The Dangerous Expansion of Executive Treaty Power in *Alaska v. Kerry* and the MARPOL Convention

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I. Introduction

Recently, the U.S. District Court for the District of Alaska decided a relatively unknown case in which the state of Alaska challenged the implementation of new amendments to the International Convention for the Prevention of Pollution from Ships ("MARPOL").[1] The challenge was based on the structure of MARPOL and its implementing legislation in the United States, which allow for amendments to certain parts of the treaty to be implemented if they are first voted on by all member countries of the International Maritime Organization ("IMO"), and then acquiesced to by the U.S. Secretary of State.[2]

In 2008, the United States and Canada entered bilateral negotiations in order to create an Emissions Control Area ("ECA") around North America, which was

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1. Alaska v. Kerry, 972 F. Supp. 2d 1111 (D. Alaska 2013).
2. *Id.* at 1116-17.

then proposed to all member countries.[3] Once the parties to the MARPOL Convention had adopted the new ECA,[4] it officially became part of the Convention and former U.S. Secretary of State Hillary Clinton accepted the amendment to the Convention on behalf of the United States.[5] As such, according to the MARPOL Convention and its domestic implementing legislation, the Act to Prevent Pollution from Ships (or the "Act"), the United States became bound by the amendment.[6] Alaska challenged the amendment primarily on the basis that it had not been ratified constitutionally by the President with the advice and consent of the Senate, among other issues.[7] Ultimately, the court granted federal defendants' motion to dismiss, upholding the treaty amendment, the actions of the Secretary of State, the implementing legislation, and the restrictions on emissions for ships traveling in Alaskan waters.[8]

This note examines the various constitutional and international law implications of *Alaska v. Kerry* and argues that MARPOL's bifurcated method of completing treaties is dangerous and should be limited in use.

II. BACKGROUND OF MARPOL AND *ALASKA V. KERRY*

The International Convention for the Prevention of Pollution from ships was signed in 1973 and amended in 1978.[9] The Convention itself is broken down into six Annexes that establish the areas subject to regulation.[10] Each Annex entered into force between 1983 and 2005 defines what qualifies as pollution, where pollution may be discharged, and in what quantity or concentration pollution may be discharged.[11]

The Convention's various Annexes began to enter into force in 1983 when a sufficient number of countries had ratified the Convention.[12] Currently, 153 states have ratified at least one of the Annexes to the Convention, including the United States, and these states represent nearly all those that engage in commercial

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3. *Id.* at 1114.

4. There are currently 153 parties to at least one of the protocols of the MARPOL Convention. *Status of Conventions*, INT'L MAR. ORG., http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (follow "Summary of Status of Conventions" hyperlink; then use the Excel spreadsheet to locate the conventions of MARPOL) (last visited Feb. 25, 2015) [hereinafter *Status of Conventions*].

5. *See Kerry*, 972 F. Supp. 2d at 1117.

6. International Convention for the Prevention for Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407 [hereinafter MARPOL]; MARPOL Protocol, 33 U.S.C. §§ 1905-1919 (2008).

7. *See Kerry*, 972 F. Supp. 2d at 1118.

8. *Id.* at 1150.

9. *International Convention for the Prevention of Pollution from Ships (MARPOL)*, INT'L MAR. ORG., http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-%28MARPOL%29.aspx (last visited Feb. 25, 2015).

10. *Id.*

11. *Id.*

12. *Id.*

shipping throughout the world.[13] All ships that are flagged by a party to the Convention are required to adhere to the terms of the Convention, the 1978 Protocol, and any further amendments to the Convention.[14]

The Convention provides that any member may submit an amendment for vote by the IMO.[15] If two-thirds of the member parties present approve the amendment by vote, that amendment is sent to all members for their approval.[16] States can expressly accept or reject amendments or take no action.[17] Six months after approval by the IMO, the amendment will enter into force for all countries that have either expressly accepted the amendment or have taken no action unless that country has stated that it must affirmatively accept all amendments.[18]

In the United States, this treaty was not self-executing but was implemented through the Act to Prevent Pollution from Ships.[19] Section 1909 of that Act provided for how amendments to the various portions of the Convention are to be agreed to on behalf of the United States.[20] The law mandates that amendments to Article VI of the Protocol itself must be accepted by the President following the advice and consent of the Senate.[21] However, the Act further states that any amendments to Annexes I, II, V, or VI "*may* be the subject of appropriate action on behalf of the United States by the Secretary of State following consultation with the Secretary, or the Administrator."[22] Furthermore, amendments may be subject to "a declaration [by the Secretary of State] that the United States does not accept an amendment."[23] Notably, the Act does not state that affirmative acceptance was required in order for the United States to be bound by the proposed amendment.[24] The discretion given to the Secretary of State means that the United States can be viewed internationally as having accepted a proposed amendment to one of the Annexes absent any action by the United States. Since the implementing legislation gives the Secretary of State discretion—i.e., she *may* take an appropriate action or *may* declare that the United States rejects an amendment—the status of a proposed amendment to which the United States does not respond raises a concern. Under the regime of amendment acceptance, the United States is bound by an amendment to the MARPOL Convention when no member of the government takes affirmative action.

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13. *Status of Conventions*, *supra* note 4.
14. MARPOL, *supra* note 6.
15. *Id*., art. 16.
16. *Id.*
17. *Id.*
18. *Id.*
19. MARPOL Protocol, 33 U.S.C. §§ 1905-1919 (2008).
20. MARPOL Protocol, 33 U.S.C. § 1909 (2008).
21. *Id.*
22. *Id.* (emphasis added).
23. *Id.*
24. *See id.*

The dispute in *Alaska v. Kerry* began when the United States and Canada negotiated an amendment to Annex VI of the Convention to create an ECA limiting emissions of sulfur oxides in the coastal waters surrounding most of North America, including Alaska.[25] Congress implemented Annex VI in 2008, including the above language on amendments to that Annex.[26] In 2009, the United States and Canada jointly submitted a proposal to the IMO to create an ECA as agreed to in their bilateral negotiations.[27] Among other issues, the Environmental Protection Agency ("EPA") evaluated the proposal and scrutinized the necessity of creating an ECA, regional meteorological conditions, the risks to human populations due to pollution, and the costs of implementing the ECA.[28] The MARPOL Convention itself mandates this level of review before parties may establish ECAs.[29] In accordance with Article 16 of the MARPOL Convention, the amendment was approved by a two-thirds vote of the IMO in March 2010 and would become effective six months later for any country that either expressly approved the amendment or did not reject it. The United States did not reject the proposed creation of the North American ECA and, therefore, it entered into force on August 1, 2011.[30]

EPA and several other U.S. government agencies simultaneously implemented regulations similar to those provided for in the Convention and began enforcing those regulations.[31] Ultimately, the State of Alaska sued to invalidate the new North American ECA, the amendment to the Convention, the Act to Prevent Pollution from Ships, the EPA regulations, and the scope of the enforcement of the regulations in the ECA.[32] This paper will discuss the constitutional challenges to the power of the Secretary of State to accept or reject amendments to the MARPOL Convention—some of which were addressed by the court—as well as the policy concerns of treaty-making power.

III. HISTORY OF TREATY MAKING IN THE UNITED STATES

The Constitution of the United States provides that the President "shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[33] As United States law has developed over the past 200 years, there has been a differentiation between three types of international agreements: true Article II treaties, which are ratified by the

25. *See* Alaska v. Kerry, 972 F. Supp. 2d 1111, 1116 (D. Alaska 2013).
26. *See id.* at 1115.
27. *Id* at 1114.
28. *Id.* at 1114-16.
29. MARPOL, *supra* note 6, Annex VI.
30. *Kerry*, 972 F. Supp. 2d at 1117.
31. *Id.* at 1117-18.
32. *Id.* at 1118-19.
33. U.S. CONST. art. II, § 2, cl. 2.

President with the advice and consent of the Senate; congressional-executive agreements; and executive agreements.[34] While all three types of international agreements create identical international obligations under international law, the procedure under United States law and the limitations on power vary.[35] Executive agreements have increasingly become the primary way in which international agreements binding the United States have been formed due to the inherent difficulty of negotiating a treaty and then obtaining the consent of two thirds of the Senate.[36] Generally, these executive agreements must be based upon the inherent power of the President and the powers granted to him by the Constitution.[37] Many of these executive agreements concern routine matters in areas such as defense, including the regular negotiations of Status of Forces Agreements between the United States and its allies.[38] However, there are still Article II treaties, which must be negotiated and then amended with the advice and consent of the Senate,[39] and the treaty discussed in this note is one of those treaties.[40] Article II treaties tend to deal with topics outside of the President's inherent Constitutional authority as Commander-in-Chief and in situations where Congress has not provided the President the authorization necessary to enter into an executive agreement. MARPOL is an Article II treaty.

The issue that arose in *Alaska v. Kerry* is that an amendment to an Article II treaty was treated as an *ex ante* congressional-executive agreement.[41] In this type of agreement, Congress passes a law granting the executive the power to negotiate a treaty on a specific subject for a specific purpose.[42] Once that power has been granted to the executive, "Congress has little power to reject agreements currently negotiated in its name and faces significant impediments to reclaiming the power it once heedlessly abandoned."[43] In this case, Congress had no power whatsoever to reject a proposed amendment to an Article II treaty because the implementing legislation of the treaty fully ceded all responsibility to the Secretary of State.[44] This note will examine the constitutionality of that cession of power to the executive and conclude that it is an unconstitutional action that carries dangerous implications for the United States on an international scale.

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34. CONG. RESEARCH SERV.,TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 4-5 (2001).

35. *Id.*

36. *Id.* at 5.

37. *Id.* at 5.

38. *See id.*

39. *See* Alaska v. Kerry, 972 F. Supp. 2d 1111, 1111 (D. Alaska 2013).

40. *Id*.

41. *See id.* at 1136, 1141.

42. Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155 (2009).

43. *Id.*

44. *See* MARPOL Protocol, 33 U.S.C. § 1909 (2008).

IV. CONSTITUTIONAL ISSUES

As there is little doubt that the amendment Alaska challenged amended a formal treaty, which was ratified by the President with the advice and consent of the Senate, the amendment should also be subject to Senate approval according to Alaska's argument. A primary question before the court was whether the Act to Prevent Pollution from Ships was constitutional and allowed the Secretary of State to formally accept amendments to treaties.[45] The court considered these issues through three different lenses to determine whether the acceptance of the amendment and the implementing legislation violated (A) the non-delegation doctrine, or (B) separation of powers doctrine.[46] Ultimately, the court used (C) the political question doctrine in order to avoid additional deficiencies the State of Alaska alleged.[47] The court held that the Act and the amendment were constitutional and did not violate any constitutional principles.[48]

A. NON-DELEGATION DOCTRINE: DID CONGRESS DELEGATE TO AN INTERNATIONAL ORGANIZATION?

The State of Alaska argued before the court that the language of the Act to Prevent Pollution from Ships violated the non-delegation doctrine because the United States may become bound by an amendment to MARPOL even when no member or branch of the government takes affirmative action to become bound by an amendment to MARPOL. The state argued that the federal government had ceded legislative authority to the IMO since the United States would automatically be subject to an international obligation that was approved by two-thirds of the members of that Organization absent a rejection by the Secretary of State.[49] The court dismissed this argument with only cursory examination after concluding that the ability of the Secretary of State to either accept or reject the proposed amendments provided sufficient control by the executive branch over the laws and international obligations of the United States.[50] One of the reasons that the court rejected this argument was that laws have rarely been invalidated on this basis, and the viability of the doctrine itself has been questioned.[51] However, the court should not have been so quick to reject this argument due to the large delegation of authority, not merely to another branch of the federal government, but also to an international organization over which the United States has no control.

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45. *See Kerry*, 972 F. Supp. 2d at 1140.
46. *Id.* at 1119.
47. *Id.* at 1122.
48. *See id.* at 1150.
49. MARPOL, *supra* note 6, art. 16.
50. *Kerry*, 972 F. Supp. 2d at 1144-45.
51. Leslie Salt Co. v. United States, 55 F.3d 1388, 1398 n.3 (9th Cir. 1995).

The court's cursory analysis began with the presumption that federal statutes are valid and ended with the assessment that the delegation was not inappropriate. In doing so, the court discussed *Wileman Brothers & Elliot, Inc. v. Giannini*, which stated that failing to object to an action is not the same as an affirmative action to accept.[52] The court differentiated the present case based upon the scope of the government's ability to object and found *Wileman Brothers* inapposite. *Wileman Brothers* concerned the scope of liability for antitrust violations, but the reasoning employed by the Ninth Circuit applies directly to the way in which MARPOL amendments would enter into force absent an objection from the Secretary of State.[53] The court in *Wileman Brothers* rejected the argument that the Secretary of Agriculture had tacitly approved sub-committee regulations "by failing to disapprove them as provided for in the regulations governing the committees."[54] The court reasoned that the Secretary's alleged "process of non-disapproval" failed to evaluate the regulations, and that "[n]on-disapproval is equally consistent with lack of knowledge or neglect as it is with assent."[55] Although the statute in *Wileman Brothers* granted sub-committees the authority to make recommendations and not to promulgate regulations, the district court of Alaska should have followed the Ninth Circuit's reasoning on the procedural deficiencies of non-disapproval. While we would assume that non-disapproval by the Secretary of State to a MARPOL amendment would not be based on a "lack of knowledge or neglect," the Secretary's failure to object creates legally binding obligations upon the United States in an international context.[56] Given the ramifications of agreeing to international obligations, the decision should be subject to more scrutiny rather than an assumption that non-disapproval was actually an approval of the amendment itself.

Based on the different circumstances between the cases, and citing no independent authority for the court's own reasoning, the court held that the Act did not impermissibly delegate treaty making to the IMO and dismissed that portion of the complaint.[57] However, the court should have found that the Act to Prevent the Pollution from Ships allows the United States to be bound by treaty obligations without any affirmative acceptance by the United States, despite the nominal ability to object following the Ninth Circuit's reasoning in *Wileman*. Therefore, the court should have held that the delegation provision of the Act to Prevent Pollution from Ships was unconstitutional because Congress delegated the United States' Treaty Power to the IMO.

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52. *See* Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 337 (9th Cir. 1990).
53. *See id.*
54. *Id.*
55. *Id.* at 338.
56. MARPOL, *supra* note 6, art. 16.
57. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1144-45 (D. Alaska 2013).

B. SEPARATION OF POWERS: DID CONGRESS DELEGATE TO THE EXECUTIVE BRANCH?

Even if the court was correct in holding that the control exerted by the Secretary of State is sufficient to prevent the IMO from making United States law, that control was impermissibly delegated to the Secretary by Congress. Here, control constitutes the power to provide advice and consent on proposed treaties, a power granted to the Senate by Article II of the Constitution.[58] In a single legislative act, Congress permanently precluded the Senate from considering any future proposed amendments to four separate Annexes to the MARPOL Convention.[59] From a strictly textual perspective, there does not appear to be any constitutional foundation for Congress delegating any of its powers to the executive branch. Although the Constitution assigns Congress the responsibility to provide advice and consent for treaties, in light of the complexity of government and the rise of the administrative state since the founding of the country, Congress may be allowed to delegate some of their powers in order for the government to function efficiently.[60] Nonetheless, there are limits on when power granted to Congress may be delegated, to whom, and with what guidelines attached.[61] The Supreme Court has held that delegations of power from Congress are permitted as long there is a limiting principle in terms of what the person to whom the power is delegated may do with that power and as long as there are principles to guide that person in the exercise of the delegated power.[62] In the administrative law context, a delegation of Congressional authority to an administrative agency has also been evaluated in terms of whether the power being delegated is legislative in nature (i.e., making the law itself, which is impermissible) or executive in nature (enforcing the law and principles articulated by Congress, which is permissible).[63]

In determining that the delegation of authority to the Secretary of State did not violate the Constitution, the district court erroneously concluded that there are sufficient limitations on the power of the Secretary for the delegation to be constitutional.[64] When it did so, the court contradicted earlier statements in the opinion. When using the political question doctrine to avoid some issues in the case, the court had found that the Act to Prevent Pollution from Ships lacked any "'judicially manageable or discoverable standards' by which the Court could evaluate the Secretary of State's decision."[65] However, in evaluating the delegation of authority to the Secretary of State, the court found that the limitations on

58. U.S. CONST. art. II, § 2, cl. 2.
59. MARPOL Protocol, 33 U.S.C. § 1909 (2008).
60. *See* Yakus v. United States, 321 U.S. 414, 425 (1944).
61. *Id.*
62. *Id.* at 426.
63. *See, e.g.,* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).
64. Alaska v. Kerry, 972 F. Supp. 2d 1111, 1146 (D. Alaska 2013).
65. *Id.* at 1126.

which Annexes may be amended at the discretion of the Secretary were sufficient to allow that delegation to be constitutional.[66] The Supreme Court has found that for a delegation to the executive to be valid, there must be an intelligible principle to guide the decision maker in exercising that authority. [67] However, despite finding that there were no "judicially manageable or discoverable standards" to guide the Secretary, the court erroneously found "intelligible principle and boundaries limiting the Secretary of State's discretion" to hold the delegation of authority constitutional.[68]

The court contradicted itself from earlier in the opinion when it justified making amendments to treaties in the manner provided for in the Act to Prevent the Pollution from Ships. In finding that the authority granted to the Secretary was narrow enough to be permissible, the court noted that the Secretary may only approve amendments that have been completed in accordance with Appendix III of the MARPOL Convention and approved by two-thirds of the IMO.[69] The court had already concluded that the Secretary of State's ability to act was a sufficient restraint on the IMO's ability to make substantive U.S. law but then found that the Secretary was constrained by only being allowed to act upon recommendations of the same international body. While this analysis nicely fits into the American concept of checks and balances, the parties that constrain each other's power are an international organization, over which the United States has no control over, and a member of the United States government, to whom the Constitution did not grant the Treaty Power.

The court also tried to justify yielding the power to accept treaty amendments to the executive branch based upon the concept that foreign affairs have traditionally been within the realm of the executive branch. While this is true ("Presidential action in the field of foreign affairs is committed to presidential discretion by law"),[70] this does not justify delegating the acceptance of amendments to a treaty to the executive branch because the Constitution constrains the role of the executive in international affairs. The discretion of the President is bounded by the requirement that treaties be made with the advice and consent of the Senate, enshrined in Article II of the Constitution. The court, in holding the delegation to be constitutional, relied on a Supreme Court case stating that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion."[71] The President must have discretion when using "negotiation and

66. *Id.* at 1146.

67. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). This case and its progeny concern delegations to agencies, but the court in this case chose to evaluate the decision of the Secretary of State under an administrative law context as a discretionary action.

68. *Kerry*, 972 F. Supp. 2d at 1146.

69. *Id.* at 1146.

70. Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975).

71. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

inquiry" internationally, but that discretion does not extend to amending treaties unilaterally, when a treaty clearly falls within the scope of international agreements that must be agreed to with the advice and consent of the Senate. Since the Secretary of State's exercise of this discretion violates separation of powers, the court should have struck down as unconstitutional the portion of the Act to Prevent Pollution from Ships allowing the Secretary to approve amendments to the treaty.

Lastly, the court tried to avoid invalidation of the Act by stating that there was not really a delegation but rather *ex ante* advice and consent to proposed amendments, enshrined when Congress passed the Act in 2008 and authorized the Secretary to take such actions.[72] However, there is a historical difference between an *ex ante* approval to negotiate a treaty and what is at issue in this case. The court, using this argument, merely found another way of framing the issue of whether the guidance to the Secretary is sufficiently narrow to avoid a constitutional problem. Congress impermissibly yielded all future power of all future Senates to provide advice and consent on four distinct categories of environmental regulations dealing with ships. This grant of authority to the executive branch is too broad because it does not provide guidance as to what treaty amendments may be negotiated and agreed to, as Congress must do to avoid an impermissibly vague delegation of power. This problem has been noted by several scholars, including one that states "many of the grants of authority [have become] increasingly vague and open-ended."[73] Broad delegations have been justified by stating that theoretically Congress has the power to revoke these grants of authority but, "[i]n practice . . . the authority to make such international agreements has proven to be nearly impossible to revoke once granted—not least because any effort to revoke or even amend a delegation can be vetoed by the President."[74] Historically, grants of *ex ante* approval allowed the executive to make specific bilateral trade agreements with a designated country.[75] However, the grant of authority in the Act goes far beyond previous grants of authority, providing little guidance to the Secretary on what amendments to the Convention would be proper. As such, the Act is an unchecked delegation of power to the executive branch in spite of the Constitution granting the advice and consent power to the Senate, and the court should have invalidated the portion of the Act allowing a truncated process for amending the protocol.

The court held that the actions of the Secretary and the EPA were permissible due to the *ex-ante* authorization by Congress through the implementing legislation

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72. *Kerry*, 972 F. Supp. 2d at 1141-42.

73. Hathaway, *supra* note 42, at 145; *see also* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L. L. 501 (2004).

74. *Id.* at 145.

75. Brewster, *supra* note 73, at 544; Hathaway, *supra* note 42, at 143.

of the Act to Prevent Pollution from Ships.[76] That argument is faulty because the supposed authorization ceded too much Senate power to a member of the executive branch with no guiding principles for the Secretary of State to follow in accepting or rejecting amendments to the MARPOL Convention. As such, the court should have held that the Secretary and the EPA unilaterally converted an international obligation into domestic law without the participation of the legislature and that such an action was unconstitutional.

C. POLITICAL QUESTION DOCTRINE

The district court used the political question doctrine to avoid the issue of whether the actions of the Secretary of State, in not rejecting the amendment, violated the Administrative Procedure Act by finding that three of the six *Baker* factors were satisfied to invoke that doctrine and dismiss the cause of action for a lack of justiciability.[77] The court found that there was "a lack of judicially discoverable and manageable standards for resolving [the case]," that it would be impossible for "a court [to] undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government," and that there was "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[78] The political question doctrine is designed to prevent courts from second-guessing the political branches on contentious issues.[79] However, when the Secretary of State chose to not act on a significant new environmental regulation and allow the United States to become bound by international law voted on by the IMO, the court should have addressed the question of whether the Secretary's failure to act was "arbitrary and capricious."[80]

The court should have looked to the jurisprudence of the Ninth Circuit and sections of the Supreme Court's opinion in *Baker* that make it clear that when a portion of the government steps outside of the statutory authority granted to the agency by Congress, then the court should attempt to resolve the issue.[81] This is especially important when the government has not only ventured beyond statutory authority, but when the department at issue has exceeded its constitutional authority and essentially usurped some of the power and responsibilities of another branch of the government. Courts have traditionally used the political

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76. *Kerry*, 972 F. Supp. 2d at 1141-42.

77. *Id.* at 1123-31 (citing Baker v. Carr, 369 U.S. 186 (1962)).

78. *Id.* at 1122-23.

79. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 248 (2002).

80. *See* Administrative Procedure Act, 5 U.S.C. § 706 (2012).

81. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."); Hopson v. Kreps, 622 F.2d 1375, 1379 (9th Cir. 1980) (finding justiciability concerning questions over the authority of the Executive to act as it had despite the political question doctrine).

question doctrine to avoid treading on areas where the Constitution has granted authority to the executive branch in order to avoid invalidating a decision made based on international relations.[82] While the MARPOL case implicates international relations, there would be no separation of powers violation if the court acted since the court would not be treading upon the constitutionally granted power of the executive branch but rather returning the constitutionally granted power of the Senate to that body.

All of the district court's conclusions regarding the political question doctrine are based on the fact that Congress has ceded the power of the Senate to review treaties to the executive branch. As such, the court concludes that there is no standard to review the Secretary of State's discretion and no way to do so without expressing a lack of respect for the political branches. However, as has already been argued, that grant of power was unconstitutional in the first place and should not be used later to justify a failure to adequately review the actions of the Secretary of State.

Lastly, the district court used the political question doctrine to avoid the embarrassment of contradictory pronouncements from different branches of the government.[83] While this one instance might contradict the other branches, a decision by the court would prevent embarrassment from conflict between the branches on an international scale. The treaty amendment procedure here creates the possibility of open conflict between the legislative and executive branches. If the court were to allow this type of amendment ratification to stand, the possibility of domestic law being used to directly undermine international treaty obligations through legislation in violation of the Convention has much greater potential for embarrassment at a later time than a pronouncement by the court now.

V. POLICY CONCERNS

Merely pointing out that this type of treaty making, which completely bypasses the Senate and relieves that body of its constitutional responsibilities, is unconstitutional does not fully address the perils that unbridled executive power poses. If Congress has the ability to remove itself from the treaty process, a series of questions arise that have implications for (A) the quality of treaty making; (B) conflicting responsibilities between domestic and international law; and how far improper delegation of power can be extended to other areas of treaty matters, considering (C) the Biden condition, and (D) other limitations.

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82. Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 77 (2006).
83. *Kerry*, 972 F. Supp. 2d at 1129.

A. DETERIORATING TREATY QUALITY

One of the foundations of our form of constitutional government is the separation of powers. Separation of powers is based on the idea that government is less likely to abuse its power when branches are independent and check the powers of other branches. However, in the case of the MARPOL protocol, the Senate has yielded complete power over making international agreements to the Secretary of State. Absent any requirement that the executive branch obtain political support for negotiated treaties through the ratification process, the democratic influence of treaties negotiated on behalf of the United States will be harmed.[84] Concessions that might not otherwise be made during negotiations due to a lack of political support in Congress might be agreed to by negotiators.[85] While such over-expenditure is not necessarily a consideration in this particular treaty, it may result in dangerous consequences if amendments could be made to other types of agreements, such as arms treaties, which require significant concessions from all parties in order for an agreement to be reached. "If the executive branch is free to negotiate the best arrangement it can, it may be unable to make any position stick and may end by conceding controversial points because its partners know, or believe obstinately, that the United States would rather concede than terminate the negotiations."[86] Allowing agreements to be made without any political support from the Senate sets a dangerous precedent for treaty making in other substantive issue areas.

B. CONFLICTING DOMESTIC AND INTERNATIONAL OBLIGATIONS

A larger issue that arises from allowing treaties to bypass Congressional approval is that domestic law may conflict with international obligations. In the case at issue, Congress underwent a dramatic shift in party makeup and political views between 2010, when the amendment went into effect, and the time of this case's adjudication in district court. Congress, which had not consented to the new ECA and the regulations that would be enforced in that ECA, could have chosen to pass lighter restrictions and then hold American vessels to those lighter standards. Such an action on the part of Congress would have created conflicting obligations in the domestic and international arenas.[87] Vessels flagged in the

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84. Hathaway, *supra* note 42, at 146-47.

85. *Id.* at 233-34.

86. *Id.* (citing THOMAS SCHELLING, THE STRATEGY OF CONFLICT 28 (1980)).

87. *See* Jennifer R. White, *IEEPA's Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organizations?*, 104 MICH. L. REV. 2019, 2036 (2006). While this note deals specifically with an environmental treaty, the lack of a limiting principle in the argument before the court in *Alaska v. Kerry* could lead to a similar scenario in other treaty areas where the United States plays a vital role, including human rights treaties.

United States and operating primarily within the waters of the United States would be fully in compliance with domestic law and presumably outside the realm of prosecution. At the same time, the United States would fail to fulfill treaty obligations that had been negotiated and agreed to by the Secretary of State without congressional approval. The shift in political views in Congress would not even be a necessary prerequisite for this type of conflict to occur. Passage of time is the only necessary condition.[88] In the future, the Secretary of State will still be free to negotiate and acquiesce to amendments to the MARPOL protocol that could be distinctly out of favor with the legislative branch at the time and the legislature could subsequently act to undermine the intentions of the executive branch.

If this conflict between international and domestic law begins to become a regular occurrence as administrations take advantage of this new aspect of making treaties, the international interests of the United States will be damaged as other countries and international organizations question whether the United States will fulfill obligations under negotiated treaties.[89] This concern will limit the willingness of other countries to enter into negotiations in good faith and will in turn force other countries to demand more concessions from the United States as a guarantee against the possibility of the United States defaulting on its treaty obligations.

C. THE BIDEN CONDITION

Another policy concern is the amount of discretion that is given to the Secretary to interpret the spirit of MARPOL and approve amendments. This worry is somewhat limited by the Biden Condition, which arose in the context of America's obligations under the Anti-Ballistic Missile Treaty after President Reagan announced his "Star Wars" initiative for a ballistic missile defense system.[90] The treaty forbade building ballistic missile defense systems, and that is how the executive had interpreted the treaty since its ratification in 1972.[91] However, in 1985, the Reagan administration determined that the understanding of the Senate at the time of ratification was that the treaty did not permanently ban the development of a ballistic missile defense system and that the United States was not in violation of its commitments under the treaty by building the new system.[92] A battle in Congress ensued and the Intermediate-Range Nuclear Forces Treaty ultimately included the Biden Condition.[93] The condition dictated

88. *See id.*
89. *See id.* at 2053-54.
90. *See* Joseph R. Biden Jr. & John B. Ritch III, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV. 1529 (1989).
91. *Id.* at 1531.
92. *Id.*
93. *Id.* at 1551.

that interpretations of treaties must be performed in accordance with the shared understanding of the Senate and the President at the time of ratification as codified by "the text of the treaty itself, as elaborated by the Executive's formal representations to the Senate in seeking consent to ratification," and that the executive may not unilaterally create a new interpretation of the treaty.[94]

The inclusion of this Condition and its application to all treaties of the United States does constrain what the Secretary can do within her authority under the Act and the MARPOL Convention itself. This constraint could lessen the types of amendments that can be acquiesced to by the Secretary, but it is the only limiting principle that guides her. Moreover, the Biden principle is only a limit on unilaterally changing the interpretation of a treaty by the executive; it is not a limit upon the power of the executive to unilaterally change the treaty.

D. OTHER LIMITATIONS

The last important question that comes out of the court's decision in *Alaska v. Kerry* concerns how far the limits of the rationale presented by the judge can be extended. The court acknowledged the absence of any standard provided by Congress to guide the Secretary of State's actions in negotiating amendments to the treaty, but the court deemed that limiting amendments to four enumerated Annexes provided sufficient limitations for the delegation to be constitutional.[95] But how far does this extend? It is unclear if Congress would be able to pass implementing legislation on a treaty and then specify that all future amendments that relate to the treaty and further its goals may be accepted or rejected by the Secretary of State. The court's reasoning provides no limiting principle for how far Congress may remove itself from the process of making treaties and accepting amendments to legitimate Article II treaties. Theoretically, under the same reasoning that the court used to justify the Act to Prevent Pollution from Ships, Congress could completely grant the power to accept amendments to any executive official on the basis that the Senate had consented *ex ante* and that the President must be granted discretion to conduct the international affairs of the country.

The court also provided no limiting principle for the subjects of international law and the treaty obligations that can be handed over to the executive branch. Is this new method of treaty making limited to environmental treaties, or could Congress provide that any future amendments to the Geneva Conventions are issues on which the Secretary of State may take appropriate action? Would such amendments become binding on the United States if the Secretary did not object after an international body approved such an amendment? Absent any limiting

94. *Id.* at 1544.
95. Alaska v. Kerry, 972 F. Supp. 2d 1111 (D. Alaska 2013).

principles in the opinion of the district court and absent any appeal to the Ninth Circuit or Supreme Court, the district court's reasoning can be extended to cover nearly any treaty subject and nearly any amendments, provided Congress passes implementing legislation.[96]

This sets a dangerous precedent for the future of treaties in the United States, as any Congress can pass implementing legislation for a treaty on any subject, even those that are not traditionally part of the President's inherent powers, and thus fully cede responsibility for those subject matters to the executive branch or any member of that branch. This allows the executive to go far beyond "faithfully executing" the laws and clearly into the realm of unilaterally creating law in subject matters not granted to the executive by the Constitution. While this has arguably occurred before in the realm of congressional-executive agreements, the broad grant of authority to unilaterally amend treaties dramatically extends the ability of the President to create international obligations and require compliance by United States citizens without any check by the Senate.

Admittedly, there are many treaties that require minor changes over time and that should not be submitted for the consideration of the Senate, and there are scientific matters that should be left to the discretion of experts once guidelines have been established in the initial advice and consent provided by the Senate. However, the reasoning used by the representatives of the federal government and embraced by the district court shows little that limits future delegations of Congressional power. Where to draw the limit may be difficult, but choosing not to set a limit establishes a far more dangerous precedent.

VI. CONCLUSION

The district court erred in holding that the Act to Prevent Pollution from Ships was constitutional in providing a method to accept treaty amendments without the advice and consent of the Senate. This method of making and accepting treaties, which binds the United States to an international obligation based upon the vote of the IMO and a lack of action by any member of the United States government, sets a dangerous precedent and should not have been allowed. Accepting this method of treaty making risks creating dangerous conflicts between domestic and international law, has no limiting principle, and will likely lead to less advantageous treaties by the United States. Although it has been permitted, this method of treaty making should be used sparingly and only on matters that are unlikely to cause great political divides. Ideally, this version of creating treaties and accepting amendments to established treaties would be limited to those areas which have either been

96. This case was not appealed, likely because EPA regulations were upheld without dispute as proper agency regulations and would be unaffected by a reversal of the constitutional decisions on appeal.

traditionally within the realm of responsibility of the President, those explicitly granted to the executive branch by the Constitution, or those of minor adjustments to existing treaty obligations. Short of those limitations, which the district court chose not to include in the present case, Congress must exercise caution in the future before providing any broad grant of executive power in the implementing legislation of treaties that have been properly made according to Article II of the Constitution.