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The Implications of *Crosby* for Federal Exclusivity in Foreign Affairs

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There is much in what Professor Spiro has said with which I agree, but some with which I disagree. To make my remarks more interesting, I thought I would focus on the areas of our disagreement. I had anticipated, of course, that John Yoo would be here and, in preparing my remarks, had in mind what he might say. So, you may hear in my remarks responses to the ghostly voice of John Yoo whose actual presence is, of course, much missed here today.

At the risk of oversimplifying Professor Spiro's remarks about *Crosby*, I think that he, and perhaps some others, believe that *Crosby* is a rather insignificant decision, in part because the Court ruled on narrow statutory preemption grounds rather than on the broader constitutional dormant power grounds that the lower courts relied upon. In particular, there was a good deal of anticipation about whether the Court would limit the scope of, or eliminate altogether, the dormant foreign affairs preemption doctrine as articulated in the *Zschernig* case[1] and would begin a process of revising the Court's traditional attitude towards federal-state relations in the area of foreign affairs. If I understand Professor Spiro correctly, he does not think that the *Crosby* decision has any particularly significant implications for either of these questions. In his view, *Crosby* should not be read as a strong reaffirmation of the Court's traditional endorsement of federal exclusivity in the realm of foreign affairs. Nor does it in any way suggest the continuing vitality of dormant foreign affairs preemption. Normatively, I understand him to argue that dormant foreign affairs preemption is undesirable and that perhaps it would have been better had the Court faced the dormant power question and forthrightly overruled *Zschernig* and its progeny. I disagree with all of these claims, although I am not sure whether Professor Spiro made all of them in exactly the way I have put them. I think a realistic appraisal of *Crosby* suggests that, notwithstanding the Court's recent and aggressive moves to recalibrate the federal-state balance on the domestic front, the Court remains fully wedded to the traditional view that foreign affairs are largely, if not exclusively, the domain of the federal government. I also think that *Crosby* suggests that dormant foreign affairs preemption is still a vital, if limited, doctrine.

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1. Zschernig v. Miller, 389 U.S. 429 (1968).

I.
THE IMPLICATIONS OF *CROSBY* FOR FEDERAL EXCLUSIVITY IN FOREIGN AFFAIRS

As an initial matter, I think that the *Crosby* case, even narrowly understood as a statutory preemption case, has wider significance for the federal-state balance in foreign affairs than may be obvious at first glance. Congress has legislated very widely in foreign affairs. There are many foreign affairs statutes and statutory framework regimes. If the Court persists in following *Crosby*'s extremely liberal approach to preemption in construing the preemptive effects of these statutes, then it may already be the case that the states are ousted from a very wide range of activities connected to foreign affairs. In the context of the Massachusetts case, the federal law that the Court relied upon was the federal Burma Sanctions Act. However, the President more often imposes sanction regimes not pursuant to a specific statutory authority like the Burma Sanctions law, but under a general framework statute known as the IEEPA (the International Emergency Economic Powers Act).[2] If one takes the reasoning of *Crosby* seriously, it suggests that sanctioning activity by states is, in any case, already preempted across the board by IEEPA and that it would be unnecessary to have more specific statutory authority, like the Burma Sanctions Act, to find preemption. Even more broadly, as I already mentioned, there are many other types of foreign affairs statutes on the books, and, applying *Crosby*'s liberal preemption approach would likely mean that, even before one takes into account more exotic lines of judicial authority, the states are widely preempted from acting in the realm of foreign affairs. In contrast, dormant foreign affairs preemption—certainly among the more exotic of those lines of decision—has always been a limited doctrine. As Professor Spiro pointed out, the Court has not applied it since the *Zschernig* case in 1968, and there are only a handful of lower court cases applying the decision thereafter. Since the decision was rendered, moreover, the conventional wisdom among scholars of foreign affairs and the Constitution has been that it is strong medicine and ought to be applied only very sparingly and in unusual cases. Thus, the more conventional decision in *Crosby* may well be of wider practical significance than would have been a decision clarifying the contours of a somewhat esoteric doctrine.

One of the particularly striking features of *Crosby* is that despite the weakness of the statutory preemption claim, at least as a matter of congressional intent, it was a unanimous decision by the Supreme Court. In turn, the Court was affirming a unanimous panel of the First Circuit,[3] which in turn was affirming the judgment of a district court[4] striking down the state sanctions law. That is a remarkable degree of judicial unanimity and seems to reflect an underlying consensus about the significance of the foreign affairs context in construing the permissibility of state activity. It is also particularly striking because in

2. 50 U.S.C. §§ 1701–07 (2002).
3. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).
4. Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D.Mass. 1998).

recent years a growing group of revisionist scholars (John Yoo being a notable example) has launched a vigorous assault on the conventional wisdom in the field of foreign affairs and the Constitution. One of the group's core claims is that federalism principles ought to apply as strictly in the context of foreign affairs as they apply in the context of domestic affairs. The unanimity of the courts, and the business-as-usual approach of the Supreme Court, suggest that the new revisionist foreign affairs thinking in the academy has not yet penetrated the jurisprudence of even the most states-rights oriented Justices on the Court.

Furthermore, there are several other respects in which the *Crosby* decision reaffirms the Court's traditional solicitude for the foreign affairs powers of the federal government even in the face of sensitive federalism considerations. This solicitude is reflected in a number of arguments which the Court either explicitly or implicitly had to reject in order to reach its ultimate conclusion that the Massachusetts sanctions were preempted.

One much discussed argument, for example, was a familiar Tenth Amendment-type objection to federal preemption. Some thought that the Court might carve out a kind of market participant immunity for states exercising their spending powers. Under this view, Massachusetts would be entitled to a constitutional immunity to be free of federal interference in deciding how to spend the tax revenues it raises from its citizens, at least in the context of the procurement of goods and services. The *Crosby* Court rejected this argument explicitly. The Court had, in fact, rejected a similar argument some years before in the *Gould*[5] case. *Gould*, however, was decided before the recent spate of federalism decisions, and one might reasonably have thought that it was a weak and vulnerable precedent. Apparently, not so, at least in the foreign affairs context.

Similarly, there was also a commandeering issue, reminiscent of *New York v. United States*[6] and *Printz*,[7] lurking in the background of the case. After all, at least as the Court interpreted the federal sanctions law, it affirmatively commandeers the states into purchasing goods and services from companies with which they do not wish to do business. Despite the Court's current enthusiasm for the anti-commandeering principle in the domestic realm, it deemed the issue not even worth mentioning in this context. More important, there was another related, and doctrinally more plausible, argument that the Court likewise decided not to address. In a number of recent cases, *New York* and *Reno v. Condon*[8] being two examples, the Court has suggested that when Congress wishes to regulate the states as states, it may have to do so pursuant to laws of general applicability. Congress, the Court has suggested, may not single out the states for regulation. Preemption necessarily raises a problem in this respect because preemption is in fact a regulation of states as states and of no one else. It is like an injunction that Congress imposes on the states not to adopt legislation in a particular area. Notwithstanding this apparent logical difficulty, it is of course

5. Wis. Dept. of Indus. v. Gould Inc., 475 U.S. 282 (1986).
6. New York v. United States, 505 U.S. 144 (1992).
7. Printz v. United States, 521 U.S. 98 (1997).
8. 528 U.S. 141 (2000).

highly doubtful that the Court will find that preemption in general somehow runs afoul of federalism limitations. Still, the kind of preemption that the Court applied in *Crosby* was of a very special, and arguably more problematic, kind. Rather than just enjoining the State of Massachusetts from adopting a regulation in a certain area, as would typically be the case when Congress preempts state law, the federal Burma sanctions law affirmatively required Massachusetts to purchase goods and services from companies doing business with Burma. Yet, while Congress imposed this requirement on the states, it did not impose a similar requirement on private participants in the marketplace. It might have been thought, therefore, that the federal sanctions law was not a law of general applicability as may arguably be required by the Court's recent federalism cases. Here, again, however, that proved not to be so, since the Court failed even to consider the point.

Finally, the Court's very narrow treatment of the *Barclays Bank*[9] decision from 1994, to which Professor Spiro referred, is especially significant. *Barclays* was a dormant foreign commerce clause not a dormant foreign affairs power case. Doctrinally, however, the two lines of authority are similar, and a number of revisionist scholars interpreted the Court's restrictive application of the one voice test in *Barclays* as virtually obliterating the dormant foreign affairs power doctrine of *Zschernig*. The *Crosby* Court's decision suggests that the revisionist view was, in this respect, little more than wishful thinking. The Court treated *Barclays* like a simple case of deference to a clear expression of congressional intent to allow states to regulate notwithstanding possible foreign affairs complications.

II.
THE CONTINUING VIABILITY OF DORMANT FOREIGN AFFAIRS PREEMPTION

What, then, are the implications of *Crosby* for the continuing viability of the dormant foreign affairs preemption doctrine? Of course, it is a bit like reading tea leaves to try to tease out the implications of a Supreme Court decision on one point for another issue in another case. Nevertheless, all of the various rulings, explicit and implicit, to which I have already referred seem to be at least strongly colored by the foreign affairs context in which the case arose and to indicate that the Court has no immediate intention of revisiting its traditional approach to foreign affairs cases. That may well extend even to its somewhat more marginal doctrines such as dormant foreign affairs preemption.

Professor Spiro seems to think that *Crosby* is just a garden-variety statutory preemption case, but I do not believe that description provides an accurate characterization of the decision. In the first place, the type of statutory preemption on which the Court relied is very similar to dormant preemption. *Crosby* was a case of implicit, not explicit statutory preemption. It fell within the conflicts branch of preemption doctrine, but it was not a case where it was impossible to

9. Barclays Bank Plc. v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994).

comply with both the federal and the state regulations, creating the kind of conflict that qualifies as garden-variety preemption. Rather, it fell within the so-called obstacle branch of conflict preemption, where the court will find a state statute preempted if it poses an undue obstacle to the full achievement of the aims and purposes of the federal legislation. It is widely recognized that this is the most attenuated form of preemption and that it requires the Court to make sensitive policy assessments of a kind that many have claimed are essentially legislative in character. In that sense, the same kind of separation of powers objections that apply to dormant preemption apply as well to this sort of obstacle-type preemption. My point is that the distinction between obstacle preemption as the Court applied it in *Crosby* and dormant powers preemption is vanishingly thin.

Furthermore, if one pays close attention to what the Court actually said in justifying its application of obstacle preemption in *Crosby*, there is even more reason to doubt that the Court is hostile to dormant foreign affairs preemption. Much of the Court's analysis would have been equally applicable even if there had been no federal Burma Sanctions Act in the first place. For example, as Professor Spiro brought out, one of the grounds that the Court cited as a basis for preemption was a provision in the federal Burma Sanctions Act which granted the President authority to waive application of the federal sanctions if he found that they would pose a threat to the national security. That is, in fact, a standard provision in virtually all sanctions laws, and the Court pointed out that there was no comparable power lodged in the President under the state law to waive the state sanctions in the event that the state sanctions proved to be a threat to the national security. The Court cited this as one of the principal grounds for preemption. Yet, it is not at all clear why the federal statute has any bearing on this particular reason for granting preemption. Irrespective of whether Congress had gotten around to passing the Burma Sanctions Act, the state sanctions might have posed a threat to the national security, and either way, the state law did not accord the President power to waive the state sanctions should such an eventuality arise. In other words, the state law posed the same potential threat to the national security irrespective of whether Congress passed a federal sanctions bill. Moreover, the passage of the federal sanctions law in no way suggested any greater congressional concern than would otherwise be the case about the possibility that such state laws might threaten the national security. Thus, if concern about the potential threat to the national security that the state law posed was a ground for preemption, it was so irrespective of whether Congress adopted a federal sanctions law. I do not doubt that having a statute to point to gave the Court some comfort, but nothing in its reasoning suggests that the statute really mattered.

Similarly, the Court relied heavily on a provision in the federal sanctions law which purported to direct the President to adopt a multilateral strategy for encouraging democratic change in Burma. Professor Spiro quoted from that part of the statute and also acknowledged that the Massachusetts law did complicate, and perhaps to some degree undermine, the President's diplomatic strategy vis à

vis Burma. Ordinarily, Congress does not have the power to tell the President how to carry out diplomatic discussions. If this provision of the sanctions law was intended to be more than purely hortatory, there is certainly a strong argument that it was unconstitutional as an invasion of the President's exclusive power as sole organ of the nation in its communications with foreign governments. In any case, it is not clear why the federal statute makes any difference to the preemption analysis. If the Massachusetts sanctions interfered with the President's ability to carry out a multilateral diplomatic strategy, the interference would have been the same whether or not Congress had given its support to the President's multilateral strategy or the President had developed that strategy solely on his own independent constitutional authority. Either way, the state law would have interfered with the recognized constitutional authority of the national government – whether belonging to Congress or the President or both – to develop a multilateral diplomatic strategy for encouraging democratic change in Burma.

I make these remarks to demonstrate that *Crosby*, although on its face a narrow decision based on statutory preemption, actually reflects a rather strong endorsement both of the Court's traditionally skeptical attitude towards the role of states in foreign affairs and of the kind of reasoning that undergirds the application of dormant foreign affairs preemption.

III.
In Defense of Dormant Foreign Affairs Preemption

Let me now turn briefly to providing a limited defense of dormant foreign affairs preemption as a normative matter. Of the various justifications for the dormant power doctrine in the area of foreign affairs—a number of which Professor Spiro has raised—I would emphasize three particularly salient considerations. First, the issues at stake in foreign affairs are often of great, sometimes momentous, importance, and this remains the case even after the end of the Cold War. Second, there is the very pervasive problem of externalities, to which Professor Spiro referred, and, third, there is the importance of unity in foreign negotiations. As to this last, in order for the United States to be able to advance its aims to the maximum extent possible, it is crucial that the federal government be able to negotiate on behalf of the whole country and to present its negotiating partners with a united home front. Independent state activities tend to undermine that capacity. Given the strength of these three considerations, therefore, it makes a great deal of sense to begin with a limited presumption in favor of preemption of potentially interfering state activities and to put the burden of congressional inertia on those states which wish to depart from the ordinary constitutional practice. This is especially the case given the longstanding constitutional tradition in which states have only an extremely limited role in foreign affairs and the federal government is understood as having a virtual monopoly.

I do not think Professor Spiro disagrees with any of this, although I think he would emphasize externalities to a greater extent than I would. Rather, he thinks that certain developments associated with globalization have made the

externalities problem disappear—in particular, the purported capacity of foreign nations to impose sanctions in a precisely targeted way that would affect only the state whose activities they are offended by, and not the rest of the nation. As long as the European countries can impose sanctions on Massachusetts that do not affect the rest of the country, he argues, then there are no externalities and the problem disappears. I think this is a very creative and provocative argument, but I also think that Professor Spiro may be moving too far too fast. Let me raise a few points to which Professor Spiro may wish to respond.

First, I am skeptical about the whole idea of targeted sanctions in this context. Given the highly interdependent character of the national economy, I wonder whether, and how often, sanctions can really be effectively targeted in the sense that he has in mind. Even if the European Union may sometimes be able to make its sanctions particularly painful for an offending state like Massachusetts, it is likely in the process to harm the interests of other states as well.

Second, the trend that he identifies is very preliminary and is based on only a small amount of anecdotal evidence. It is unclear whether this trend will really develop into a widespread international practice.

Third, the standard that he imposes on himself for when the externalities problem would disappear is too lenient. Even assuming that foreign nations are now capable of targeting sanctions in the way he suggests, the question is not whether international law *permits* them to target sanctions on subnational units, like the U.S. states, but whether it *requires* them so to target their sanctions. Otherwise the externalities problem still exists. I do not believe that there is any evidence that international law is moving in that direction, and there are powerful reasons to think that there is not, probably will not be, and perhaps should not be movement in that direction.

Finally, I am not sure that, even if all of the objections could be satisfied, the externalities problem would really disappear. The United States government will likely find itself under intense pressure to defend the interests of a state that is subjected to international coercion in an international dispute. Indeed, it is arguably a fundamental underlying premise of the national compact that the whole will come to the defense of the part in the event that the part is threatened from abroad. To the extent that observation is true, the externality problem remains.

Of course, there is much more to say about this interesting subject, but I believe that my time is now up. Thank you very much.