17,17 35:15 sorry 21:16 58:4 sort 18:2 20:3 21:19 26:21 39:20 sorts 22:1 57:16 sotomayor 5:12,14 6:5,8,14,24 21:25 22:9,16,19 23:5,8
<hr/> R				
r 3:1 racetrack 35:14 radiations 26:4 raich 6:10 19:19 raise 50:22 rat 20:17 ratification 3:21 29:4 33:18 46:2 54:12 ratified 28:14 29:13,15 46:5,11 ratify 33:14 54:20 rational 6:11 16:21 16:24 reach 3:12 49:4 reaching 19:7 read 26:10 ready 10:20 real 10:3 37:9,12 37:14,15 41:23 46:2 50:19,23,24 50:25 really 3:11 6:9,19 7:21 12:12,18 16:8 21:10 24:23 reason 5:10 34:25 35:5 51:16 54:13 55:2 reasonably 30:20 reasoning 13:8				
		<hr/> S		
		s 2:1 3:1 sadly 35:18 safeguard 46:9 samesex 32:15,18 34:2 sarin 14:4,7,13,16 15:6,13 19:14,15		

23:25 24:6,9 37:23 58:3 sounds 13:1 source 44:2 sovereign 27:17 52:24 53:9 speaking 25:5 specific 33:8 43:13 specifically 26:5 49:20 spending 54:22 squared 27:20 stage 52:25 53:8 stakes 50:22 state 4:17,19,25 5:4 5:7 6:6,20 8:22 9:19 10:21,23 11:2,7,11,21 17:4 17:5 19:3 22:24 23:14,20 26:16,20 29:7 30:17 32:12 32:19 34:22 41:15 42:16 45:24 47:18 48:2,6,7 50:24 56:5 58:2 statement 18:18,25 57:22 58:3 states 1:1,6,12 3:5 9:7 10:20 11:6,18 17:10 18:19 19:8 23:16 25:1 26:1 28:25 29:5 32:15 34:1,12,14 41:14 41:21 44:20 46:13 47:20 52:3,24 53:7,15 54:22 statute 3:11 4:8,10 6:21,22 10:22,24 12:9,12,24 13:10 13:14,17,20 14:15 17:25 18:12 20:10 20:11,23 21:10 23:12,22,23 24:18 27:1 28:6 35:4 37:25 39:18 44:25 55:7,15,16,20	56:1 statutes 14:21 24:13,17 statutory 36:14 50:17 55:18 56:18 steps 25:1 stick 12:5 stood 27:5 stop 22:13 strain 30:13 strange 26:12 street 52:18 strike 30:19 structural 8:12,20 29:4 33:8,9,18 structure 18:20 26:5 42:14,17,25 43:6 45:25 structured 6:21 stuff 55:12 subdivisions 17:11 subject 8:4,7 29:24 43:10,11,16,24 44:19 53:1,4,12 subjecting 31:18 subjects 9:12,13 submit 37:12 40:4 53:25 submitted 58:7,9 substances 14:17 substantial 51:17 sudden 20:21 suffice 42:21 sufficient 12:1 13:15 15:14 54:12 suggest 5:5 13:9 55:17 suggesting 12:19 18:18 suggestion 55:6 suicide 23:17 superseded 18:20 supported 7:4 suppose 16:20 25:16 27:4 28:1 32:23 56:20	supposed 12:21 supremacy 26:17 supreme 1:1,12 26:19 sure 11:19,23 25:1 47:25 54:20 57:23 surprise 25:16 swathe 43:24 syria 5:17,19 39:20 56:4,5,5 syrian 39:7 system 3:16,23 6:7 46:7 systems 19:4 <hr/> T <hr/> t 2:1,1 take 6:25 7:20 14:8 15:18 29:25 32:7 38:13 45:14 49:3 54:16 takes 22:21 talk 13:3 37:6 talked 14:18 talking 19:20 47:18 56:10 talks 19:1 35:9,13 35:15 target 24:13 task 10:21 tell 14:2 30:12 35:25 39:4 40:8,9 50:7 telling 41:9,18 tells 4:17 tenth 8:24 51:9 term 55:21 terminology 4:9 terms 4:9 6:6 10:13 15:19 26:1,1 42:6 terribly 40:3 terrorism 24:14 terrorist 23:25 test 11:23,23 12:2,3 12:17,17,20,20 14:2 15:18	texas 30:12 thank 27:8 54:4,5,9 58:5 thats 6:16 7:5,18 9:23 10:12 12:3 12:20 13:5,15,23 17:12 19:5 20:2,2 20:5,9,23 21:3,10 22:13 23:8 24:5 27:6 30:2 34:19 39:12 41:9 42:17 43:12 44:23,23 46:22 47:22,23,23 49:22 50:3,4 51:12,12,15 52:7 55:15,23,25 56:3 56:22 57:21 theory 14:25 16:9 21:16 55:14 theres 4:9 5:10 6:15 8:3 10:1,3,21 10:25 14:4,7 15:12,14 19:21 20:10 23:10 24:24 25:21,22,25 28:1 29:9 31:9 32:3,6 33:25 35:1 36:17 38:15 43:9 48:21 55:16 theyre 20:20 35:22 37:8,14,14 thing 12:6 20:6 21:15 29:19 43:25 54:18 58:1 things 9:13 13:14 14:16,19 19:20 20:18 23:18 25:15 35:8 37:4 39:19 think 6:4,9,18 7:6 7:10,13,14,18,19 7:22 8:19,23 9:2 9:23 10:2,17 11:13,13 12:6 13:22 15:11,14,22 16:12,14 17:7,13 17:14,16,20,21	18:2,5,6,23 19:6 19:16,19,23 20:6 20:9,19,24 21:8,9 21:20,23 22:4 23:6,15,19 24:21 24:22,23 25:17 26:4,9 28:11 30:15 31:22 32:25 33:4,24,25 34:9 34:13,15 35:6,18 35:20 36:6,9 38:12 41:2,19,22 41:23 42:20 43:16 43:19 45:8,21 46:18 47:5 48:21 48:22,23 49:7,13 50:5,16,23,24 51:12,16 52:12 55:5,12,19,24 56:10,24 57:8 thinking 40:22 57:7 thinks 57:24 thought 8:6 12:17 13:2,14 22:13 29:2,9 32:10 thousand 39:3 three 20:11 21:6 throw 39:2 throwing 37:4 time 27:7,22 29:6 36:2 41:12 50:10 51:3 53:2 times 11:2,3 today 43:14 told 37:16,18 38:3 toxic 38:4,11 41:4 transfer 28:24 translation 5:6 transport 22:5 transported 6:16 treaties 9:5 10:3 26:1 42:10 43:19 45:5,18 46:3,11 47:21 48:4 49:17 51:25 53:2 54:12
--	--	---	---	--

treatment 9:13	22:13,13 24:21	unlawful 5:3 14:19	37:11 38:7,12,20	42:19 44:13 46:23
treaty 3:21,25 4:2,3	25:19 35:16 39:20	35:22	39:9,13 40:11	47:12 50:7,12
5:21 7:4,11,15,16	40:1,9 45:17	unlawfully 35:19	41:1,22 42:2,20	55:18,19 56:1,12
7:21,23 8:3,16,17	50:16,18,19 53:23	unlimited 44:11	43:7 44:12,17,22	ways 9:6
8:21 9:1,3,10,19	tuesday 1:9	unusual 14:20	45:8,25 46:25	weapon 14:24 20:3
9:21 10:1,5,6,10	turned 11:3	unwavering 55:14	47:4,22 48:9,21	22:2,4,7 37:20
10:13,19 11:15,17	turns 21:16 22:7	use 3:12 6:1 11:20	49:7 50:14 51:2	57:5
11:19,25 14:18	two 24:17 25:15	11:20 12:14 15:5	51:10 52:10	weaponized 21:12
15:7,11,19 16:9	32:7 55:22	20:8 21:18 22:3,5	victim 11:1	21:23
16:25 17:3,24	twothirds 28:14	24:7 39:16 46:5	vienna 16:16,23	weaponry 5:16
18:3,8,9,19 19:8	29:3,3 32:14	48:19 54:21 57:1	view 42:16 45:22	weapons 20:7,19
19:25 20:16 21:4	33:13,17 46:2	57:5,5	vii 19:5	20:22 21:11,13,16
22:12,17 23:5,7	twoway 52:18	uses 14:15,23 39:22	vindicating 13:9	21:17 24:25 25:3
23:11,12 24:24		39:22,23 40:21	vinegar 14:22	25:6 36:6 38:11
25:2,8,10,14,21	U	usually 46:19	19:15 20:18 36:3	39:7,21,23 40:20
25:24 26:11,16,19	u 46:4	usurp 46:13	37:11 57:2	53:10,14,15
26:24,25 27:5,15	unauthorized	V	violate 5:3 56:6	wed 29:1
27:20 28:1 29:13	20:14	v 1:5 3:5 4:11 18:7	violated 18:9 55:24	went 11:2 26:15
29:16,24 30:3,4,5	uncertainties 50:12	25:21 26:10,13	violates 5:6 7:24	35:13
30:6,8,16,23	unconstitutional	49:22 51:5	violating 18:13	weve 13:14 55:24
31:11,15,21,24,25	4:5 5:21 6:1	vacated 13:7	violation 11:15	whats 23:20 44:4,5
32:4,13,18 33:1,4	10:10 12:22 13:10	valid 3:25 10:5,13	42:8	56:3
33:5,12,16,21	24:19 56:15	14:13 16:10,11	W	whatsoever 10:1
34:2,8,10,12,13	underlying 49:11	17:2 26:23,23	waive 7:7	whos 16:23
34:22 35:1 36:11	49:14	30:4,8,22,25	walk 28:11	whove 48:1
39:24 40:1 42:14	undermine 42:9	31:24,25 32:1	want 15:9 22:16	wife 38:4
42:15 43:5,9,10	undermining 51:1	44:14,16,18,24,25	30:16 38:23 39:12	win 26:16
43:11,11,17 44:1	understand 6:5	45:6,7,10,13,15	41:17 50:12 56:9	wise 53:5,12
44:5,9,13,14,15	11:11,23 14:15	49:8 52:11,13	wanted 38:25 40:23	word 9:3 37:22
44:18,24,25 45:1	15:12 16:8 17:5	55:1	wants 20:13	49:3
45:9,13,14,19	19:14 38:7 39:9	validity 15:25 16:1	war 9:17 20:1	wordforword 45:1
46:13,21 47:14	47:13 50:14,15,20	55:1	43:20 45:20	words 4:1 35:1,3,3
48:19,24 49:1,6,8	50:23 52:16 55:19	validly 17:3 31:24	warlike 22:17 24:6	35:7,21,21 50:2
49:9,15,19 51:4	understood 9:21	31:24	24:7 39:16,22	work 16:8 17:4
51:17,22 52:6,11	13:25 51:12,15	variant 56:17	40:6 41:24	22:24 23:22 56:13
52:11,13,19 53:5	53:3	variety 10:18	washington 1:8,15	worked 48:1
53:13 54:14,17,25	undertaken 5:4	vast 43:24	1:18	world 9:17 15:10
55:3 57:25 58:4	unfairly 18:16	verb 21:18	wasnt 11:7 57:8	17:9 43:20 52:24
treatys 26:22	unfortunate 40:3,7	verba 52:13	way 4:18 6:12,21	53:8,20,21 57:18
trenches 11:6	unimaginable	verrilli 1:17 2:6	11:11 15:1 16:21	worried 50:4
tried 7:21	28:13,18 29:19	27:9,10,12 28:10	16:25 17:14 18:15	wouldnt 16:25 24:2
true 4:8 9:3 47:23	united 1:1,6,12 3:5	28:21 29:2,8,20	19:7,18 20:8,20	48:24
47:24 53:1	17:10 19:8 25:1	29:22 30:21 31:3	20:24 21:9 22:23	write 41:19,20
try 15:10 19:17	30:15 34:12 41:14	31:12,22 33:7	26:2,15,20 35:23	written 10:10 48:18
23:17 31:8	41:21 47:20 52:24	34:7 36:8,21 37:6	36:18 37:10 39:14	wrong 56:11
trying 19:21 21:10	53:7,15			

X	6 26:19			
x 1:2,7	7			
Y	7 4:24			
years 48:15	8			
yesorno 48:22	9			
youd 28:11,26				
youre 5:7 11:5				
12:19 13:13 15:6				
18:17 19:20 26:6				
31:18,20 36:19				
41:8,11,18 42:1				
43:25 56:9				
youve 42:18,18				
45:13				
Z				
zone 49:5				
0				
000 46:11				
05 1:13 3:2 58:8				
1				
1 4:24 19:6 46:11				
10 1:13 3:2				
11 58:8				
120 48:12				
12158 1:4 3:4				
2				
2013 1:9				
229 34:11				
27 2:7				
3				
3 2:4				
33a 4:24 19:6				
4				
4 54:6				
43 20:11 21:7				
5				
5 1:9				
54 2:10				
6				