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Chapter 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Treaties and Agreements as part of Twenty-first Century International Lawmaking

On October 17, 2012, U.S. State Department Legal Adviser Harold H. Koh delivered the 33rd Thomas F. Ryan Lecture at Georgetown University Law Center in Washington, D.C. on the subject of “Twenty-First Century International Lawmaking.” The excerpt of his remarks that follows discusses the support of the Obama administration for ratification of several treaties, including New START, the Law of the Sea Convention, the Disabilities Convention, and two key nuclear security treaties. The excerpt also includes Mr. Koh’s discussion of the form that international agreements may take under U.S. law, including congressional-executive agreements and sole executive agreements. The entirety of Mr. Koh’s address is available at http://www.state.gov/s/l/releases/remarks/199319.htm.

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Let me start with treaties. Even in this age of legislative near-deadlock, treaties—in the constitutional, Senate “advice and consent” sense—remain an integral part of our international lawmaking practice. Article II of the Constitution gives the President the power to “make treaties,” subject to the advice and consent of two-thirds of the Senate, and the Supremacy Clause, Article VI, makes those treaties “the supreme law of the land.”

But in modern times, Article II treaties have never been the only option. The long-dominant view in the Academy—articulated by my late Yale colleague Myres McDougal and Asher Lans in the Yale Law Journal as far back as 1945—has been that treaties and congressional-executive agreements are in fact interchangeable, legally available options for binding the United States in its international relations. At the same time, a governmental practice has arisen of doing certain types of agreements by treaty: for example, extradition, human rights, membership in international organizations, and arms control matters. Other forms of international lawmaking have traditionally been done by congressional-executive agreement. For example, free-trade agreements have traditionally been entered into with the ex post approval of Congress expressed through subsequent legislation.

I am sometimes asked, why don’t we just ratify a particular convention by congressional-executive agreement, rather than Article II Treaty? If it is so hard to get 67 votes for a treaty, why don’t we just accede to it by statute? The short answer, which you will understand sitting here less than a mile from the Capitol, is that a particular non-treaty route might be legally
available to the Executive for entering into certain kinds of international agreements, but may not be politically advisable as a matter of comity to Congress. Congress has its own strong views on how certain types of agreements should be entered into and will fight for those outcomes as a matter of institutional and political prerogative. That does not mean that the Executive’s hands are tied in any given case. But what it does mean is that a key part of being an Executive Branch lawyer is accurately forecasting to your clients when choosing a particular legal route—even if lawful—may foster bitter political conflict and invite unnecessary trouble.

Every time we enter into an international agreement, we also send the world a message. Securing a 67-vote Senate supermajority for a treaty is particularly hard work, and requires a very high degree of bipartisanship. In any given case, concluding a treaty with the requisite two-thirds support sends a powerful political message about how united our nation is behind a particular international obligation. And so, for all their difficulties, Article II treaties remain a critically important focus of our international lawmaking practice.

Take the New START treaty, which passed the Senate in 2010 by a hard-won vote of 71-26. Under New START, the United States and Russia agreed to limits on the number of deployed warheads and nuclear weapon delivery vehicles, as well as complicated verification procedures. Lawyers in my office played a key role in this massive effort—advising policymakers, working on language at the negotiating table, and working with the Senate every step of the way to ensure ratification. Why was New START so important? Because that treaty allowed us to resume on-site inspections of Russian facilities, a right that had expired along with the previous START treaty. Restoring this “trust but verify” regime was critical to a genuine system of arms control, which is why President Obama called ratifying the New START treaty a “national security imperative.”

Currently before the Senate, as you probably know, are two more treaties that the Obama Administration is strongly supporting. The first is the 1982 Law of the Sea Convention, which Secretary Clinton testified in support of in May of this year. Although that treaty has long enjoyed substantial bipartisan support, and was also pushed by our predecessors in the Bush Administration, some critics have alleged that joining it would sacrifice our national sovereignty. But nothing could be further from the truth. In fact, the opposite is true: joining the Convention would enhance our sovereignty. It would secure for the United States sovereign rights over vast new areas and resources, including vast continental shelf areas extending off our coasts and into the Arctic, at least 600 miles off Alaska. It would give U.S. companies the legal certainty they need to make expensive investments and create American jobs. It would enhance our national security by guaranteeing our military the freedom of navigation principles enshrined in the Convention. And it would amplify our voice when we use the Law of the Sea platform to speak about the numerous maritime issues that implicate our national interests, such as the ongoing tensions in the South China Sea. For these reasons, we continue to be hopeful that the Senate will soon act on these interests and give advice and consent to the Law of the Sea Convention.

Second, we also are urging the Senate to give its advice and consent to the Disabilities Convention, the Convention on the Rights of Persons with Disabilities. Here in the United States, we have a long history of bipartisan leadership on domestic disability legislation—including the Americans with Disabilities Act (ADA), legislation that is not only the gold standard worldwide but served as the model for this very Convention. At its heart, the Convention promotes a core principle of our Constitution: nondiscrimination. It seeks to ensure that all persons with disabilities would be able to enjoy the same rights as non-disabled persons, on an equal basis with them. My office, with substantial input from the Department of Justice and other key
agencies, prepared the article-by-article analysis and proposed reservations, understandings, and declaration in the transmittal package for this treaty, and has actively assisted the ratification efforts. This past July 26th, the 22nd Anniversary of the Americans with Disabilities Act, the Senate Foreign Relations Committee sent the treaty to the Senate floor with bipartisan support. Again, we hope to see the full Senate give its advice and consent soon.

Finally, despite having completed in 2008 the advice and consent phase of treaty accession, this Administration is seeking Congressional action to complete our ratification of two key nuclear security treaties designed to strengthen our legal basis for securing nuclear materials and preventing nuclear terrorism: the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material, and the International Convention for the Suppression of Acts of Nuclear Terrorism. These treaties require updates to the United States criminal code, for which the Administration presented draft legislation in 2010 and again last year. The House passed a version of this bill this summer, and we await Senate action that would permit us finally to deposit our instruments of ratification.

Now just a few generations ago, what you just heard me say would have been both the beginning and the end of a speech on international lawmaking: the Constitution specifies treaties as the constitutionally enumerated mechanism for entering international agreements, and that’s that. Indeed, scholars such as my friend and former Obama Administration colleague Larry Tribe made such an argument in the 1990s, when he called unconstitutional the mechanism by which the Clinton Administration joined NAFTA—by an Act of Congress, or as a congressional-executive agreement. But the overwhelming consensus in the legal academy rejected that view and approved of the way our constitutional practice has developed to permit binding agreements entered into by the Executive and approved by majorities of both houses of Congress.

The constitutionality of these congressional-executive agreements is now well-settled, particularly where Congress is exercising its foreign commerce power. Indeed, the United States used a congressional-executive agreement as the procedure to conclude the 1945 Bretton Woods Agreement, which did nothing short of establishing the post-war global economic order. Since that time the same type of legislative instrument has been used to join NAFTA and the Agreement Establishing the World Trade Organization. And during this Administration, Congress has now approved three new free trade agreements—with the Republic of Korea, Colombia, and Panama. Because the process for domestic approval of such agreements not only eliminates the need for a 67-vote supermajority, but also includes the House, it allows implementing legislation to become part of the international lawmaking process.

What is also well-settled, with Supreme Court case law to prove it, is that there is a category of cases where the President can enter a binding international agreement based on his own independent, Article II authorities, without action from Congress. This was the holding of the famous Belmont and Pink cases where President Franklin Roosevelt, as part of his recognition of the Soviet Union, agreed to settle certain interstate claims. The Court recognized not only that the President had authority to enter into the Agreement on his own authority as President, but also found, under the Supremacy Clause, that that agreement prevailed over any contrary state law.

None of this is news—you can learn it all from reading Lou Henkin’s Foreign Affairs and the Constitution or the ALI’s Restatement (Third) of Foreign Relations Law. But when you dig into the details, the clarity starts to fade. Academics like to put things in boxes, and tend to treat this area of law as divided into three. You have your treaty box. You have your congressional-executive agreement box, which is subdivided into “ex ante” agreements, where
Congress first authorizes the agreement by statute, and the Executive then negotiates and concludes it; and “ex post” agreements, where the Executive first negotiates an agreement and then brings it to Congress for subsequent approval. Third, you have your “sole executive agreement” box, covering those areas where the President makes international law based on his independent constitutional authority.

But in the real world, this tidy framework grossly over-simplifies reality. There are a wealth of international agreements that are consistent with, and can be implemented under, existing law, but that do not fall neatly into any of these boxes. Many of these agreements may not even be intended to affect legal interests at the domestic level (e.g., by being judicially enforceable like in the Pink and Belmont cases). For example, recently, we in the Legal Adviser’s Office were surprised to find controversy surrounding the Executive’s authority to enter into the Anti-Counterfeiting Trade Agreement, or ACTA, a multilateral agreement on enforcing intellectual property rights. Certainly, some of that controversy may have derived from policy disagreements with the goals of the ACTA, but a surprisingly large number of law professors questioned the Executive’s legal authority even to enter the agreement. They said, “I don’t see an express ex ante congressional authorization, so it can’t fit into the congressional-executive agreement box, nor does this look like a traditional topic for a sole executive agreement. Since it falls between the stools, that must mean the U.S. lacks any authority to enter the agreement!”

But authority in this area sits not on isolated stools, but rather runs in a spectrum. Why was entering the agreement a legally available option? First, while Congress did not expressly pre-authorize this particular agreement, it did pass legislation calling on the Executive to “work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.” Further, we and USTR determined that the agreement negotiated fit within the fabric of existing law; it was fully consistent with existing law and did not require any further legislation to implement. We also surveyed how the political branches have dealt with similar agreements in the past, and found that Congress’ call for executive action to protect intellectual property rights arose against the background of a long series of agreements on the specific question of intellectual property protection done in a similar fashion. What we saw in practice resembles a phenomenon I called in my book The National Security Constitution “quasi-constitutional custom,” a widespread and consistent practice of executive branch activity that Congress, by its conduct, has essentially accepted. In this respect, the ACTA resembled the Algiers Accords that ended the Iranian Hostages crisis, whose constitutionality was broadly upheld by the Supreme Court 31 years ago in Dames & Moore v. Regan. There, the Supreme Court upheld the Algiers Accords by relying not on any particular express ex ante congressional authorization, but rather, on “closely related” legislation enacted in the same area and a long history of Executive Branch practice of concluding claims settlement agreements. Although the Algiers Accords, like ACTA, did not fall neatly into any of these three “boxes”, the Supreme Court in Dames & Moore easily upheld the constitutionality of the Algiers Accords and found a “legislative intent to accord the President broad discretion” and, citing the Steel Seizure Case, noted that such legislation “may be considered to invite ‘measures on independent presidential responsibility.’”

* * * * *

2. The Anti-Counterfeiting Trade Agreement
As Mr. Koh mentioned in the remarks excerpted above, the Obama administration continued to face concerns in 2012 about the United States joining the Anti-Counterfeiting Trade Agreement ("ACTA"). For more information and the text of the agreement, see www.ustr.gov/acta. In an exchange of letters in 2012 with U.S. Senator Ron Wyden, Mr. Koh explained the constitutionality of the United States entering into ACTA without further Congressional action. Mr. Koh’s March 6, 2012 letter is set forth below. Both Senator Wyden’s letter to Mr. Koh and Mr. Koh’s response are available at www.state.gov/s/l/c8183.htm. See Digest 2011 at 109-10 for the exchange of letters between Senator Wyden and U.S. Trade Representative Ron Kirk regarding the same issue.

* * * *

Thank you for your letter, dated January 5, 2012, regarding the Anti-Counterfeiting Trade Agreement (ACTA). As Ambassador Kirk has stated, the ACTA represents a crucial advance in the international fight against counterfeiting and piracy. It will support and promote American jobs in our innovative and creative industries by helping to protect them against the global proliferation of intellectual property theft in a manner fully consistent with the principles of freedom of expression and access to information in the digital environment. I welcome the opportunity to respond to your further questions regarding the Agreement.

Under international law, the ACTA is a legally binding international agreement. By its terms, the ACTA enters into force when at least six parties have deposited instruments indicating their consent to be bound. Accordingly, once in force for the United States, the ACTA will impose obligations on the United States that are governed by international law. As in the case of other international agreements, it is possible that Congress could enact subsequent changes in U.S. law that are inconsistent with U.S. international obligations. If Congress were to enact a law that put the United States in breach of its ACTA obligations, the United States could, of course, seek to convince the other parties that the ACTA should be amended to make it consistent with the change in U.S. law. Alternatively, the United States could withdraw from the ACTA, in accordance with its provisions. Obviously, this answer is a general one: the precise ramifications of any subsequent legislation would depend on a careful analysis of that legislation, related laws, and the ACTA provisions implicated.

I share Ambassador Kirk’s view that the Administration is currently in a position to accept the ACTA for the United States. As reflected in his letter, the United States would be relying on existing U.S. intellectual property law for implementation of the ACTA, including the Copyright Act of 1976, the Lanham Act, the Digital Millennium Copyright Act, and other statutes. Pursuant to these laws, the United States would be in a position to fulfill all of the obligations that it would undertake as a party to the ACTA, such as providing civil remedies, border enforcement mechanisms, and criminal penalties for certain intellectual property offenses. The ACTA was negotiated in response to express Congressional calls for international cooperation to enhance enforcement of intellectual property rights. Congress has passed legislation explicitly calling for the Executive Branch to work with other countries to enhance enforcement of intellectual property rights. For example, the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, codified at 15 U.S.C. 8113(a), calls for the Executive Branch to develop and implement a plan aimed at “eliminating ... international counterfeiting and infringement networks” and to “work[] with other countries to
establish international standards and policies for the effective protection and enforcement of intellectual property rights.” The ACTA helps to answer that legislative call. As also pointed out by Ambassador Kirk, the ACTA is part of a long line of trade agreements that were similarly concluded by successive Administrations.

I hope you find this response helpful, and I thank you for your continued interest in the ACTA.

* * * *


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The United States Mission to the United Nations presents its compliments to the United Nations and refers to the Secretary-General’s note C.N.829.2011.TREATIES-28 (Depositary Notification), dated January 10, 2012, which communicated that the Secretary-General had received from the Plurinational State of Bolivia an instrument of accession to the Single Convention on Narcotic Drugs, 1961, as amended (the Convention), with a proposed reservation submitted in accordance with Article 50, paragraph 3 of the Convention.

The Mission informs the United Nations that the United States objects to the proposed reservation. The United States considers the Convention to be one of the cornerstones of international efforts to prevent the illicit production, manufacture, traffic in and abuse of drugs, while ensuring that licit drugs are available for medical and scientific purposes. The United States is concerned that Bolivia’s reservation is likely to lead to a greater supply of available coca, and as a result, more cocaine will be available for the global cocaine market, further fueling narcotics trafficking and related criminal activities in Bolivia and the countries along the cocaine trafficking route.

The United States welcomes Bolivia’s renewed commitment to continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.

Should Bolivia’s reservation be deemed to be permitted in accordance with Article 50, paragraph 3 of the Convention, this objection would not constitute an obstacle to the entry into force of the Convention between the United States and Bolivia, but the United States would not assume toward Bolivia any legal obligation under the Convention that is affected by the reservation.

* * * *
B. LITIGATION INVOLVING TREATY LAW ISSUES

1. Constitutionality of U.S. Statute Implementing the Chemical Weapons Convention

In 2011, the United States filed a supplemental brief and a supplemental reply brief in the U.S. Court of Appeals for the Third Circuit in an appeal brought by a defendant who was convicted under the U.S. statute enacted to implement U.S. obligations under the Chemical Weapons Convention, 18 U.S.C. § 229-229F. United States v. Carol Anne Bond, No. 08-2677 (3d Cir. 2011). See Digest 2011 at 111-17. The court heard oral arguments in the case in November 2011 and issued its decision on May 3, 2012, holding that the statute is a valid exercise of Congress’s power to enact treaty implementing legislation as a Necessary and Proper effectuation of the Article II Treaty Power of the Constitution. 681 F.3d.149 (3d. Cir. 2012). Excerpts from the majority opinion of the court follow (two separate concurring opinions are not excerpted; footnotes and citations to the record have been omitted).

Whatever the Treaty Power’s proper bounds may be, …we are confident that the Convention we are dealing with here falls comfortably within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use. Given its quintessentially international character, we conclude that the Convention is valid under any reasonable conception of the Treaty Power’s scope. In fact, as we discuss at greater length herein, because the Convention relates to war, peace, and perhaps commerce, it fits at the core of the Treaty Power. …

3. The Necessary and Proper Clause

Thus, because the Convention falls comfortably within the Treaty Power’s traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention. Bond argues that it does.

She says that the Act covers a range of activity not actually banned by the Convention and thus cannot be sustained by the Necessary and Proper Clause. Whether that argument amounts to a facial or an as-applied attack on the Act, … it fails. We stated in Bond I that “Section 229 ... closely adheres to the language of the ... Convention,” 581 F.3d at 138, and so it does. True, as Bond notes, the Convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons, 32 I.L.M. at 804, while the Act makes it unlawful to “receive, stockpile, retain, own, possess, use, or threaten to use” a chemical weapon, 18 U.S.C. § 229(a)(1), but those differences in wording do not prove that the Act has materially expanded on the Convention. See United States v. Belfast, 611 F.3d 783, 806 (11th Cir.2010) (“[T]he existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identicality is not required.”). The meaning of the list...
in the former seems rather to fairly encompass the latter (with the possible exception of the “threaten to use” provision of the Act) and, if the Act goes beyond the Convention at all, does not do so in the “use” aspect at issue here.

So while Bond’s prosecution seems a questionable exercise of prosecutorial discretion, and indeed appears to justify her assertion that this case “trivializes the concept of chemical weapons”, the treaty that gave rise to it was implemented by sufficiently related legislation. See Comstock, 130 S.Ct. at 1956 (“[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”); Lue, 134 F.3d at 84 (rejecting the argument “that because the Hostage Taking Convention targets a specific aspect of international terrorism—hostage taking—the statute effectuating the Convention must deal narrowly with international terrorism or risk invalidity” as a “cramped” view of Congressional authority, because treaty-implementing legislation must simply “bear a rational relationship to a permissible constitutional end”).

In short, because the Convention pertains to the proliferation and use of chemical weapons, which are matters plainly relating to war and peace, we think it clear that the Convention falls within the Treaty Power’s core. … Consequently, we cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here. See Gonzales v. Raich, 545 U.S. 1, 23, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (“[W]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.” (citations and internal quotation marks omitted)); Holland, 252 U.S. at 432, 40 S.Ct. 382 (“If the treaty is valid there can be no dispute about the validity of the [implementing] statute....”); cf. U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made ... shall be the supreme Law of the Land.”).

* * * *

After the Court of Appeals decided the case, Bond filed a petition for writ of certiorari on August 1, 2012. The United States filed its brief in opposition to certiorari on October 4, 2012. * Excerpts from the U.S. brief follow (with citations to the record omitted).

* * * *

The court of appeals explained that petitioner’s claim fails under the rule of [Missouri v.] Holland that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.” 252 U.S. at 432. But even setting aside Holland, the court said it would be untroubled by the exercise of federal authority in this case because, “[w]hatever the Treaty Power’s proper bounds may be,” it was “confident that the Convention [it was] dealing with here falls comfortably within them.” Id. at 26.

The Act’s terms very closely track those of the concededly-valid Convention in all material respects, so there is no argument that the Act goes beyond the scope of the Convention. Further, even assuming that federalism principles had a role to play in evaluating the validity of

* Editor’s note: On January 18, 2013, the Supreme Court granted the petition for writ of certiorari. Digest 2013 will discuss further developments in the case.
treaty-based legislation, as explained below, the Act would not infringe on such hypothetical federalism limits.

Petitioner nowhere plainly explains what her proposed test for the constitutionality of treaty-implementing legislation should be. She appears to assert that her prosecution contravenes federalism principles because Pennsylvania could have prosecuted her for assault, but it is well-settled that the Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. See, e.g., *Cleveland v. United States*, 329 U.S. 14, 16 (1946) (Mann Act’s criminalization of interstate transportation for “purpose of prostitution or debauchery, or for any other immoral purpose” not unconstitutional invasion of traditional area of state regulation); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir.) (“[f]ederal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement per se of states’ sovereignty in the administration of their criminal laws”), cert. denied, 522 U.S. 904 (1997).

Under the dual-sovereign doctrine, Pennsylvania remained free to prosecute petitioner for assault notwithstanding the federal prosecution. See *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994). This federal prosecution therefore in no way impinged on Pennsylvania’s sovereign powers. Indeed, the Act, which did not preempt any Pennsylvania law, has less of an impact on state prerogatives than other historic exercises of the treaty power. See, e.g., *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

Petitioner is incorrect that, assuming that federalism principles apply to legislation implementing a valid treaty, Congress violated such limitations by not deferring to state law to implement “any treaty obligation the United States had to criminalize her conduct.” The Necessary and Proper Clause affords Congress discretion to decide how best to execute the powers set forth in the Constitution. See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (explaining that the “constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people”). In fact, because the relevant provisions of the Convention are not directly judicially enforceable, the absence of federal legislation to implement the Convention’s requirements could have left the federal government without adequate means to ensure the United States’ compliance with the Convention.

Petitioner’s argument echoes one side of a debate that occurred leading up to the Constitutional Convention regarding the treaty power. That debate was textually resolved in the Constitution, which granted the treaty power to the Executive, with advice and consent by the Senate. U.S. Const. Art. II, § 2. The Framers made that choice because of the government’s inability, under the Articles of Confederation, to induce the states to implement treaties. See, e.g., *The Federalist*, No. 42, at 264 (James Madison); No. 22, at 150-151 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Samuel B. Crandall, *Treaties: Their Making and Enforcement* 34-35, 51-52 (2d ed. 1916). The Constitution also expressly withheld the treaty power from the States. U.S. Const. Art. I, § 10. Thus it cannot be said that the decision below represents a “reconfigur[ing]” of constitutional structures.

Moreover, a rule that Congress cannot exercise its power to implement treaties if a state law provision arguably overlaps with a treaty requirement would be wholly unworkable.
Congress would have to conduct 50-state surveys of state law, and perhaps of municipal law as well, for each treaty provision to determine if the provision were implemented locally. Under petitioner’s reading, such surveys would also have to ascertain whether provisions that were not directly related to the subject matter (e.g., assault laws) might overlap with the treaty provisions. In this case, the government has never maintained that state law would be sufficient to implement the Convention, and petitioner’s premise that a generic assault statute would adequately implement the Nation’s treaty obligations to restrict not only the use, but also the development, production, acquisition, retention, and transfer, of toxic chemicals is not tenable.

Petitioner claims that *Medellin v. Texas*, 552 U.S. 491 (2008), supports her view that the federal government should have deferred to state law rather than enacting Section 229. But *Medellin*, to the extent that it is relevant to this case, demonstrates petitioner’s error. The *Medellin* Court held that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.” *Id.* at 525-526. *Medellin* found ineffective a presidential memorandum that directed States to comply with a judgment of the International Court of Justice regarding the Vienna Convention on Consular Relations. Instead, it was Congress under the Constitution that had the power to give effect to the international decision. *Ibid.* (And, of course, in this case Congress did act.) The facts in *Medellin* also illustrate the fundamental flaw in petitioner’s proposed reliance on States to execute the United States’ international obligations. Because the actions of the State of Texas did not fulfill the United States’ international obligations, the United States was found in breach of the Vienna Convention. See *Medellin v. Texas*, 554 U.S. 759 (2008) (per curiam).

Finally, there is no requirement that the government establish that the prosecution of petitioner in particular “is necessary and proper to complying with the Convention.” This Court “ha[s] often reiterated that ‘[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.’ ” *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)) (some internal quotation marks omitted; brackets in original).

* * *

2. **Constitutionality of Statute Implementing Berne (Copyright) Convention: *Golan v. Holder***


The Supreme Court denied a petition for certiorari on May 14, 2012 brought by petitioners contending that United States citizens residing in Puerto Rico are entitled, under the Constitution and international law (in particular, the International Covenant on Civil and Political Rights (“ICCPR”)), to elect voting members of the U.S. House of Representatives. *Igartua v. United States*, 132 S.Ct. 2376 (2012). In the district court, plaintiffs’ complaint
was dismissed. On appeal, the Court of Appeals for the First Circuit affirmed. 626 F.3d 592 (1st Cir. 2010). The United States filed a brief in opposition to the petition for certiorari on April 3, 2012, excerpted below (with citations to the record and most footnotes omitted).

2. The court of appeals correctly held that the people of Puerto Rico are not entitled under the Constitution to elect voting members of the House of Representatives. As the district court concluded, moreover, a federal court is powerless to adjudicate a claim that the Constitution should provide something other than what it does—even if a grievance against the Constitution were a cognizable injury under Article III, it would not be subject to redress by judicial order. Further review is not warranted.

   a. The election of members of the House of Representatives, like the election of the President, is “governed neither by rhetoric nor intuitive values but by a provision of the Constitution.” Igartua-De La Rosa v. United States, 417 F.3d 145, 147 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006). The Constitution provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” U.S. Const. Art. I, § 2, Cl. 1 (emphasis added). The Framers expressly distinguished between “States” and “Territori[es],” see id. Art. IV, § 3, and reserved to “the People of the several States” alone the right of representation in the House. Nor is there any doubt about what, for these purposes, counts as a “State[ ]”: after identifying the original 13 States by name, see id. Art. I, § 2, Cl. 3, the Constitution provides that Congress may vote to admit new States to the Union, id. Art. IV, § 3. Each of the remaining 37 States has been admitted by that process. Puerto Rico has not.

   Nor has Puerto Rico acquired electoral representation in the federal government by the only other means contemplated by the Framers: amendment of the Constitution. See U.S. Const. Art. V. It was by that process that United States citizens residing in the District of Columbia acquired the right to participate in presidential—but not congressional—elections. See Amend. XXIII, § 1 (authorizing the District of Columbia to appoint electors that “shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State”). Nothing in the text, structure, or history of the Constitution suggests that the Framers intended any other mechanism for a territory to gain representation in Congress. See Adams v. Clinton, 90 F. Supp. 2d 35, 56 (D.D.C. 2000) (three-judge court), aff’d, 531 U.S. 941 (2000) (“[T]he overlapping and interconnected use of the term ‘state’ in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood. *** There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.”).

   In light of the plain language of the Constitution, the courts of appeals have uniformly rejected claims that citizens of United States territories are entitled to vote in federal elections. See Igartua III, 417 F.3d at 148 (Puerto Rico) (presidential elections); Ballentine v. United States, 486 F.3d 806, 810-812 (3d Cir. 2007) (Virgin Islands) (presidential and congressional elections); Attorney Gen. of Territory of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (Guam) (presidential elections), cert. denied, 469 U.S. 1209 (1985).

   b. Petitioners’ arguments to the contrary do not warrant review. Petitioners contend that
the inability of Puerto Rico residents to participate in federal elections violates constitutional principles of due process and equal protection. But Article I’s restriction of voting representation in the House to the “People of the several States” cannot be unconstitutional “because it is what the Constitution itself provides.” *Igartua III*, 417 F.3d at 148. This Court’s decision in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), is not to the contrary. The Court in *Rodriguez* recognized that a citizen of Puerto Rico, like a citizen of a State, “has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” 457 U.S. at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)) (emphasis added). The Court did not hold or suggest in *Rodriguez* that the Constitution entitles citizens residing in Puerto Rico to participate in federal elections on the same terms as those who reside in States.

Petitioners correctly observe that this Court and the First Circuit have sometimes treated Puerto Rico as though it were a State for statutory purposes, and that the First Circuit has done so with respect to at least some constitutional principles that apply only to States, such as Eleventh Amendment immunity. See, e.g., *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (2003). But neither this Court nor the court of appeals has concluded that Puerto Rico is a State under the Constitution. Nor has any court of appeals suggested that the Commonwealth is entitled to claim the most fundamental prerogative of statehood: electoral representation in the government of the United States. The Framers did not anticipate that the federal courts would decide, under any rubric of *de facto* or functional statehood, whether a particular territory should be entitled to claim the privileges of membership in the Union. The Constitution commits that quintessentially political question to Congress. U.S. Const. Art. IV, § 3; see *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Petitioners emphasize that all persons born in Puerto Rico are natural-born United States citizens, see 8 U.S.C. 1402, and that their lack of voting representation in Congress denies them a voice in crafting the laws that apply to all Americans. The United States does not underestimate the importance of voting or electoral representation, and, like the court of appeals, “recognize[s] the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States.” *Igartua III*, 417 F.3d at 148. As a legal proposition, however, petitioners’ contention that “the source of the right to vote in Federal elections is citizenship” is mistaken. In cases brought by United States citizens residing in the District of Columbia, this Court has repeatedly rejected the claim that a right to electoral representation inheres in national citizenship. In *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), for example, Chief Justice Marshall upheld the power of Congress to tax residents of the District, rejecting arguments premised on “that great principle which was asserted in our revolution, that representation is inseparable from taxation.” Id. at 324-325; see also *Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (Brandeis, J.) (“There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.”).

c. Petitioners also contend that “the Constitution does not prohibit United States citizens residing in Puerto Rico from voting for representatives in the U.S. House of Representatives,” implying that Congress could alter the status quo if it wished. That question, however, is not presented by this case. Even if Congress could use its powers under the Territory Clause to grant voting representation in Congress to citizens in Puerto Rico, it has not sought to do so: it has not, for example, altered the statutory process for apportioning Representatives among the States, see 2 U.S.C. 2a, or granted Puerto Rico’s territorial delegate, see 48 U.S.C. 891, the right to vote on the floor of the House. Cf. *Michel v. Anderson*, 14 F.3d 623, 630-632 (D.C. Cir. 1994)
(discussing constitutional limitations on the powers of non-voting territorial delegates in the House of Representatives). The statutory process for electing members of the House remains unchanged. The question whether Congress could constitutionally alter that process thus remains purely hypothetical.

3. For similar reasons, petitioners’ contentions regarding the ICCPR and other international instruments do not warrant this Court’s review. Even if petitioners were correct about the meaning and domestic effect of the instruments on which they rely, no international agreement may override the express terms of the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-18 (1957) (plurality opinion); see also *Igartua III*, 417 F.3d at 148. Further review is additionally unwarranted because, as Chief Judge Lynch observed (626 F.3d at 603), petitioners failed to preserve in the court of appeals their argument that the ICCPR is self-executing. In their briefs below, petitioners did not make an argument “as to how the [ICCPR] bind[s] federal courts,” and instead “cite[d] the ICCPR merely ‘as supportive,’ noting that it has ‘been used by many courts to interpret existing U.S. law or to determine legal rights when the plaintiff has an independent cause of action.’” 626 F.3d at 603. As Judge Lynch correctly noted, “[t]his amounts to forfeiture if not waiver.” *Ibid.*

In any event, petitioners’ arguments concerning international law fail on their own terms. As the court of appeals recognized, see 626 F.3d at 602-603 & n.11; *Igartua III*, 417 F.3d at 148-150, none of the international agreements on which petitioners rely is self-executing. “[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts.” *Medellín v. Texas*, 552 U.S. 491, 504 (2008). As a matter of domestic law, a treaty provision that is not self-executing “can only be enforced pursuant to legislation to carry [it] into effect.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (1987).10

Petitioners principally rely on the ICCPR. The ICCPR, however, is not a self-executing treaty and therefore does not create any rights directly enforceable in the courts of the United States. See *Sosa*, 542 U.S. at 728, 735. This Court in *Sosa* cited the ICCPR as an example of a circumstance in which “the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law.” *Id.* at 728. Because “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts,” *id.* at 735, the Court explained, the ICCPR alone could not “establish the relevant and applicable rule of international law” governing litigation in a United States court, *ibid.*

Although members of the court of appeals characterized this portion of *Sosa* as dicta, see, e.g., 626 F.3d at 628 (Torruella, J., dissenting), the Court in *Sosa* discussed the ICCPR in the course of rejecting the plaintiff’s argument that the Covenant established an international norm against arbitrary arrest sufficient to support a cause of action for damages under the Alien Tort Statute, 28 U.S.C. 1350. See *Sosa*, 542 U.S. at 733-737. A considered rationale of that kind, integral to the outcome of the case, is not mere *obiter dicta*. See *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) (“As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”). And every court of appeals to consider the

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10 Indeed, some of the instruments cited by petitioners, such as the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), do not themselves impose binding obligations as a matter of domestic or international law. See *Sosa*, 542 U.S. at 734.
question has likewise concluded that the ICCPR is not self-executing. Further review is not warranted.

* * * *


On November 9, 2012, the United States filed a brief in support of its motion to dismiss and in opposition to plaintiff’s motion for a preliminary injunction in Alaska v. Clinton et al., Case No. 12-cv-00142-SLG, in U.S. District Court for the District of Alaska. The complaint brought by the State of Alaska challenged the procedure by which an emissions control area (“ECA”) that includes waters off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships (“MARPOL”), including Annex V, and domestic implementing legislation (the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901 to 1915). Excerpts below from the U.S. brief (with footnotes omitted) include the introduction and the section discussing why Alaska’s complaint fails to state a claim under the Treaty Clause of the Constitution. The brief in its entirety is available at www.state.gov/s/l/c8183.htm.

The United States also filed a brief on December 20, 2012 in support of its motion to dismiss the complaint brought by Intervenor-Plaintiff Resource Development Council for Alaska, Inc. (“RDC”), which asserts claims similar to and in support of those brought by Alaska. That brief, which incorporates and summarizes arguments made in the U.S. brief supporting the motion to dismiss Alaska’s complaint, is also available at www.state.gov/s/l/c8183.htm.

* * * *

Air pollution from ocean-going ships is an international problem that cannot be adequately addressed by any individual country. That is why the United States, Canada and 70 other countries entered into an international treaty to lower the amount of pollution from ships. Because air pollution from ships can have a more direct impact on human health and the environment in certain locations, the treaty established a procedure for the treaty parties to jointly designate “emission control areas,” or “ECAs,” that would have more stringent limits regarding ship emissions. The treaty, known as the International Convention for the Prevention of Pollution from Ships (MARPOL or Convention), and Annex VI to the treaty, under which ECAs are designated, received the advice and consent of the Senate and are implemented domestically through the Act to Prevent Pollution from Ships (APPS). 33 U.S.C. §§ 1901 to 1915.

Alaska challenges the approach of the Executive and Legislative branches to implement MARPOL because the treaty parties designated waters adjacent to most of the United States and Canadian shorelines in the Atlantic and Pacific oceans, including waters off part of Alaska, as an ECA. In support of its challenge, Alaska asserts an array of faulty statutory, constitutional and Administrative Procedure Act (APA) arguments, all aimed at asking this Court to force the United States to act in a manner that likely would be considered by the treaty parties as a breach of our obligations under MARPOL. Alaska’s claims fundamentally misconstrue the process through which Congress, the Executive, and the MARPOL parties address the relevant amendments to MARPOL, including ECAs. Viewed properly, none of Alaska’s arguments changes the fundamental points that APPS provides explicit domestic legal authority to implement and enforce the ECA and that the United States properly became a party to the ECA amendment, consistent with MARPOL, APPS and the Senate’s understanding during its consideration of Annex VI that the United States might seek establishment of an ECA.

This Court should dismiss Alaska’s Second Amended Complaint for lack of subject matter jurisdiction and because Alaska’s claims fail to state a claim upon which relief can be granted. Specifically, Alaska’s first cause of action, which alleges that the Secretary of State’s acceptance of the ECA under APPS was improper because the ECA did not comply with an appendix to Annex VI, is barred by the political question doctrine, and also seeks review that is expressly precluded under the APA. In addition, there are sound scientific bases for including the seas off the coast of Alaska’s southern and southeastern shores in the ECA. Alaska’s second cause of action alleges violations of the Treaty Clause of the Constitution and the separation of powers doctrine; however, that challenge fails because Congress properly provided the domestic legal authority to enforce the ECA, and it also is barred in part by the political question doctrine.

Alaska’s third cause of action fails to state a claim upon which relief can be granted because it incorrectly asserts that the Environmental Protection Agency (EPA) was required to undertake notice and comment rulemaking to establish the geographic scope of the ECA. EPA, however, did not establish those boundaries; the MARPOL parties did when they adopted the ECA, and the Secretary of State then accepted the ECA as adopted. Finally, Alaska’s fourth cause of action fails to state a claim upon which relief can be granted because its assertion that ECAs need to be designated through an EPA rulemaking under section 1903 of APPS is simply incorrect under the APPS’ terms and, even if such rulemaking were necessary, the APA’s “foreign affairs” exception exempts such actions from notice and comment requirements.

Finally, Alaska has failed to meet the demanding standards for the extraordinary remedy of a preliminary injunction. Accordingly, this Court should deny Alaska’s motion for preliminary injunction and dismiss the Second Amended Complaint.

I. LEGAL AND FACTUAL BACKGROUND

A. MARPOL

MARPOL is the most prominent global agreement to control pollution from ships. It consists of certain obligations that are set forth in the articles of the Convention, and six annexes of regulations prescribing more specific obligations with respect to six particular types of pollution from ships. Article 16 to the MARPOL Convention sets out the requirements for amending the Convention, which the Parties generally do by acting through the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO). Id. art. 16(2). A proposed amendment is circulated to all Parties for consideration no less than six months following submittal. Id. art. 16(2)(a)-(c). After consideration by the MEPC, an amendment requires a two-thirds majority of present and voting Parties for adoption. Id. art.
Once adopted, amendments to the articles of the MARPOL convention and amendments which add new annexes to it enter into force only with respect to Parties which affirmatively declare that they have accepted such amendments. \textit{Id.} arts. 16(2)(g)(i), 16(5). Amendments to existing annexes or their appendices may be made through a simplified amendment procedure. \textit{Id.} art. 16(2)(f)(ii)-(iii).

Under the simplified procedure, an amendment is deemed accepted at the end of a specified period (which can be no sooner than ten months after adoption) unless, within that period, at least either one-third of the Parties, or Parties whose combined merchant fleets constitute at least half of the gross tonnage of the world’s merchant fleet, communicate their objections. \textit{Id.} art. 16(2)(f)(iii). An amendment subject to the simplified procedure then enters into force six months after the acceptance date for all parties except those that have made a declaration of non-acceptance. \textit{Id.} art. 16(g)(ii). An individual Party to MARPOL can thus determine that an amendment to an annex will not enter into force for that Party.

B. Annex VI

Annex VI creates a program to address air pollution from ships, including through engine and fuel standards. Specifically, and as modified by amendments adopted in 2008 pursuant to the simplified amendment procedure, Annex VI sets tiered fuel sulfur content limits generally applicable world-wide, with a limit of 3.5 percent beginning in 2012, and a further limit of 0.5 percent as early as 2020 depending on a 2018 fuel availability review.\textit{Id.} MARPOL Annex VI, reg. 14. In its original form, MARPOL Annex VI included provisions for Sulfur Emission Control Areas (SECAs), which provided for more stringent controls for sulfur oxides (SOx) in designated geographical areas. The 2008 amendments set nitrogen oxides (NOx) performance standards for new marine diesel engines on vessels operating in a designated ECA beginning in 2016, and fuel sulfur content limits for vessels operating in a designated ECA at 1 percent after July 2010 and 0.1 percent beginning on January 1, 2015. \textit{Id.} Annex VI, reg. 13 § 5, reg. 14 § 4.

The 2008 amendments to Annex VI broadened the SECA concept to the more generalized concept of ECAs, and tightened controls for NOx and/or SOx and particulate emissions, as set forth in Regulations 13 and 14 of Annex VI, as amended. \textit{Id.} Annex VI, regs. 13-14.

Parties to MARPOL may seek to add new ECAs by submitting a proposal to amend Annex VI in accordance with the MARPOL amendment procedures described above. Appendix III to Annex VI sets forth criteria that the proposal shall include—including a description of the scope of the proposed ECA, the environmental and shipping conditions giving rise to the proposal, and the economic impacts of the proposal—and directs that these criteria are to be “take[n] into account” as “factors to be considered in the assessment” by the IMO. \textit{Id.} Annex VI, App. III ¶ 1.1, 3.1, 4.2 (available at 2d Am. Compl., Ex. C).

C. The United States’ Ratification of Annex VI

In 1998, the United States signed the protocol creating Annex VI, which President George W. Bush transmitted to the Senate in May 2003 for advice and consent. Message from the President of the United States Transmitting Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Thereto, S. Treaty Doc. No. 108-7 (2003)(excerpt attached as Ex. A). (Ex. A). That package transmitted to the Senate included the Secretary of State’s submission to the President, which specified that the United States might seek to designate a SECA and explained that, consistent with the United States government’s long-standing practice with respect to
amendments of the MARPOL Convention, such an action and any similar future United States acceptances of amendments to Annex VI could enter into force for the United States without further Senate advice and consent. Ex. A at A-5, A-9.

Following transmittal, in 2005 the Senate Foreign Relations Committee held a hearing on Annex VI. Treaties Before the Comm. On Foreign Relations, 109th Cong. (2005) In testimony before the Committee and in answers to additional questions for the record, the United States discussed the possibility that it would propose one or more SECAs on its Atlantic, Pacific, and Gulf of Mexico coasts to address air quality problems caused by ship emissions; the simplified amendment procedure for future amendments to Annex VI; and the shared understanding of the Senate and the Executive branch, consistent with long-standing practice under the MARPOL Convention, that obtaining Senate advice and consent for future amendments of such nature undertaken pursuant to MARPOL’s simplified amendment procedure was not necessary. Ex. B at B-9, B-12, B-19, B-20, B-24, B-28 (statement of Hon. David A. Balton, Deputy Assistant Secretary for Oceans and International Environmental and Scientific Affairs, Department of State, and responses to additional questions for the record). The Senate Foreign Relations Committee report, recommending Senate consent to Annex VI, reiterated that “[t]he executive branch has indicated that, upon ratification of Annex VI, the United States may seek the establishment of one or more SECAs in the United States pursuant to the procedures set out in Appendix III to Annex VI,” and noted that “[t]he Environmental Protection Agency is currently conducting studies to evaluate proposed SECAs along the Pacific, Atlantic, and Gulf Coasts of the United States.” S. Exec. Rep. No. 109-13, at 4 (2006). The Senate gave its advice and consent to Annex VI in April 2006. 152 Cong. Rec. S3400 (daily ed. April 7, 2006). After Congress enacted implementing legislation by amending the Act to Prevent Pollution from Ships, Pub. L. 110-280 (2008), the United States deposited with the IMO its instrument of ratification on October 8, 2008. See IMO Status of Convention documents (available at http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx).

D. The Act to Prevent Pollution from Ships (APPS)

MARPOL is implemented domestically through the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901-1915, enacted in 1980. Section 1907 of APPS provides that “[i]t is unlawful to act in violation of the MARPOL Protocol, . . . [APPS], or the regulations issued hereunder.” 33 U.S.C. § 1907(a). APPS has been amended several times, including in 2008 by the Marine Pollution Prevention Act, Pub. L. 110-280, to require compliance with Annex VI and to grant EPA and the Department of Homeland Security (DHS) the authority to administer and enforce Annex VI. 33 U.S.C. § 1903. APPS Section 1902 specifies where APPS applies to U.S.-flagged and foreign-flagged ships. APPS is to be construed and applied in a manner consistent with international law, including navigational rights and freedoms. Id. § 1902(i).

APPS also addresses the domestic procedure for acceptance of amendments to MARPOL. Proposed amendments to Annex VI may be accepted on behalf of the United States by the Secretary of State in consultation with the Secretary of Homeland Security or the EPA Administrator, without further approval by the Senate. APPS recognizes that the Secretary of State may also make a declaration of nonacceptance to such proposed amendments following consultation with the Secretary of Homeland Security. 33 U.S.C. § 1909(c).

E. The North American ECA

Even before the Senate gave advice and consent to Annex VI, the United States government began to engage in well-publicized efforts to establish more stringent emission standards applicable to vessels in or proximate to United States’ waters through the international
designation of an emission control area. In 2002, in response to concerns that EPA needed to
dress emissions from ocean-going vessels to fulfill its mandate under the Clean Air Act, EPA
proposed a rule regarding the applicability of the Clean Air Act to marine engines and
foreignflagged vessels. 67 Fed. Reg. 37,548 (May 29, 2002). EPA noted in the Federal Register
Notice that it “intend[ed] to work through the MARPOL process to designate certain areas in the
U.S. as sulfur [emission] control areas,” and gave notice regarding the issue of “whether all
waters under U.S. jurisdiction or only specific areas should be designated as SECAs, and
whether such designation(s) could be expected to have an adverse impact on port traffic within
SECAs.” Id. at 37,574. After the Senate gave its advice and consent to Annex VI, EPA discussed
setting geographic limits for more stringent emission controls in an advanced notice of proposed
rulemaking (ANPRM) that discussed the IMO process, proposed more stringent NOx, SOx, and
PM controls, and sought public comment on the geographic scope for such controls. 72 Fed.
Reg. 69,522, 69,543 (Dec. 7, 2007) (Proposed Rule). EPA conducted further public outreach
subsequent to this notice.

The United States and Canada submitted a joint proposal for a North American ECA to
the MEPC, and that submittal was published on April 2, 2009. Concurrently, a Technical
Support Document providing a more detailed account of the scientific analyses performed in
developing the ECA Proposal was also published.

Based on detailed ship emission inventories covering ships operating in areas up to 200
nautical miles from shore, as well as meteorological data affecting those emissions, the ECA
Proposal concluded that such emissions generally reached inland areas; correspondingly,
emissions from ships within the proposed ECA were expected to contribute to on-shore
concentrations of air pollution. See, e.g., ECA Proposal 4, 6; ECA Proposal, Annex 1 at 9-11.

As part of the support for the conclusion that emissions would contribute to
concentrations of air pollution in inland areas, the ECA proposal quantified emissions
transporting to inland areas using a sophisticated air quality modeling tool developed in support
of national air quality standards and national regulations under the Clean Air Act (CAA). ECA
Proposal, Annex 1 at 14-19. This confirmed that emissions from ships within 200 nautical miles
from shore “affect air quality far inland on all U.S. coastlines,” TSD 3-22, necessarily impacting
air quality in ports, and in large and small cities from near the shore stretching far inland.
Although this modeling tool includes gridded meteorological data only for the 48 contiguous
states and therefore did not provide the same quantified estimate of emissions contributions to
ambient concentrations of air pollution in Alaska, emissions from ships in the Alaska portion of
the proposed ECA were expected to behave in a similar manner as those for the northern Pacific
areas. ECA Proposal, Annex 1 at 19.

The MEPC forwarded the ECA Proposal to its Technical Group for further consideration.
Report of the [MEPC] on its Fifty-Ninth Session (“MEPC 59 Report”) at 25 (available at
“determined that the ECA proposal for the coastal waters of the United States and Canada
satisfied the criteria set forth in appendix III to MARPOL Annex VI” and, noting this
determination, the MEPC approved the ECA for consideration at its next meeting, MEPC 60. Id.
at 25, 29.

Using MARPOL’s simplified amendment framework, the ECA was adopted at the MEPC
60 meeting and entered into force on August 1, 2011. Annex 11, Resolution MEPC.190(60),
at 1. The one-percent first-phase fuel sulfur standard for ships operating within the North
American ECA entered into effect on August 1, 2012, and the second phase setting fuel sulfur
content limits at 0.1 percent will take effect on January 1, 2015.

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C. Alaska’s Second Cause of Action Fails Because Congress Properly Provided the Domestic Legal Authority to Enforce the North American ECA

Alaska’s assertions in its second cause of action that the ECA amendment “did not create domestic federal law” because it was neither “made by the President with the advice and consent of the Senate” under the Treaty Clause nor “implemented pursuant to legislation passed by both houses of Congress,” and that “Congress has unconstitutionally yielded its lawmaking powers and the Senate’s treaty-making role” through APPS to the Executive Branch. 2d. Am. Compl. ¶¶ 49-51, 53, are premised on a fundamental misunderstanding of how MARPOL and its amendments are implemented as a matter of United States domestic law.

The North American ECA amendment to MARPOL Annex VI is implemented through APPS, which provides the domestic legal authority to implement the MARPOL Convention and the annexes to which the United States is a party. The ECA amendment validly entered into force in accordance with the simplified amendment procedure set forth under MARPOL. This simplified amendment procedure is expressly provided for in Section 1909 of APPS and is consistent with the Senate’s understanding of the domestic procedures that would be followed before amendments to Annex VI, like one designating an ECA, would be accepted by the United States. Furthermore, the text of APPS and the ratification history of Annex VI provide an acceptable delineation of the area in which the Secretary of State exercises her discretion in taking action with respect to amendments to the MARPOL annexes, particularly in light of the wide latitude accorded to the Executive Branch in the arena of foreign affairs. Accordingly, Alaska’s second cause of action fails to state a claim upon which relief can be granted, and should be dismissed.

1. APPS Provides Explicit Domestic Legal Authority to Enforce the ECA

Alaska argues that the Annex VI amendment creating the ECA is not domestic federal law because it was neither “made by the President with the advice and consent of the Senate” pursuant to the Treaty Clause nor “implemented pursuant to legislation passed by both houses of Congress.” 2d Am. Compl. ¶¶ 50-51. Alaska’s contention is plainly wrong as a matter of law. The ECA entered into force for the United States consistent with both the Senate’s understanding in giving its advice and consent to Annex VI and with its implementation through legislation passed by both houses of Congress.

As amended in 2008, APPS expressly provides legal authority for domestic implementation of Annex VI and subsequent amendments. By its plain language, APPS authorizes “the Secretary [of the department in which the Coast Guard is operating to] enforce the MARPOL Protocol.” 33 U.S.C. § 1903(a). It provides that “[i]t is unlawful to act in violation of the MARPOL Protocol,” 33 U.S.C. § 1907(a), and authorizes investigations of and imposes civil and criminal penalties for violations of the MARPOL Protocol. 33 U.S.C. §§ 1907(b), 1908.

Moreover, APPS defines “MARPOL Protocol” as “the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, and includes the Convention.” 33 U.S.C. § 1901(a)(4). “Convention,” in turn, is defined as “the International Convention for the Prevention of Pollution from Ships, 1973, including Protocols I and II and Annexes I, II, V, and VI thereto, including any modification or amendments to the Convention, including any modification or amendments to the Convention,
Protocols or Annexes which have entered into force for the United States.” 33 U.S.C.§ 1901(a)(5) (emphasis added). Thus, every reference to the “MARPOL Protocol” throughout APPS, by definition, includes Annex VI and its amendments. Given that the definition of “MARPOL Protocol” includes Annex VI and its amendments, APPS clearly provides that the ECA, as an amendment to Annex VI, is enforceable domestic law. Accordingly, APPS explicitly provides the legal authority to implement the ECA amendment.

To the extent Alaska is arguing that implementing legislation can only render an international commitment enforceable if Congress passes such legislation following the negotiation and conclusion of the international commitment, that is equally wrong. Congressional ex ante authorization for international agreements extends to the earliest days of the nation. In 1792, Congress authorized the Postmaster General to enter into mail-exchange agreements. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 239; this authorization now takes the form of a grant of authority to the Secretary of State “to conclude postal treaties, conventions, and amendments related to international postal services . . . .” 39 U.S.C. § 407(b)(1). See also B. Altman & Co. v. United States, 224 U.S. 583, 597 (1912) (finding that an executive agreement had been properly made pursuant to the authority of the Tariff Act of 1897, which had been enacted years earlier, and which had created domestically enforceable tariff rates).

Alaska’s reliance on Medellin v. Texas, 552 U.S. 491 (2008), is misplaced. While Medellin turned on the question of whether Article 94 of the Charter of the United Nations was “self-executing” and thus directly enforceable in court, id. at 504, the United States does not contend that the ECA amendment is self-executing. Rather, the domestic legal authority for EPA and the Coast Guard to enforce the ECA is not MARPOL, but APPS.

Further, there is no support for Alaska’s suggestion that language in the Senate Foreign Relations Committee Report noting that Annex VI “will require implementing legislation” means that the Senate “implicitly prohibited the executive branch from unilaterally making any of the treaty obligations in Annex VI—including any obligations flowing from amendments—domestic federal law.” Plaintiff’s Memorandum in Support of Motion for Preliminary Injunction (State’s Br.) at 30 (ECF Doc. No. 19). This argument is based on a misunderstanding of the meaning of the Committee Report statement and ignores the chronology of the ratification of Annex VI and amendments to APPS. At the time of the Senate hearings regarding Annex VI, APPS was not applicable to Annex VI, because Congress had not yet amended APPS to implement Annex VI. Indeed, Ambassador David Balton acknowledged at the Senate Foreign Relations Committee hearing on Annex VI that legislation to implement Annex VI was necessary and “would likely take the form of a series of amendments” to APPS. See Hearing Before the Committee on Foreign Relations, United States Senate, S. Hrg. No. 109-324, at 16 (Sept. 29, 2005). After the Senate gave advice and consent to Annex VI, APPS the overarching implementing legislation for MARPOL—was amended to encompass and grant enforcement authority for Annex VI. The need for implementing legislation identified by the Senate Foreign Relations Committee was thus satisfied by the 2008 amendment to APPS. Accordingly, the language Alaska identifies in the Committee Report does not draw into question the plain meaning of APPS authority and definitions, 33 U.S.C. §§ 1901(4), 1901(5), 1903(a), 1907(b), 1908, which provide the domestic federal law implementing the MARPOL Protocol, including the ECA.

2. The ECA Amendment Was Validly Brought into Force for the United States, Consistent with the Senate’s Understanding and as Confirmed in APPS
As addressed above, the relevant source of domestic law to implement MARPOL in this case is APPS and not the ECA amendment itself. In addition, the ECA amendment itself also validly entered into force for the United States in accordance with the simplified amendment procedure set forth in MARPOL without the need to return to the Senate for advice and consent.

On April 2, 2009, the United States and Canada submitted the ECA Proposal to the MEPC. The MEPC thereafter approved the proposal for potential adoption at the next MEPC meeting. At that meeting, the parties to Annex VI, acting through the MEPC, adopted the annex amendment through MEPC resolution 190(60) on March 26, 2010. In accordance with the requirements of MARPOL, the amendment entered into force on August 1, 2011 for all parties.

In giving its advice and consent to Annex VI, the Senate understood that Annex VI amendments, like the one designating an ECA, would be subject to the simplified amendment procedure and would not go back to the Senate for further advice and consent. The treaty package transmitted to the Senate for advice and consent expressly stated that “amendments to Annex VI could . . . be adopted and enter into force through the . . . simplified amendment procedure specified in Article 16(2) of the MARPOL Convention of 1973,” and that “[p]ursuant to longstanding practice under the MARPOL Convention, U.S. acceptance of amendments to Annex VI will not require further advice and consent by the Senate.” Protocol of 1997 Amending MARPOL Convention, S. Treaty Doc. No. 108-7, at X (2003). In a question submitted for the record following a Senate committee hearing on Annex VI, Senator Biden acknowledged that “[a]mendments to MARPOL Annexes proceed through a simplified amendment procedure [and that] U.S. acceptance of amendments to Annex VI would not, therefore, involve Senate consent.” S. Hrg. No. 109-324, at 41. The same simplified amendment process had already applied for decades to amendments to other MARPOL annexes, and the Senate similarly did not object.

Other MARPOL Annex amendments adopted and accepted through these procedures have varied both in substance and in scope, including, among many other examples dating back to the 1980s, amendments to other MARPOL Annexes creating special geographic areas where similarly heightened standards apply, e.g. resolution MEPC.48.31 (1991) (designating the Gulf of Mexico and the Caribbean Sea as a special area under Annex V regarding garbage from ships), and amendments designating which noxious liquid substances are regulated at all under Annex II, see resolution MEPC.118(52) (2004). In some cases, both before and after the Senate’s advice and consent to Annex VI and the 2008 amendments to APPS, these amendments have affected enough provisions that they replace the entire text of a MARPOL Annex with a modified version. See, e.g., resolution MEPC.117(52) (2004) (thoroughly reorganizing and adding new provisions to Annex I on oil pollution); resolution MEPC.176(58) (2008) (increasing the stringency of Annex VI requirements globally, not only in ECAs but also in all marine areas, and making other changes).

The amendment designating the North American ECA was among the types of amendments expressly highlighted by the Senate in its consideration that certain MARPOL amendments would not be brought to the Senate for its advice and consent. The Secretary of State’s letter to the President transmitting Annex VI for approval specified that “[t]he United States may seek the establishment of SOx Emission Control Areas in certain areas pursuant to the procedures set out in Appendix III to Annex VI.” S. Treaty Doc. No. 108-7, at VI. The Senate Foreign Relations Committee Report on Annex VI acknowledged that “[t]he executive branch has indicated that, upon ratification of Annex VI, the United States may seek the establishment of one or more SECAs in the United States pursuant to the procedures set out in
Appendix III to Annex VI.” S. Exec. Rep. No. 109-13, at 4. At the Senate committee hearing regarding Annex VI, Senator Lugar asked about the process for ECA designation. S. Hrg. No. 109-324, at 15. Ambassador Balton acknowledged that the possibility of a North American ECA proposal was under consideration, and Bryan Wood-Thomas, then Associate Director of the Office of Transportation and Air Quality at EPA explained that an ECA proposal must meet specific criteria outlined in the treaty. Id. at 15-16. In response to a question from Senator Biden submitted following the Senate committee hearing, Ambassador Balton explained that EPA was working with interested states of the United States to study whether an ECA designation was warranted for any of the United States coastal waters. Id. at 41.

Additionally, APPS confirms this understanding of the simplified amendment procedure under MARPOL. APPS provides that a proposed amendment to Annex VI or its appendices “may be the subject of appropriate action on behalf of the United States by the Secretary of State.” 33 U.S.C. § 1909(b). APPS is similar to other implementing statutes that both provide ex ante authority to implement amendments to treaties and contemplate a domestic process for implementing amendments that do not have to receive Senate advice and consent. For example, the Whaling Convention Act of 1949, which implements the International Convention for the Regulation of Whaling, including an annexed schedule of regulations and its amendments, provides that the Secretary of State, with the concurrence of the Secretary of Commerce, may “present or withdraw any objections on behalf of the United States Government to such regulations or amendments of the schedule to the convention as are adopted by the [International Whaling] Commission and submitted to the United States Government in accordance with article V of the convention.” 16 U.S.C. § 916b. The Coast Guard Authorization Act of 2010 implements the Anti-Fouling Convention and authorizes the Secretary of Homeland Security to administer and enforce the treaty and its annexes, “including any amendments to the Convention or annexes which have entered into force for the United States,” and is accompanied by legislative history making clear that the Senate did not expect amendments to certain parts of the treaty to require Senate advice and consent. 33 U.S.C. §§ 3801(3), 3803; International Convention on the Control of Harmful Anti-Fouling Systems on Ships, S. Exec. Rep. No. 110-19, at 9 (2008) (recognizing that the Anti-Fouling Convention provided for a simplified amendment procedure and indicating that “[a]mendments to Annexes 2, 3, and 4 [of the convention] should not, in the normal course, rise to the level of those that require the advice and consent of the Senate”).

* * * *

5. APA Challenge Alleging Conflict with International Agreement

In Lakes Pilots Association v. United States Coast Guard, Civ. No. 11-cv-15462-SJM-MJR, plaintiff Lake Pilots Association (“LPA”) brought an action in U.S. district court for the Eastern District of Michigan seeking review of a final decision finding that LPA overbilled the shipping industry for pilotage services during 2006 and 2007 and ordering repayment. The action was brought under the Administrative Procedure Act (“APA”) and alleged, among other things, that the Coast Guard’s decision was in conflict with the international agreement reached between the United States and Canada relating to the provision of pilotage services on the Great Lakes. The United States filed its brief in support of summary judgment on August 10, 2012. Excerpts below from the U.S. brief (with footnotes and citations to the record omitted) include the U.S. arguments that the Coast Guard’s actions
do not conflict with the international agreement and that the international agreement does not create enforceable rights for private parties such as the plaintiff. The full text of the U.S. brief is available at www.state.gov/s/l/c8183.htm.

1. The Memorandum of Arrangements Does Not Identify Change Points for Purposes of United States Regulations.

The Memorandum of Arrangements upon which LPA relies (AR002895-2907) was concluded by an exchange of notes on March 29, 1979, but has an effective date of January 18, 1977. Id. The Memorandum does not identify change points for purposes of determining when a U.S. pilot may charge for overcarriage under U.S. regulations. LPA instead relies on the definition of “District 2” in the definitions section of the Memorandum.

Elsewhere in the Memorandum, where participation in pilotage services are divided between U.S. and Canadian pilots, “Welland Canal” is designated “Canadian pilots only,” and pilot services are split between U.S. and Canadian pilots “[b]etween Port Colborne and Port Huron, with no intermediate ports of call” based on 8-vessel blocks. The Memorandum further delineates which country’s pilots will serve vessels stopping at ports within the District, other than Welland Canal.

Nothing in the Memorandum suggests that this general divvying up of the waters of “District 2” is intended to have any effect on when U.S. pilots can or cannot charge overcarriage fees. The Memorandum does not purport to establish “designated change points” for purposes of that regulation. And nothing in the inclusion of a definition for the Welland Canal for purposes of defining District 2 establishes that LPA is entitled to charge the daily overcarriage rate anytime it does not make the change precisely on the one mile arc mentioned in that definition.

Further, LPA was charging this fee while providing pilotage services assigned to U.S. pilots under 4(b)(2) [of the Memorandum], which speaks of services “[b]etween Port Colborne and Port Huron.” Yet, Port Colborne itself is certainly inside the one mile arc included in the definition on which LPA relies. This seeming conflict also counsels against the interpretation advanced by LPA. Likewise, as set out in the same Memorandum, the pilot boat in use in this situation is to be stationed at Port Colborne.

3. LPA Cannot Rely on the Memorandum of Arrangements to Avoid Repayment.

As discussed above, there is no conflict between the Memorandum and the regulations because the Memorandum does not define change points or address when overcarriage fees may be charged. However, it is worth emphasizing that the United States–Canada Memorandum does not purport to provide any individually enforceable rights that LPA could use to avoid the repayment ordered by the Coast Guard. The Memorandum is an international agreement between the U.S. and Canada. It simply, in relevant part, obligates the States Parties to coordinate revenue sharing and the provision of pilotage services on the Great Lakes. The rights and obligations with respect to the international agreement are thus held by the U.S. and Canada, not LPA. Cf. United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) (holding that even in the case of treaties, they do not, “[a]s a general rule . . . create rights that are privately enforceable in the
federal courts. ‘A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.’”) (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

In briefing this issue, LPA mistakenly relies on a series of cases to support the argument that it may invoke the Memorandum as a basis for refusing repayment that would otherwise be required under § 401.450. However, these cases are easily distinguishable. For example, LPA cites Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982) for the proposition that an executive agreement may be regarded as equivalent to “federal law.” Id. at 648. But this case only held that a particular agreement was equivalent to federal law for purposes of statutory interpretation. Similarly, in Weinberger v. Rossi, 456 U.S. 25 (1982) as well as B. Altman & Co. v. United States, 224 U.S. 583 (1912), the precedent that the D.C. Circuit relied on, the Court held that an executive agreement was a “treaty” but made clear that the designation was solely one of statutory interpretation.

The plaintiff next cites American Ins. Ass’n v. Garamendi, 539 U.S. 396, 416-17 (2003) for the proposition that “valid executive agreements are fit to preempt state law, just as treaties are.” While this is certainly true of some executive agreements, the agreement in Garamendi differs significantly from the agreement in this case. The agreement in Garamendi falls into a narrow category of international claims settlement agreements. Such agreements, concluded without the specific ex post approval of Congress or advice and consent of the Senate, have the potential to preempt state law, because of “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned.”

* * * *

On September 21, 2012, the United States filed its reply brief in support of summary judgment. The excerpt below from the reply brief refutes additional arguments made by LRA in opposing summary judgment relating to the role of the international agreement between the U.S. and Canada.

* * * *

D. LPA Misconstrues the Coast Guard’s Argument Regarding the Role of the Memorandum of Arrangements in this Litigation.

The Coast Guard does not argue that the Memorandum is not a binding agreement between the United States and Canada. And it certainly does not agree that it is violating that agreement. Rather, the Coast Guard’s point in its opening brief was that the agreement does not confer rights on private individuals enforceable in domestic courts.

International agreements are primarily compacts between nations providing for rights and obligations of governments. See Head Money Cases, 112 U.S. 580, 598 (1884). As such, they generally do not confer rights on private individuals enforceable in domestic courts and are instead enforced through “the interest and the honor of the governments which are parties . . .” Id. See also Mora v. New York, 524 F.3d 183, 201 & n.25 (2nd Cir. 2008) (collecting cases). In the context of an advice and consent treaty, the D.C. Circuit held that the United States’ alleged violation of a treaty is reviewable under the APA only if the treaty itself confers rights on private individuals. Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 938, 942-43
(D.C. Cir. 1988). See also De La Torre v. United States, Case No. No. C 02–1942 CRB, 2004 WL 3710194, at *9–*10 (N.D. Cal. Apr. 14, 2004) (no claim under the APA where “[t]here is nothing in the executive agreements to indicate an intent by its creators that any of the terms of the agreements would give rise to affirmative, judicially-enforceable obligations on behalf of the [plaintiffs] in federal district court.”).

To determine whether an international agreement confers rights on private individuals, courts look to the text of the agreement, which controls unless it “effects a result inconsistent with the intent or expectations of its signatories.” Gross v. German Foundation Indus. Initiative, 549 F.3d 605, 612 (3rd Cir. 2008) (citing Sumitomo Shoji Am., Inc. v. Avagliano, 504 U.S. 655, 663 (1992) (internal citation omitted)). Based on the text of the agreement, there is no intent to confer private rights: It speaks only to the obligations of the two governments regarding the coordination of pilotage services on the Great Lakes.

*   *   *   *

6. Constitutional Challenge to Tax Treaties

In a case in U.S. district court for the Northern Mariana Islands, a manufacturer and some of its employees and affiliates filed suit claiming that the U.S. government cannot collect Federal Insurance Contributions Act (“FICA”) taxes on wages paid to nonresident alien contract workers temporarily admitted to the Commonwealth of the Northern Mariana Islands (“CNMI”). Ai, Fang, et al., Concorde Garment Manufacturing Corporation and Does 1-1000 v. United States, No. 11-cv-0014 (D.N.M.I. 2012). On December 5, 2012, the United States filed its brief in support of judgment on the pleadings and dismissal, or, in the alternative, summary judgment. The excerpt below from the U.S. brief (with most footnotes omitted) addresses the plaintiffs’ argument that requiring certain employees to pay FICA taxes, when some U.S. tax treaties make certain other employees exempt, violates the U.S. Constitution. The full text of the U.S. brief is available at www.state.gov/s/l/c8183.htm.

*   *   *   *

The exceptions from FICA taxes for certain residents of the Philippines and Korea are not a violation of equal protection under the Fifth Amendment. As an initial matter, the Court’s review should be highly deferential because the political branches have extremely broad discretion in the areas of taxation, immigration, and the conduct of foreign relations.

Furthermore, these exceptions do not create classifications involving a suspect class, and therefore, at most, the constitutionality of these exceptions would be reviewed under rational basis review. Plaintiffs’ claim that a suspect class is involved is based on a mischaracterization of the nature of the exceptions for certain residents of the Philippines and Korea. These exceptions do not involve classifications of race, national origin, or alienage. Rather, the exceptions only require that the temporary workers have legal residency in either the Philippines or Korea and enter under certain immigration provisions. These are narrow exceptions to the rule that ALL workers—whether Chinese nationals, U.S. citizens, or even residents of the Philippines or Korea
admitted under the other provisions of immigration law—are subject to the FICA taxes. Because these exceptions create a preference based on these special factors, and not on their class of race, national origin or alienage, there is no suspect class. Further, even if the Court were to deem that the exceptions created preferences based on alienage or national origin, the Court would review under a rational basis because the laws governing the treatment of aliens are federal, not state, laws.

Finally, the application of FICA taxes in the CNMI is not so vague or arbitrary that it unconstitutionally violates due process.

The FICA tax exceptions for certain residents of the Philippines and Korea are not a violation of equal protection under the Fifth Amendment

  a) The exceptions for residents of the Philippines and Korea are analyzed with deference to the political branches, and, at most, are analyzed under a rational basis standard

Decisions about the treatment of a foreign country’s residents, including for immigration, taxation, or other purposes, have long been a core element of the conduct of foreign relations handled by the Executive and the Legislative branches. The United States has extensive and important ongoing military, political, security, and economic relations with the Philippines and Korea, and these relations provide more than sufficient rationale for treating certain of their residents working in certain areas in the United States under certain immigration provisions differently than residents of China or other countries. As the Supreme Court in Mathews v. Diaz, 426 U.S. 67, 81 (1976) stated, the “reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President” in an area dealing with residents of foreign countries coming to the United States.

Plaintiffs allege that because certain residents of the Philippines and Korea admitted to Guam and the CNMI were allegedly exempt from FICA taxes, whereas Individual Plaintiffs who are alleged to be residents of China were not, there is an equal protection violation based on either race, national origin, or alienage. Amend. Compl. ¶¶ 65-66, 69-70. Plaintiffs, however, misconstrue these exceptions, and the plain statutory and treaty language reflects that no classification is made on the basis of race, national origin, or alienage.

First, and notably, the relevant language of the exception for residents of the Philippines provides that “service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to 101(a)(15)(H)(ii) of the Immigration and Nationality Act” does not meet the definition of “employment.” 26 U.S.C. §3121(b)(18) (emphasis added). Article 25 of the Korea Tax Treaty mirrors the language of the exceptions for residents of the Philippines. It provides, “(1) The taxes imposed by Chapter 21 of the Internal Revenue Code shall not apply with respect to wages paid for services performed in Guam by a resident of Korea while in Guam on a temporary basis as a non-immigrant alien admitted to Guam pursuant to section 101 (a) (15) (H) (ii) of the United States Immigration and Nationality Act (8 U.S.C. 1101 (a) (15) (H) (ii))” and “(2) The exemption provided in paragraph (1) shall continue only so long as the similar exemption provided by section 3121 (b) (18) of the Internal Revenue Code.” (emphasis added). Thus, the

35 In 1984, the United States concluded a tax treaty with China but those negotiations did not lead to the creation of a FICA tax exemption for Chinese residents in either Guam or the CNMI. Agreement between the Government of the United States of America and the Government of the Peoples Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, signed at Beijing, April 30, 1984, T.I.A.S. 12065. (“the U.S.-China Tax Treaty”)
plain language of the statute and treaty clearly demonstrates that these exceptions are not limited to any single national origin or race. Instead, the exceptions apply to all national origins and all races as long as the individual is both (i) a resident of the Philippines or Korea and (ii) admitted on a temporary basis as a non-immigrant alien pursuant to certain immigration provisions. Thus, it is indisputable that the exceptions do not make classifications on the basis of race or national origin.

Further, Plaintiffs are also incorrect that the exceptions create a preference based on alienage. Whereas a statute which creates a preference on the basis of alienage provides a preference to a class of individuals based upon their immigration status in the United States (i.e., nonresident aliens versus U.S. resident aliens versus U.S. citizens), the exceptions at issue here do not provide a preference to nonresident aliens or resident aliens or citizens as a class. Rather, they simply exempt from FICA taxes certain residents of the Philippines or Korea admitted to certain locations under certain immigration provisions. Thus, residents of the Philippines and Korea not covered by these specific FICA tax exceptions, such as residents admitted under other immigration provisions, are subject to the FICA taxes, just as are residents of other countries. There is no classification here on the basis of one’s alienage.

Thus, because these exceptions do not employ a suspect classification such as race, national origin, or alienage, they are valid if they bear a rational relation to a legitimate government purpose. See Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983). Under the rational basis standard, “a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts.” United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970); Regan, 461 U.S. at 547.

Moreover, even if the Court were to find that these exceptions employ the classification of alienage, it would be a federal classification between aliens and this Court’s standard of review, would be as deferential or more deferential than rational basis review because the exceptions involve the question of federal power in the area of the conduct of foreign relations, immigration, and taxation.

The powers in the conduct of foreign affairs under the Constitution are broad and expansive and, as explained above, the formulation of statutes and treaties in the confluent areas of foreign relations, taxation and international commerce involve delicate decisions and judgments by the Executive and Congress, to which the courts should give deference. It is a long and well-established practice in conducting foreign relations to make distinctions in treatment among different types of aliens. The Supreme Court in Matthews, a case involving the equal

37 As the Supreme Court emphasized in discussing the equal protection clause and treatment of aliens in Toll v. Moreno (a case striking down a state—not a federal—classification based on alienage), “[o]ur cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. Federal authority to regulate the status of aliens derives from various sources, including the federal Government’s power ‘[t]o establish [a] uniform Rule of Naturalization,’ U.S. Const., Art. I, § 8, cl. 4, its power ‘[t]o regulate Commerce with foreign Nations’, id., cl. 3, and its broad authority over foreign affairs.” (internal citations omitted).

38 From the Jay Treaty of 1794, which is replete with provisions governing how Great Britain and the United States would treat each other’s citizens including with respect to duties, up to the present, such as with bilateral investment treaties, the Executive has treated residents and nationals of other countries differently, as a result of negotiations with foreign sovereigns to advance the national interests of the United States. The United States currently has in force over 60 tax treaties, which set forth different tax treatment for residents of those countries depending on a number of factors. The U.S.-China Tax Treaty and the U.S.-Korea Tax Treaty are examples of these treaties, which confer prescribed tax treatment for certain Chinese and Korean residents in return for the prescribed tax treatment for certain U.S. citizens and residents. See Treaties in Force: A List of Treaties and Other International Agreements
protection question and the question of whether the federal government could grant certain medical benefits to some aliens, but deny them to others, on the basis of how long the aliens had been in the country, stated as follows:

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of the changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or to the Executive than to the Judiciary.... Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. Mathews, 426 U.S. at 81.

The Mathews Court went on to define the scope of its deferential standard of review in cases involving a challenged classification between aliens as follows:

Since it is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. Id. at 82.

The Supreme Court declined to substitute its judgment for the political branches of government in determining whether a statute that discriminated between classes of aliens entitled to certain medical benefits had a rational basis:

The task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment. In this case, since appellees have not identified a principled basis for prescribing a different standard of review than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program upon the same conditions as citizens. We decline the invitation. Id. at 83-84.

Applying this narrow standard, the Court found that the statutory classification at issue did not violate equal protection because it was not “wholly irrational.” Id. at 83.

In line with Mathews, courts have consistently upheld federal differentiation between U.S. citizens and aliens or among aliens. …

Furthermore, subsequent to Mathews, the Ninth Circuit has equated the “wholly irrational” standard in Mathews with the rational basis test. Aleman v. Glickman, 217 F.3d 1191, 1197-98 (9th Cir. 2000). It is now well established that whereas classifications based on alienage
are subject to strict scrutiny when enacted by a state, see, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971), alienage classifications are subject to rational-basis review when enacted by the federal government because “[f]ederal interests regarding aliens are significantly different than those of the states.” *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995); see also, e.g., *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976); *Aleman v. Glickman*, 217 F.3d 1191, 1197-98 (9th Cir. 2000). Under rational-basis review, a statutory classification must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,” even if there is an “imperfect fit between means and ends.” *Aleman*, 217 F.3d at 1201 (internal quotation marks omitted).

The Second Circuit similarly determined that a rational basis standard—not strict scrutiny—applied in a case raising an equal protection challenge to federal law the different treatment of Haitians and aliens from Cuba and certain other countries. *Midi v. Holder*, 566 F.3d 132, 137 (2nd Cir. 2009). That court explained, “This is so because Congress has plenary power over immigration and naturalization, and may ‘permissibly set immigration criteria based on an alien’s nationality,’” *Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006), even though such distinctions would be suspect if applied to American citizens.” *Ibid*.

These cases make clear that a court should be extremely cautious about substituting its judgment for that of the political branches of government which determined that residents of the Philippines and Korea admitted into certain areas of the United States under certain immigration provisions were exempt from FICA taxes, while others were not, as this area of law gives great flexibility to those branches and prescribes a very deferential standard of judicial review of policy choices made in this area, especially when, as is the case here, there is indisputably no classification between aliens and citizens or aliens and legal residents, and, even if a court were to find that the exceptions do employ the classification of alienage, it should review this classification under rational-basis review, at most.

Finally, as alluded to by the *Mathews* court, “the task of drawing lines for federal tax purposes” gives the political branches an extremely broad power to categorize and classify for tax purposes. *Mathews*, 426 U.S. at 83; see also *Regan*, 461 U.S. at 547; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 26 (1916); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158 (1911). Tax legislation carries a “presumption of constitutionality,” (*id.*) which is particularly strong. *Nammack v. Commissioner*, 56 T.C. 1379, 1385 (1971), aff’ed per curiam 459 F.2d 1045 (2d Cir. 1972); see *Black v. Commissioner*, 69 T.C. 505, 507-508 (1977). “Perfect equality or absolute logical consistency between persons subject to the Internal Revenue Code … [is not] a constitutional sine qua non.” *Barter v. United States*, 550 F.2d 1239, 1240 (7th Cir. 1977) (per curiam). When legislating tax statutes, the Supreme Court has stated that

[t]he broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination
against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. Regan, 461 U.S. at 547-48 (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (footnotes omitted)).

Thus, because these exceptions involve the task of drawing lines for federal tax purposes, this Court’s review should be extremely deferential: at most it would be rational basis review, and possibly even more deferential. See Brushaber, 240 U.S. at 24-25 (holding that the application of the taxing power is constitutional unless it so arbitrary or grossly inequitable in its basis for classifying taxpayers that it must be regarded as confiscatory, pursuant to the Fifth Amendment meaning of a taking); Georgeff v. United States, 67 Fed. Cl. 598, 607 (2005); Bruinooge v. United States, 213 Ct.Cl. 26, 29 (1977) (“It is unclear whether such a test [from Brushaber, requiring that the tax legislation be so arbitrary or grossly inequitable that it must be regarded as confiscatory], if it is in fact more lenient than the traditional test [of rational basis review], still exists. At least, we are unaware that it has ever been invoked, for the Supreme Court has sustained discriminations in federal tax statutes that have been constitutionally challenged upon finding that a sufficient rational basis existed.”).

In sum, the Court should review these exceptions, at most, under a rational basis review, for all the reasons presented above.

b) The exception for certain residents of the Philippines survives rational basis review

As described above, if any rational basis for the exception for the residents of the Philippines can be perceived by this Court, whether or not considered by Congress, the exception withstands scrutiny.

The legislative history reflects an intention by Congress to exempt certain residents of the Philippines from FICA taxes because practically none of the residents of the Philippines would acquire sufficient credits to qualify for social security benefits. Other possible reasons for this exception are readily apparent, however. First, and most importantly, the federal government decided to extend different treatment for certain residents of the Philippines—and later Korea—as part of its handling of bilateral relations, an exercise in foreign affairs which inherently serves a legitimate and rational governmental purpose, and which inherently requires a delicate balancing of competing interests. Moreover, the United States-Philippines ongoing “relations are based on shared history and commitment to democratic as well as economic and military ties,” and Congress was also likely motivated by these strong historical, geographical, military, and economic ties in deciding to enact this exception. Additionally, residents of the Philippines have been assisting with Guam’s labor needs since World War II to the present with the build-up of military presence in Guam., and Congress was likely motivated by this consideration as well.” Id.

In sum, the exception for residents of the Philippines admitted pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act bears a rational relation to the legitimate government purposes of maintaining good bilateral relations with the Philippines, serving the labor needs of Guam, preserving economic ties, preserving military ties, and maintaining the historical connection between the two nations.

The above possible reasons for the exception provide more than a sufficient basis for this Court to find that the exception for residents of the Philippines survives a very deferential rational basis review.

c) The exception for certain residents of Korea survives rational basis review
The exception for certain residents of Korea under the U.S.-Korea Tax Treaty also survives rational basis review. The letter from President Ford, dated September 3, 1976, which became part of the legislative record, states that the primary purpose of the treaty is “to identify clearly the tax interests of the two countries to avoid double taxation and to help prevent illegal evasion of taxation.” It adds, “[t]his Convention [tax treaty] would promote closer economic cooperation and more active trade between the United States and Korea.” Id. at fn. 42. The President ratified the US-Korea Tax Treaty after the treaty received the advice and consent of the Senate to such ratification. The United States’ interest in fostering better foreign relations with a key military and economic ally, including coordination of taxation and fiscal issues, bears a rational relation to a legitimate government interest of ratifying the US-Korea Treaty, and this exception was an integral part of the negotiated treaty accomplishing these interests, and it therefore survives the deferential rational basis review.

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Cross References

Consular Notification and Compliance Act, Chapter 2.A.2.c.
Extradition of fugitive alleging fear of torture (Trinidad y Garcia v. Benov), Chapter 3.A.3
International Law Commission, Ch. 7.D.
U.S. statement on negotiations under Durban Platform on climate change, Chapter 13.A.1.b.(1)