

Brief Argues That Precedent Was Based on Research Error

BY JAMIE SCHUMAN

After arguing in a 2005 *Harvard Law Review* article that 93-year-old treaty power case *Missouri v. Holland* was wrongly decided, Nicholas Quinn Rosenkranz hoped the U.S. Supreme Court would consider the issue. But he wasn't holding his breath.

Just eight years later, *Holland's* fate is before the court in *Bond v. U.S.* Under *Holland*, Congress can enact legislation to implement a treaty even if it would not have had that authority without a treaty. In the Cato Institute's amicus brief in *Bond*, Rosenkranz, a senior fellow at the libertarian think tank, argues that this rule runs counter to the concept of enumerated powers.

"The proposition that a treaty could increase the power of Congress seems to me wrong on its face and inconsistent with deep principles of constitutional structure," said Rosenkranz, a professor at the Georgetown University Law Center.

The Center for Constitutional Jurisprudence and the Atlantic Legal Foundation, both nonprofit law outfits that promote limited government, joined Cato on the brief. Edwin Meese III, who was attorney general under President Reagan, also signed on after learning about the project when he sat next to Rosenkranz at a lunch.

A suburban love triangle gone awry, Carol Anne Bond's saga may seem a strange vehicle to unseat Justice Oliver Wendell Holmes' canonical opinion in *Holland*. In 2006, Bond, from Landsdale, Pa., learned that her husband had impregnated her close friend, Myrlinda Haynes. Bond got back at Haynes by sprinkling toxic chemicals on her car door, mailbox and doorknob.

Haynes received just a minor thumb burn, but officials chose to charge Bond



Georgetown University Law Center's Nicholas Rosenkranz

under the Chemical Weapons Convention Implementation Act rather than state law for assault or harassment. In May 2012, the U.S. Court of Appeals for the Third Circuit upheld Bond's six-year sentence under the federal statute, which Congress had enacted in response to a 1993 treaty designed to eliminate weapons of mass destruction.

Bond's attorneys maintain that the statute as applied to their client is outside Congress' authority and invalid.

To Rosenkranz, Bond's conviction highlights the danger of the Third Circuit's reading of *Holland*: it lets treaties expand legislative powers "virtually without limit." That view, he argues, is inconsistent with the text of the Treaty Clause, the Necessary and Proper Clause and the Tenth Amendment. It also goes against "countless canonical statements that Congress's powers are fixed and defined" and ignores the general rule that legislative authority can be increased only by constitutional amendment, he wrote.

Rosenkranz also warns that *Holland* gives the President and the Senate a "wish-for-more-wishes power" and incentivizes leaders to enter into international entanglements.

In calling for the Court to overturn *Holland*, Rosenkranz maintains that the

Third Circuit wrongly relied on a "single, conclusory sentence" from the case: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."

He claims that line is unreasoned dicta from an opinion focused on a different topic, that the Migratory Bird Treaty Act of 1918 did not encroach on states' rights under the Tenth Amendment.

Rosenkranz relied heavily on his *Harvard Law Review* piece in his brief.

"Law review articles generally don't have much of an effect in the world, so if you find that your article is actually being adjudicated before the Supreme Court, that is extremely gratifying," he said.

A big point made in the article was that key scholarship in support of the reasoning the Third Circuit adopted—a paper from late constitutional law scholar Louis Henkin—was based on inaccurate research. Henkin had cited language from an early draft of the Constitution to suggest that the Necessary and Proper Clause includes the power to enforce treaties, but Rosenkranz discovered that the wording had actually come from a different clause.

"Once I discovered that the conventional historical account was simply wrong, that really left no good arguments supporting *Holland*," he said.

The Supreme Court will hear *Bond* in October. In 2011, it found that Bond had standing to challenge the constitutionality of her charge.

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