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Providing Judicial Review for Decisions by Political Trustees

Henry H Perritt, *Chicago-Kent College of Law*

PROVIDING JUDICIAL REVIEW FOR DECISIONS BY POLITICAL TRUSTEES

HENRY H. PERRITT, JR.*

I. INTRODUCTION

Chaos in Iraq, controversy over U.S. unilateralism, and skepticism about "nationbuilding" have unsettled ground rules for international intervention. Human rights violations, failed states, refugee crises, and international terrorism have combined to put the international community in the position of exercising a measure of sovereignty over formerly independent territories, as in Bosnia, Kosovo, East Timor, Afghanistan, and Iraq. This practice of ad-hoc international intervention is likely to continue.

Such political trustees¹ exercise temporary legislative, executive and judicial authority; yet in no case to date have they structured their judicial authority so as to provide for judicial review of either the constitutional variety, or of the administrative variety.² It does not appear that any legal institution presently has the power to review decisions or actions by political trustees such as the United National Interim Administration Mission in Kosovo ("UNMIK").³ Unless the legislature or courts of a U.N. member

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* Professor of Law and former Dean, Chicago-Kent College of Law, Illinois Institute of Technology. This article grows out of the author's extensive involvement in Kosovo, where he has been exposed to the practical realities of impaired internal legitimacy of an unaccountable U.N.-administered political trusteeship, and has been involved in opposing national-court litigation over political trustee decisions. The author appreciates suggestions on earlier drafts by his colleagues Harold J. Krent, and Margaret G. Stewart.

1. See Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 389 (2003) (defining political trustee as one or more states or international organizations exercising sovereignty over foreign territory).

2. As used in this article, "constitutional review" refers to the review of decisions by the highest authority of the political trusteeship to ensure compliance with the terms of its charter. "Administrative review" refers to the review of decisions by lower level authorities of the political trusteeship to ensure compliance with legislative acts. "Constitutional review" decisions bind the highest-level authority and can be overturned only by the body that originally created the political trusteeship in the first place, such as the U.N. Security Council. In contrast, "Administrative review" decisions can be overturned by the highest level legislative authority.

3. The International Court of Justice lacks clear authority to review decisions by the United Nations Security Council. Jose E. Alvarez, *Judging the Security Counsel*, 90 AM. J. INT'L L. 1, 2 (1996). But some commentators suggest that some limited forms of judicial review by the Security Council in

state ignores U.N. immunity and subjects U.N. officials to jurisdiction of its courts,⁴ or unless a political trustee waives immunity for cases presented to specialized review tribunals,⁵ judicial review is unavailable in the political trustee context.

The failure to provide at least for administrative review is undesirable for two reasons: its absence increases the likelihood of litigation in national courts to review decisions by political trustees, and such national litigation represents a far greater potential threat to effective political trusteeship than review in specialized tribunals linked to the trusteeship; and its absence undercuts international and internal legitimacy of political trusteeships because it puts the political trusteeship outside the bounds of a "rule of law."

This article explains that political trustees can structure judicial review so as to avoid interference with the core prerogatives of a trustee to act quickly and decisively; that models for judicial review in the English, U.S. and Western European civil law systems provide valuable insights in designing mechanisms of judicial review as a part of political trusteeships;

the International Court of Justice exist. *See id.* at 39; *see also* Jonathan A. Frank, *A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action*, 30 DENV. J. INT'L L. & POL'Y 532, 539-41 (2002) (reviewing arguments for and against ICJ review of Security Council decisions, in light of different roles played by the two institutions).

The courts of the provisional institutions of Kosovo do not have authority to review U.N. decisions or actions, although they are explicitly given authority to review decisions of other provisional government institutions. Section 9.4.2 of the Constitutional framework empowers the local courts to review decisions by institutions of the PISG. As the following sentences explain, however, that power does not extend to review of decisions by UNMIK and the other international institutions. UNMIK Regulation 2001/9, UNMIK/REG/2001/9 (May 15, 2001) (structuring the constitutional framework), *available at* <http://www.unmikonline.org/regulations/2001/reg09-01.htm> [hereinafter "constitutional framework"]. Before these courts were established and empowered by the constitutional framework regulation, UNMIK, through an earlier regulation, has conferred immunity on its agents. UNMIK Regulation 2000/47 § 1, UNMIK/REG/2000/47 (Aug. 18, 2000) (defining immunity of NATO Kosovo Force ("KFOR") and UNMIK and their personnel), *available at* <http://www.unmikonline.org/regulations/2000/re2000.47.htm>. Section 3.1 of Regulation 1000/47 makes UNMIK immune "from any legal process;" section 3.2 immunizes senior officers of UNMIK from "local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo;" section 3.3 immunizes other UNMIK personnel from "legal process in respect of words spoken and all acts performed by them in their official capacity;" section 2 confers similar immunities on KFOR and its personnel; section 4 similarly immunizes KFOR and UNMIK contractors. *Id.* §§ 2-4. UNMIK provided for up to 72 hours detention of otherwise immune UNMIK personnel pending decision by the Special Representative of the Secretary General ("SRSG") on a request for waiver of immunity with respect to the detainee. UNMIK Administrative Direction 2002/18 § 1.2, UNMIK/DIR/2002/18 (Sept. 9, 2002), *available at* http://www.unmikonline.org/regulations/admdirect/2002/ade2002_18.pdf. There is no basis to infer repeal of this earlier immunity from the constitutional framework document.

4. *See infra* Part III.A.2.a (discussing national-court treatment of U.N. immunity).

5. *See* UNMIK Regulation 2002/13, UNMIK/REG/2002/13 (June 13, 2002) (establishing Special Chamber of Kosovo Supreme Court to review decisions by privatization agency), *available at* http://www.unmikonline.org/regulations/2002/RE2002_13.pdf.

and that the military occupation and martial law concepts are incomplete because they make certain assumptions about the relationship between civil and military authority which are not satisfied in modern political trusteeships.

This article concludes with a proposal for carefully circumscribed power for judicial review of the administrative variety, which could be added to the legal frameworks for ongoing political trusteeships such as those in Bosnia, Kosovo, Afghanistan and Iraq, and which should be made part of the mandate for any new political trusteeships in the future.

New solutions to new problems are easier to understand if they are explicitly linked to conceptual frameworks that already exist. Because of that, this article consistently uses analogies to American administrative law, particularly to the functions performed by major components of the American Administrative Procedure Act.⁶ Despite this reference to American administrative law, it is important to understand that this article does not assume—and that no one should assume—a legal framework for review of international political trustees that is the same as the American constitutional framework. The political history of major legal and governmental institutions in the United States is unique and entirely unlikely to be replicated in the international setting. Moreover, one of the greatest difficulties in designing international institutions is that most—if not all—“hard law”⁷ is state based, and legal mechanisms at the international level must grapple with the absence of treaty-based legislative institutions at the international level to serve as a source of international governmental power. Nevertheless, the analogies can be useful. The only place where they clearly do not work is with respect to the existence, jurisdiction, and functioning of a reviewing institution; there is no “Article III” judiciary at the international level.

II. OVERVIEW OF POLITICAL TRUSTEESHIPS

Since the termination of the United Nations Trusteeship system in 1999,⁸ the international community has established political trusteeships in

6. 5 U.S.C. §§ 551–703 (2000).

7. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1879–80 (2002). Guzman distinguishes international law through usage of two terms, “hard law” and “soft law.” See *id.* The former category is shaped through treaties and customs; the latter category refers to promises falling short of treaties, such as nonbinding treaties, joint declarations, or final communiqués. *Id.*

8. The last trust territory, the island of Palau, achieved independence in that year. Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-first Century Iraq?*, 14 IND. INT’L & COMP. L. REV. 771, 779 (2004) (noting that trusteeship in Palau was terminated in December, 1994).

five cases: Bosnia, Kosovo, East Timor, Afghanistan, and Iraq. Each of these trusteeships has been different from others, especially in the theoretical allocation of sovereignty between international institutions of civil administration and indigenous institutions. They also have differed in whether they drew their basic authority from a United Nations Security Council resolution or from the principles of military occupation under customary international law. Nevertheless, they have shared two characteristics. In all five cases, the international authorities exercised ultimate executive and legislative power. In none of the five cases has any general mechanism for judicial review been provided.

A. United Nations in Bosnia

The political trusteeship in Bosnia was the first of the modern political trusteeships. Established under U.N. Security Council authority ending a vicious inter-ethnic conflict attendant to the breakup of Yugoslavia,⁹ the political trusteeship in Bosnia initially blurred the allocation of authority among international institutions,¹⁰ pre-existing local institutions established when Bosnia declared independence from Yugoslavia thus triggering the conflict, and new local institutions established by a "constitution"¹¹ negotiated in the Dayton Accords¹² and imposed by the United Nations.¹³

9. See generally RICHARD HOLBROOKE, *TO END A WAR* (1998) (discussing the Bosnia negotiations).

10. Continued involvement by the international community in the exercise of sovereignty in Bosnia was addressed by various provisions of the constitution and more specifically in Annex 10. Dayton Peace Accords, *opened for signature* Nov. 21, 1995, U.S. Dept. of State Dispatch, Vol. 7, Supplement No. 1, at Annex 10 [hereinafter "Dayton Accords"]. In Annex 10, the signatories to the Dayton agreements requested the designation of a High Representative of the United Nations. *Id.* at art. I, para. 2. In Article II, the high representative was authorized to monitor implementation of the peace agreement, "[m]aintain close contact with the Parties to promote their full compliance," coordinate the activities of the civilian organizations and agencies in Bosnia, while respecting their autonomy to facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation, participate in meetings of donor organizations, and report to the United Nations, the European Union, the United States, the Russian Federation and other interested governments, parties, and organizations." *Id.* at art. II, para. 1.

11. Annex 4 of the Dayton Accords was entitled "Constitution of Bosnian Herzegovina." *Id.* at Annex 4. It contained articles defining the responsibilities between the "entities"—Republika Srpska and the Federation of Bosnia and Herzegovina. *Id.* at art. III. The Constitution also established a parliamentary assembly, a presidency, a constitutional court, and a central bank. *Id.* at art. IV–VII. Article I, Paragraph 1 provided, "[t]he Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina,' shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a member state of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations systems and other international organizations." *Id.* at art. I, para. 1. Annex 4 was separately signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and Republic of Srpska. The Day-

Over time, the local institutions proved largely dysfunctional, and the international authorities took on most of the attributes of sovereignty, including at least the exercise of ultimate executive and legislative authority.¹⁴

No aspect of the machinery for international trusteeship in Bosnia provides for judicial review of decisions by the international trustee, al-

ton Accords included a side letter from the delegation of the Republic of Srpska requesting that the Federal Republic of Yugoslavia "be the guarantor of the obligations taken by Republic of Srpska in the peace process." *Id.*

12. The Dayton Peace Agreement was initialed at Wright Patterson Air Force Base in Dayton, Ohio on November 21, 1995, and signed in Paris on December 14, 1995. *See* HOLBROOKE, *supra* note 9, at 309; Dayton Accords, *supra* note 10, at Annex 10. The agreement was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. It explicitly noted the agreement of August 29, 1995, which authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republic of Srpska, the parts of the peace plan concerning it, with the obligation to implement the agreement that had been reached strictly and consequentially. Dayton Accords, *supra* note 10, at preamble. Article V of the General Framework Agreement explicitly endorsed Annex 4.

13. U.N. Security Council Resolution 1031 embraced the Dayton Accords. S.C. Res. 1031, U.N. SCOR, 3607th mtg., at 1, U.N. Doc. S/RES/1031 (1995). Explicitly acting under Chapter VII of the charter, the Security Council, "welcome[d] and support[ed] the Peace Agreement and call[ed] upon the parties to fulfil in good faith the commitments entered into in that Agreement." *Id.* at para. 1.

14. In 1997, a Peace Implementation Conference was held in Bonn. In the conclusions of that conference, the Peace Implementation Council welcomed the High Representative's intention to use his final authority regarding interpretation of civilian implementation of the Dayton Accords by making binding decisions, a power found only implicitly in Annex 10 of the Dayton Accords. *See* Office of the High Representative, *Decision Amending the Constitution of the Federation of Bosnia and Herzegovina*, preamble (April 2, 2003), available at <http://www.ohr.int/decisions/archive.asp> (referring to authority derived from conclusions of the peace implementation conference). In early 2003, the Office of the High Representative published a "Mission Implementation Plan," setting forth a detailed plan for further progress in Bosnia. Office of the High Representative, *OHR Mission Implementation Plan* (Jan. 30, 2003), available at http://www.ohr.int/ohr-info/ohr-mip/default.asp?content_id=29145. Security Council Resolution 1112, adopted on June 12, 1997, welcomed conclusions of the ministerial meeting of the steering board of the Peace Implementation Council held in Sintra, Portugal on May 30, 1997 and reaffirmed, "that the High Representative is the final authority in theater regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make his recommendations." S.C. Res. 1112, U.N. SCOR, 3787th mtg., U.N. Doc. S/RES/1112 (1997). The Sintra Declaration reported that the steering board unanimously agreed that all the authorities of Bosnia and Herzegovina were failing to live up fully to their obligations under the Dayton Accords and found this "unacceptable." Office of the High Representative, *Peace Implementation Council Sintra Declaration*, para. 5 (May 30, 1997), available at http://www.ohr.int/pic/default.asp?content_id=5180. It further concluded, "[t]he main responsibility for the future of the country rests with the elected and constitutional representatives of the country. The help they will receive from the international community will be dependent upon the commitment they demonstrate to the Peace Agreement." *Id.* para. 8. By May 2003, the High Representative had made a number of formal decisions, some of which were styled as "enacting the decision," or "enacting the law." *See* *Decision Amending the Constitution of the Federation of Bosnia and Herzegovina*, *supra* (linking full text of decisions). *See generally* Gerald Knaus & Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY 60 (2003) (providing analysis and critique of continuing exercise of sovereignty power by High Representative).

though a "constitutional court" was part of the machinery of the imposed constitution with theoretical power to review decisions by local authorities.¹⁵

B. UNMIK in Kosovo

U.N. Security Council Resolution 1244 put the United Nations in the position, for the first time, of exercising sovereignty and running a country.¹⁶ Resolution 1244, and subsequent implementing documents issued by the Secretary General of the United Nations, established the U.N. Mission in Kosovo ("UNMIK")¹⁷ as a political trustee,¹⁸ exercising sovereignty on behalf of the people of Kosovo, with a reversionary interest in the state of Yugoslavia.¹⁹ Under this arrangement, UNMIK exercises legislative, executive, and judicial functions without differentiating them very clearly.²⁰ These governmental powers continue even after elections were held and local judges, legislators, and ministers took office under the "constitutional framework."²¹

With one limited exception, no mechanism exists for judicial review of UNMIK decisions. While the constitutional framework explicitly empowers local courts to review decisions of the provisional local institutions,²² the local courts lack the power to review UNMIK decisions,²³ and

15. Dayton Accords, *supra* note 10, at Annex 4, art. VI, para. 3(a) (granting jurisdiction to hear disputes between or among local institutions, but excluding international institutions).

16. S.C. Res. 1244, U.N. SCOR, 4011th mtg., at 3, U.N. Doc. S/RES/1244 (1999) [hereinafter "S.C. Res. 1244"] (authorizing Secretary General to establish civil administration for Kosovo).

17. *Id.* at 6 (authorizing appointment of Special Representative of Secretary General to head civil administration).

18. This article uses the terms "trust" and "political trustee" in the sense of an entity that exercises sovereignty on behalf of another, rather than in the formal sense that the term "trust territory" is used in Chapter 12 of the U.N. Charter. See generally Perritt, *supra* note 1, at 389; Henry H. Perritt, Jr., *Stabilizing Kosovo: Enterprise Formation and Financial Markets*, 2 J. GLOBAL FIN. MARKETS 28 (2001) (explaining "trustee-occupant" concept as defining UNMIK's role).

19. Perritt, *supra* note 18.

20. S.C. Res. 1244, *supra* note 16, at 3 (delineating powers and responsibilities of civil administration).

21. Constitutional Framework, *supra* note 3.

22. *Id.* § 9.4.2 (explicitly conferring right to judicial review of decisions by provisional government).

23. In UNMIK Regulation 2000/47 at section 3, the SRSG declared that "UNMIK, its property, funds and assets shall be immune from any legal process." See UNMIK Regulation 2000/47 §§ 1-3 (defining "UNMIK" to mean the "international civil presence established pursuant to Security Council Resolution 1244 . . . integrating the Interim Civil Administration (United Nations), Humanitarian Affairs (UNHCR), Institution-building (OSCE), and Reconstruction (EU) components").

no other judicial body has the power to do so.²⁴ Only the Kosovo Ombudsperson, set up under the constitutional framework,²⁵ and the U.N. Inspector General²⁶ exercise power to inquire into and investigate allegations of UNMIK misbehavior or abuse of power. The Claims Commissions envisioned under Section 7 of UNMIK Regulation 2000/47 had not been established by either UNMIK or KFOR as of December 4, 2004.²⁷

Local government institutions in Kosovo, the so-called "Provisional Institutions of Self-Government" ("PISG"), enjoy governmental competence in certain areas defined by the SRSG in the Constitutional Framework.²⁸ But even in those areas, PISG decisions are subject to veto by the SRSG.²⁹ The PISG is headed by an elected assembly and thus enjoys a measure of local political accountability. Decisions by the PISG and its subordinate bodies are subject to judicial review in the courts of Kosovo.³⁰ A Special Chamber of the Kosovo Supreme Court on Constitutional Framework Matters can decide disputes among local government institutions and can determine claims that PISG legislation violates the constitutional framework.³¹ This judicial review authority does not extend to UNMIK decisions. The SRSG retains power to "tak[e] appropriate measures" whenever he determines that the actions of the SRSG are incompatible with Security Council Resolution 1244 or the Constitutional Framework.³²

24. See generally Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002) (criticizing the breadth of immunity granted to UNMIK personnel and characterizing Ombudsperson as ineffective because of lack of enforcement power).

25. See UNMIK Regulation 2001/9 § 10.3; UNMIK Regulation 2000/38, UNMIK/REG/2000/38 (June 30, 2000), available at http://www.unmikonline.org/regulations/2000/re2000_38.htm.

26. Formally the U.N. Office of Internal Oversight Services, available at <http://www.un.org/Depts/oios/>.

27. Ombudsperson Institution in Kosovo, Special Report No. 1, *On the Compatibility with Recognized International Standards of UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the Implementation of the Above Regulation* (Apr. 26, 2001) [hereinafter "Special Report No. 1"], available at <http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr1.pdf>.

28. See UNMIK Regulation 2001/9 § 5.1.

29. Laws adopted by the Assembly do not become effective until promulgated by the SRSG. *Id.* §§ 9.1.44–45. The SRSG has power to dissolve the Assembly. *Id.* § 8.1.

30. *Id.* §§ 9.4.1–2 ("Each person claiming to have been directly and adversely affected by a decision of the Government or an executive agency under the responsibility of the Government shall have the right to judicial review of the legality of that decision after exhausting all avenues for administrative review.").

31. *Id.* § 9.4.11.

32. *Id.* § 12.

The only concrete mechanism for judicial review of decisions by the political trustee is the Special Chamber of the Kosovo Supreme Court, which has exclusive jurisdiction to review decisions by the privatization agency.³³

C. United Nations in East Timor

East Timor, like Kosovo, put the United Nations in the position of actually serving as the political trustee.³⁴ In East Timor, sovereignty was held by the U.N. trustee as local institutions were designed and developed. Sovereignty then devolved to those institutions in a series of steps, concluding with continued United Nations involvement to provide support to the new institutions.³⁵

33. On June 13, 2002, the SRSG established the Kosovo Trust Agency ("KTA" or "the Agency") explicitly citing authority under Resolution 1244 and UNMIK Regulation 1999/1. UNMIK Regulation 2002/12, UNMIK/REG/2002/12 (June 13, 2002), *available at* http://www.unmikonline.org/regulations/2002/RE2002_12.pdf. The KTA was established as an independent body, possessing "full juridical personality," with the capacity to contract, acquire, hold and dispose of property and to sue and be sued in its own name. *Id.* §1. KTA reports through the reconstruction component of the civil administration. *Id.* § 12.3. KTA was authorized to administer publicly-owned and socially-owned enterprises ("SOEs") and related assets within the context of Section 8.1 (q) of the Constitutional Framework. *Id.* § 2.1. *See also id.* § 30 (granting Special Chamber "exclusive jurisdiction for all suits against the [KTA]").

34. East Timor has a long history with political trusteeship. In 1960, the United Nations General Assembly added East Timor to its list of non-self-governing territories, marking the beginning of a transition from governance by Portugal. In 1974, Portugal attempted to establish a provisional government and a popular assembly to determine the status of East Timor. "Civil war broke out between those who favored independence and those who advocated integration with Indonesia. Unable to control the situation, Portugal withdrew. Indonesia intervened militarily and integrated East Timor [into its territory]. The United Nations never recognized this integration, and both the Security Council and the General Assembly called for Indonesia's withdrawal." United Nations Mission of Support in East Timor ("UNMISET"), *East Timor – UNMISET - Background* [hereinafter "UNMISET Background"], *available at* <http://www.un.org/Depts/dpko/missions/unmiset/background.html> (last visited Oct. 18, 2004).

35. In 1999 U.N. Security Council Resolution 1246 authorized the establishment of the United Nations Mission in East Timor ("UNAMET") to oversee a transition period during which the East Timorese people could decide their status. S.C. Res. 1246, U.N. SCOR, 4013th mtg., U.N. Doc. S/RES/1246 (1999). After continued violence, the government of Indonesia accepted assistance from the international community. Security Council Resolution 1264 authorized a multinational force ("INTERFET") "to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance." *Id.* This resolution was followed by Security Council Resolution 1272, which established the U.N. Transitional Administration in East Timor ("UNTAET"). *See* UNMISET Background, *supra* note 34. (establishing UNTAET as "an integrated, multidimensional peacekeeping operation fully responsible for the administration of East Timor during its transition to independence. Resolution 1272 mandated UNTAET to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation of humanitarian assistance, rehabilitation and development assistance; to support capacity-building for self-government; and to assist in the establishment of conditions for sustainable development.") Which created a revised U.N. mission, the United Nations Mission of Support in East Timor ("UNMISET"), designed to provide assistance to

During the period of international administration no mechanism for judicial review existed.

D. Civil Administration in Afghanistan

Post-war³⁶ arrangements in Afghanistan gave U.N. authorities less authority than in Kosovo and East Timor, but nevertheless exemplify a political trusteeship where the trustee responsibilities are divided between the U.N. and indigenous institutions. The Bonn Agreement,³⁷ negotiated by

governmental administrative structures, interim law enforcement and public security, assistance in developing the East Timor police service, and otherwise to support the country's internal and external security. S.C. Res. 1410, U.N. SCOR, 4534th mtg., U.N.Doc. S/RES/1410 (2002).

36. In October 2001, an ad-hoc coalition of forces, dominated by the United States, attacked Afghanistan, with the explicit objective of displacing the Taliban, the then government. The military operations were justified as an exercise of the privilege of self-defense by the United States, and otherwise legitimate to end the Taliban's threat to international peace and security. The post-September 11th Security Council Resolutions S.C. Res. 1377, U.N. SCOR, Annex, U.N. Doc. S/RES/1377 (2001), S.C. Res. 1378, U.N. SCOR, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378 (2001), S.C. Res. 1383, U.N. SCOR, 4434th mtg., U.N. Doc. S/RES/1383 (2001), and S.C. Res. 1386, U.N. SCOR, 4443rd mtg., U.N. Doc. S/RES/1386 (2001) [hereinafter "S.C. Res. 1386"], did not explicitly approve use of force to depose the Taliban government of Afghanistan. The closest to verbal approval is language in the preamble to Security Council Resolution 1386: "Supporting international efforts to root out terrorism, in keeping with the Charter of the United Nations . . .," S.C. Res. 1386, *supra*, at preamble, and "Authoriz[ing] the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate." S.C. Res. 1386, *supra*, at para. 3 (emphasis in original).

37. *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, U.N. SCOR, U.N. Doc. S/2001/1154 (2001) [hereinafter *Bonn Agreement*]. The Bonn Agreement established an interim authority to be "the repository of Afghan sovereignty," *id.* at I(3), and called for an international security force to support it. *Id.* at Annex I, para. 3. The interim administration is responsible for the day-to-day conduct of the affairs of state, and has the power "to issue decrees for the peace, order and good government of Afghanistan." *Id.* at III(C)(1). Part II of the Bonn Agreement makes applicable the 1964 Constitution, insofar as not inconsistent with the terms of the Bonn Agreement, and "existing laws and regulations, to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations." *Id.* at II (1)(ii). The interim authority is to be succeeded by a "Transitional Authority" established by an "Emergency Loya Jirga" to be convened by the former King of Afghanistan. *Id.* at I(4), I(5). The chairman, vice chairman, and other members of the interim administration were selected by participants in the "UN talks on Afghanistan," on the basis of professional competence, personal integrity, ethnic, geographic, and religious balance. *Id.* at III(A)(3). The Emergency Loya Jirga was to be established by a Special Independent Commission, comprising twenty-one members "selected from lists of candidates submitted by participants in the UN talks on Afghanistan . . . as well as Afghan professional and civil society groups." *Id.* at IV(1). The United Nations was charged with assisting with the establishment and the functioning of the commission. *Id.* at IV (1). A Loya Jirga "is a forum unique to Afghanistan in which, traditionally, tribal elders . . . have come together to settle affairs of the nation or rally behind a cause. The phrase loya jirga is Pashto and means 'grand council.'" Q & A: *What is a Loya Jirga*, BBC NEWS ONLINE, July 1, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/1782079.stm.

The emergency loya jirga is to decide on "a broad-based transitional administration, to lead Afghanistan until such time as a fully representative government can be elected through free and fair elec-

representatives of Afghani interests and a representative of the U.N. Secretary General, outlined the details of the trusteeship. Pursuant to this agreement, the United Nations Security Council established the United Nations Assistance Mission in Afghanistan (UNAMA) on March 18, 2002.³⁸ UNAMA was authorized to promote national reconciliation and to fulfill the responsibilities entrusted to the United Nations in the Bonn Agreement,³⁹ including those related to human rights, the rule of law, and gender issues. UNAMA was also authorized to manage all U.N. humanitarian relief, recovery, and reconstruction activities in Afghanistan "in coordination with the Afghan Administration."⁴⁰

In Afghanistan, the role of the United Nations is limited. The Special Representative of the Secretary General "shall monitor and assist in the implementation of" the Bonn Agreement⁴¹ and

shall advise the Interim Authority in establishing a politically neutral environment conducive to the holding of the Emergency Loya Jirga in free and fair conditions. The United Nations shall pay special attention to the conduct of those bodies and administrative departments which could di-

tions to be held no later than two years from the date of the convening of the Emergency Loya Jirga." *Bonn Agreement, supra*, at I(4). The Bonn Agreement further provides that a Constitutional Loya Jirga is to be convened within eighteen months after the establishment of the Transitional Authority. *Id.* at I(6). This loya jirga is to adopt a new constitution for Afghanistan based on work by a constitutional commission established by the Transitional Administration. *Id.* at I(6).

38. Resolution 1401 established UNAMA for an initial period of one year, with a mandate and structure specified by the Secretary General in a report of March 18, 2002. S.C. Res. 1401, U.N. SCOR, 4501st mtg., U.N. Doc. S/RES/1401 (2002).

39. The Secretary General's report to the Security Council summarizes the results of the Bonn Conference and proposed a structure for the United Nations presence in Afghanistan in accordance with U.N. responsibilities under the Bonn Agreement. *See The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 56th Sess., Agenda item 43, para. 9, U.N. Doc. A/56/875-S/2002/278 (2002).

40. *Id.* (Paragraph 1 of Security Council Resolution 1401 gives UNAMA the powers recommended in the Secretary General's Report). Decisions to develop concepts for nation rebuilding in Afghanistan with respect to post-war Afghanistan were, no doubt, informed by the deliberation of a "Committee of Experts," convened in November, 2001, by Michael Scharf and Paul Williams. *See Michael P. Scharf & Paul R. Williams, Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 NEW ENG. L. REV. 709, 709 (2002). Drawing on experience in Haiti, Bosnia, Kosovo, Sierra Leone and East Timor, the Committee recommended an establishment of a non-chaotic and neutralized state identification of appropriate governing structures and implementation of intermediate sovereignty. *Id.* at 713-14.

41. *Bonn Agreement, supra* note 37, at Annex II, para. 2. In an Annex, the participants in the U.N. talks in Afghanistan "request the United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas." *Id.* at Annex I, para. 3.

rectly influence the convening and outcome of the Emergency Loya Jirga.⁴²

The transitional administration began work in June 2002,⁴³ beset with an inability to extend its authority throughout the country and continued security problems.⁴⁴ Work was progressing toward adoption of a new constitution in late 2003,⁴⁵ intended to be followed by national elections in June 2004.⁴⁶

No mechanism was provided for judicial review of decisions by the international community. Given the limited U.N. civil administration role, it might have been appropriate to provide for an international tribunal to afford judicial review of decisions by the interim and transitional Afghani institutions.

E. Coalition Provisional Authority in Iraq

The Coalition Provisional Authority ("CPA") in Iraq "[was] vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483, and the laws and usages of war."⁴⁷ The

42. *Id.* at Annex II, para. 3. In July 2002, the Secretary General reported on a successful conclusion of the emergency loya jirga held from June 11–19, 2002 and reported on problems accompanying declining donor funding and on continuing security problems, supporting his recommendation of a limited expansion of the International Security Assistance Force beyond Kabul. *See The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 56th Sess., Agenda item 43, U.N. Doc. A/56/1000-S/2002/737 (2002).

43. *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 57th Sess., Agenda item 37, para. 2, U.N. Doc. A/57/487-S/2002/1173 (2002).

44. The Secretary General reported, however, that "[t]he Transitional Administration's attempts to fulfill its ambitious objectives have been stalled . . . by limitations in its ability to impose its authority nationwide. The intended policy of replacing the existing provincial governors, and heads of the provincial police, military garrisons, revenue offices and civil administrations with officials drawn from other provinces . . . has not been realized." *Id.* at para. 9. He also reported that the most serious challenge facing Afghanistan is the lack of security, and noted that progress on establishing a national police force was necessary in that regard. *Id.* at paras. 11–14.

45. In early October, delegates were being selected to vote on the proposed constitution. *See* Press Briefing, David Singh, UNAMA Media Relations Officer, Update on the Constitutional Process (Oct. 5, 2003), at <http://www.unama-afg.org/news/briefing/spokesman/2003/03oct05.htm>.

46. *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, U.N. GAOR, 57th Sess., Agenda item 37, paras. 12–14, U.N. Doc. A/57/850-S/2003/754 (2003) (reporting on progress toward constitutional loya jirga and prospects for meeting 2004 deadline for elections).

47. Coalition Provisional Authority Regulation No. 1 § 1(2) (May 16, 2003), available at http://www.cpairaq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf [hereinafter "CPA Reg."] *cf.* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209, 2208 (codified at 22

legal framework for the United States role was ambiguous under U.S. law.⁴⁸ The President issued no executive order establishing the CPA, and no statute defines it, except for the Iraq Emergency Supplemental Appropriation Act.⁴⁹ Whether the Administrator of the CPA reported directly to the President or to the Secretary of Defense is unclear.⁵⁰ Congressional

U.S.C.A. § 2151 Note) (referring to CPA and its successors) (2003) [hereinafter "Iraq Emergency Supplemental Appropriation"].

Sovereignty was formally transferred to the Interim Government on June 28, 2004. A "Law of Administration for the State of Iraq for the Transitional Period," negotiated between the CPA and Iraqi leaders and signed March 8, 2004, provided for the transfer of power from the CPA to a "fully sovereign Iraqi Interim Government" that was to take power on June 30, 2004. *See* Law of the Administrations for the State of Iraq for the Transitional Period, Mar. 8, 2004, *available at* <http://www.cpa-iraq.org/government/TAL.html>. (last visited January 20, 2005). The UN Security Council approved the new arrangement in Security Council Resolution 1546, and the CPA disbanded itself in its Regulation 9. *See generally* CPA Reg. No. 9 (June 9, 2004), *available at* http://www.iraqcoalition.org/regulations/20040609_CPAREG_9_Governing_Council_s_Dissolution.pdf.

48. The duties of the CPA similarly were vague, except for a few appropriation-act requirements which are bizarre in their particularity, singling out opportunities for the disabled, for women, and religious discrimination as mandates for the CPA, but not otherwise addressing political trustee obligations. The Appropriation Act requires that the CPA work with Iraqi officials to ensure that a new Iraqi constitution "preserves full rights to religious freedom and tolerance of all faiths." *Id.* It requires procurement to occur under federal procurement law. *Id.* at 1228. The Act requires reports by the Secretary of State on efforts to encourage contributions by other countries, to encourage addressing the needs of people with disabilities, and to ensure that a new Iraqi constitution preserves religious freedom and tolerance of all religious faiths. *Id.* at 1233. The act requires that post-conflict stability activities "to the maximum extent practicable . . . increase the access of women to, or ownership by women of, productive assets such as land, water, agricultural inputs, credit, and property in Afghanistan and Iraq, respectively; provide long-term financial assistance for education for girls and women in Afghanistan and Iraq, respectively; and integrate education and training programs for former combatants in Afghanistan and Iraq, respectively, with economic development programs to encourage the reintegration of such former combatants into society; and promote post-conflict stability in Afghanistan and Iraq, respectively." *Id.* at 1233-34.

49. The Act appropriates funds to the President for the "Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government) . . ." *Id.* at 1225 (2003). The Act extends certain of its requirements to "any successor United States Government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq." *Id.* at 1231

50. "The president made a decision to start it out with Jerry Bremer reporting to me. The implication in the press was that he was going to report to the White House or Condi Rice. As Condi has indicated, that was not the import of the memo, that's not what the memo said, that's not what was intended. We know that that activity, as it matures, will migrate over at the Department of States. I mean, that's how—where ambassadors report. And eventually, it will arrive there at some point. And that would be a decision would make at some point as these—as the task kind of moves less security towards more political and economic, one would think." Press Conference, Donald H. Rumsfeld, Secretary of Defense, Department of Defense, Press Conference with NATO Secretary-General Lord Robertson (Oct. 8, 2003), *at* <http://www.defenselink.mil/transcripts/2003/tr20031008-secdef0746.html>; "Nothing changes in terms of the Coalition Provisional Authority and the Department of Defense. This is still being led by the Pentagon . . ." Press Briefing, Scott McClellan, White House Press Secretary (Oct. 6, 2003), *at* <http://www.whitehouse.gov/news/releases/2003/10/20031006-5.html#10>.

oversight of CPA implied that some attributes of sovereignty remained with the United States.⁵¹

The Administrator of the CPA determined that “[t]he CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration.”⁵² He declared that “[t]he CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions . . . and the laws and usages of war.”⁵³

The CPA regulations provided no mechanism for judicial review. The CPA established no mechanism to review its decisions or those of entities established under its authority. The Iraq Emergency Supplemental Appropriation Act provided for an independent Inspector General with limited oversight responsibilities,⁵⁴ but otherwise did nothing to afford tribunals within which the legality of trustee decisions could be tested. U.N. approval of the political trusteeship in Iraq lent some support to the immunity arguments reviewed in Part III(A)(2). But the dominance of the United States Government in the civil administration in Iraq also supported arguments that political trustee decisions were reviewable under the Administrative Procedure Act and other statutes authorizing U.S. judicial review of U.S. government actions.

III. FAILURE TO PROVIDE FOR JUDICIAL REVIEW POSES TWO RISKS

The failure to provide explicitly for judicial review of political trusteeship decisions presents two risks to the success of those trusteeships. It increases the risk of litigation in national courts over trustee decisions, because of unpredictability of application of immunity in such a context and the dependence of forum non-conveniens dismissal on the availability of an adequate alternative forum. It undermines the legitimacy of political trusteeships, regardless of whether national-court litigation occurs.

51. An appropriations rider requires the Director of OMB, in consultation with the Administrator of the CPA to report to the Congress on the uses of appropriated funds on a project-by-project basis. Iraq Emergency Supplemental Appropriation, *supra* note 47, at 1231.

52. CPA Reg. No. 1 § 1(1).

53. *Id.* § 1(2).

54. The Act establishes an Inspector General of the Coalition Provisional Authority, appointed by the Secretary of Defense, who must report to the Congress on the use of appropriated funds and monitor and review reconstruction activities. Emergency Supplemental Appropriations Act, *supra* note 47, at 1234. The Inspector General also has the same duties and responsibilities as other inspectors general under the Inspector General Act of 1978. *Id.* at 1236. The Inspector General must report quarterly to the Congress on the activities of the CPA. *Id.* at 1237.

A. Increased Risk of Litigation in National Courts Over Trustee Decisions

Political trustees will make decisions that have winners and losers. They must develop new legislation, grant and deny licenses to valuable public privileges, such as access to electromagnetic spectrum for cell phone providers, award contracts to perform public services and conduct public works, and restructure industry. In each of these examples someone will have an interest in challenging the trustee decisions. Litigation over these decisions in national courts around the world would produce a web of inconsistent decisions, could result in significant blockages to trustee operation depending on the outcome of such litigation and how national-court judgments are enforced, and distract trustee attention from its main work.

Yet, such national court litigation is likely unless the framework for a political trusteeship includes specialized—and exclusive—mechanisms for judicial review. While strong immunity arguments may be available, political trustees perform functions outside the historic ambit of diplomatic activities which diplomatic immunity doctrines were created to protect, and political trustees may not be recognized as “states,” and therefore may not be entitled to immunity doctrines historically developed to shield exercise of sovereignty. Existence of specialized review bodies as part of—or paralleling—the trusteeship would considerably reduce the likelihood of such national court litigation because they would increase the probability of *forum non conveniens* dismissal.

National court review of trustee decisions would not be comprehensive; only certain plaintiffs would have standing. Actions could be maintained only against defendants within the personal jurisdiction of the tribunal and not immune from suit in that tribunal. Relief would depend further on the availability of a cause of action, and the inapplicability of *forum non conveniens* or other comity doctrines that would avoid reaching the merits. Only a subset—maybe a small subset—of the controversies that might warrant judicial review in a comprehensive system is potentially justiciable in national courts. But the subset is not null; it likely contains plaintiffs and defendants and claims that could result in national-court decisions.

Two types of national court litigation are conceivable. The first would involve the political trustee or its constituent units as a defendant. The second would involve states participating in or sponsoring the trusteeship as defendants. The following sections consider each possibility. The first is framed by an actual case, in which a U.S. enterprise, disappointed by the decisions of the privatization agency established by the political trustee in Kosovo, filed suit for breach of contract in state court in New York. The second considers a cluster of hypothetical claims against the United States

Government, challenging decisions by the U.S.-established and dominated political trustee in Iraq.

National court litigation is more likely when assets belonging to the political trustee or to persons under its control are found in the state within which litigation is attempted. Absent such assets, enforcement of a national court judgment is unlikely; the political trustee can simply ignore it. Of course a national court judgment might be enforced by the courts of another state, if it agrees with the first court's analysis of immunity and jurisdictional issues.

1. *Choice of law.* Several of the prerequisites for national court litigation turn on the choice of law (private international law): It is widely accepted that any judicial forum should apply its own choice to law rules in deciding whether to apply foreign law or forum-law to various aspects of the controversy.⁵⁵ Accordingly, the resolution of many of the issues prerequisite to maintenance of a national-court lawsuit over political trustee decisions depends on where suit is brought. Nevertheless, some choice of law rules are well settled and widely applied by most national legal systems. Immunity is determined by the law of the forum.⁵⁶ Comity—the respect to be given legislative, executive and judicial decisions by a foreign sovereign—is determined by the law of the forum, although the classification of the decisions may depend on the law of the decisionmaker.⁵⁷ Personal jurisdiction is determined by the law of the forum.⁵⁸ Standing to bring suit, and whether a legal claim exists as to which relief can be granted may depend on the law of the trusteeship state or of another place, as when a breach of contract claim arising from a contract entered into in the trustee territory to be performed there. Heavy reliance on the law of the forum for so many of these issues makes it difficult to predict the outcome of national court litigation. Nevertheless, one can predict with a high degree of confidence the arguments that will be made by the parties in such lawsuits. The following sections frame those arguments and suggest how the existence of specialized administrative review mechanisms might affect the outcome of those arguments.

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(2) (1971) (concluding that "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").

56. *Nevada v. Hall*, 440 U.S. 410, 417 (1979) (discussing core principle of *The Schooner Exchange v. McFaddon*, 7 Cranch 116, and concluding that sovereignty implies that courts determine their own power). *But see* *Biscoe v. Arlington County*, 738 F.2d 1352, 1358–59 (D.C. Cir. 1984) (discussing circumstances in which court applies another state's immunity rules).

57. *Supra* text accompanying note 55.

58. *Supra* text accompanying note 56.

2. *Suits against the political trustee and its subordinate bodies.* To date there have not been many lawsuits in national courts challenging trustee decisions. It is unlikely that this passivity on the part of parties displeased with trustee decisions is a permanent state. For example, in late 2003 a New Jersey company disappointed by a decision of the privatization agency in Kosovo, the Kosovo Trust Agency ("KTA"), filed suit in state court in New York City, subsequently removed to federal court, against the United Nations, the United Nations Mission in Kosovo, and the KTA. The availability of a specialized court in Kosovo with exclusive jurisdiction over privatization disputes considerably strengthened the forum-non-conveniens arguments available to the defendant KTA and to the author in an amicus brief prepared on behalf of the Government of Kosovo urging dismissal and ultimately persuaded the plaintiff to dismiss the New York action.

In that action, as in other national court lawsuits, several doctrines determine whether national court litigation can proceed against a political trustee. First, there are a number of related immunity doctrines applicable to the United Nations and to "states." Second, there is the question of whether trustee decisions constitute "acts of state," which are outside the competence of national courts, as a matter of comity. Third, the doctrine of forum non conveniens militates in favor of dismissing cases when there is an available, adequate, and preferable alternative forum. The immunity and act of state doctrines depend on whether the U.N. is the source of authority for the political trustee, and whether the trustee is entitled to be treated as a "state" under public international law. The force of the forum non conveniens doctrine depends entirely on the existence of a specialized tribunal to conduct judicial review over decisions giving rise to the national-court litigation.

a. *Immunity enjoyed by the United Nations.* Political trustees may be shielded from national-court judgments by immunity doctrines developed to protect the United Nations and other international organizations as an extension of diplomatic immunity concepts.⁵⁹ The availability of such immunity, however, turns on the role the U.N. plays in authorizing the political trusteeship and the willingness of a national court to extend diplo-

59. See Veronica L. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned From the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOK. J. INT'L L. 989, 1010-12 (2003) (explaining evolution of U.N. immunity from concept of diplomatic immunity); Valerie Oosterveld et. al., *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767, 801 (2002) (describing two types of immunity: diplomatic immunity and immunity for personnel conducting affairs in the context of international conventions pursuant to international agreements).

matic immunity concepts to institutions performing governmental functions.

The United Nations, its subordinate components, and its officers enjoy absolute immunity under the Convention on Privileges and Immunities of the United Nations.⁶⁰ In the Kosovo privatization case, it was possible to argue that UNMIK exercises the U.N.'s authority in Kosovo, delegated to the SRSG in Security Council Resolution 1244 through the Secretary General and then through the Special Representative of the Secretary General. UNMIK thus stood in the shoes of the U.N. itself in terms of immunity.

Furthermore, the KTA was a creature of UNMIK Regulation 2002/12 and exercised only those powers delegated to it under that UNMIK Regulation. Thus, KTA could argue that it enjoyed the same immunity as the delegating authority. Just as UNMIK would be immune from private suit in the national courts of foreign countries were it to have taken on the privatization task itself rather than delegating the function to KTA, KTA likewise was immune.

That UNMIK has partially waived immunity for KTA, by subjecting it to suit in the Special Chamber of the Supreme Court of Kosovo, did not alter the reality that its immunity against suit in other courts remained intact. In this respect, its immunity was similar to that of agencies of the United States Government, which remain immune from breach-of-contract actions in the regular federal courts despite partial waiver of immunity in the Tucker Act for suits in the United States Claims Court.⁶¹

The same arguments would have been available to resist national-court litigation over the decisions of the political trustee in East Timor.⁶² In other political trusteeships, however, such an argument would be weakened because other sources of law, such as continued sovereignty in local institutions⁶³ or customary law of military occupation,⁶⁴ rather than U.N. authorization, provided the legal foundation for governmental powers exercised by the political trustee.

b. Immunity under the IOIA. It also was possible to argue that KTA enjoyed immunity derived from the United Nation's immunity under § 7(b)

60. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, art. II, § 2, 21 U.S.T. 1418, 1422 T.I.A.S. 6900 [hereinafter "Convention on the Privileges and Immunities"].

61. See *Ward v. Brown*, 22 F.3d 516, 519 (2d Cir. 1994) (Claims Court has exclusive jurisdiction of breach of contract actions seeking more than \$10,000 unless some statute other than Tucker Act waives sovereign immunity).

62. See *infra* Part II.C.

63. Bosnia is the strongest example. See *infra* Part II.A.

64. Afghanistan and Iraq are examples. See Parts II.D and II.E.

of the International Organizations Immunity Act ("IOIA").⁶⁵ The IOIA confers immunity such as is enjoyed by foreign states, thus linking it to Foreign Sovereign Immunities Act ("FSIA") immunity.⁶⁶ It covers organizations, such as the United Nations, in which the United States participates pursuant to a treaty, and which the President has designated by Executive order.⁶⁷ The President designated the United Nations as an organization covered by the immunities conferred by the IOIA in Executive Order No. 9698.⁶⁸

According to this argument, KTA, deriving its power and thus its immunity from the United Nations, was immune from suit in a U.S. judicial forum. This would be so under the IOIA, which may confer the absolute immunity foreign governments enjoyed at the time of the IOIA's passage instead of conferring only the restrictive immunity provided for in the later-enacted FSIA.⁶⁹ In several reported cases, federal courts have suggested that U.N. immunity under the treaty and/or under the IOIA is broader than FSIA immunity, although the facts of some cases made it unnecessary to reach that question.⁷⁰

Under this structure, the KTA, deriving its powers from the United Nations, was entitled to the same absolute immunity the U.N. enjoys under the IOIA.

Both the treaty-based and the statutory immunity arguments depended entirely on the authority of the political trustee flowing from the United Nations. In a political trusteeship organized outside the U.N. system, these arguments would be altogether unavailable.

c. *Immunity under the FSIA.* It can be argued that political trustees, such as UNMIK and their instrumentalities, such as the KTA, are immune

65. See 22 U.S.C. § 288a (2000).

66. See *id.*

67. 22 U.S.C. § 288 (2000).

68. 11 C.F.R. § 1809 (1946).

69. Compare *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998) (holding that Congress did not intend restrictive immunity doctrine of FSIA to apply to IOIA) with *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (identifying uncertainty as to the scope of IOIA immunity but finding it unnecessary to resolve the ambiguity because the United Nations' had absolute immunity under the convention).

70. See *Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001) (finding that U.S. troops acting under U.N. authority in Haiti enjoyed United Nation's absolute immunity under treaty; not mentioning IOIA); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 533 n.1 (S.D.N.Y. 1994) (finding it unnecessary to consider exceptions of FSIA because convention provided sufficient ground for finding U.N. immune); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 372-73 (S.D.N.Y. 1996) (suggesting that U.N. immunity under treaty is broader than FSIA immunity but not deciding question because challenged conduct did not fall within commercial activity exception).

from suit under the Foreign Sovereign Immunities Act ("FSIA"),⁷¹ which provides, subject to certain statutory exceptions, that "a foreign state shall be immune from the jurisdiction of the courts of the United States."⁷² The FSIA defines "foreign state" to include political subdivisions, agencies, and instrumentalities of foreign states.⁷³ Such sub-state entities are defined in turn to include entities which are separate legal persons, corporate or otherwise, which are organs of foreign states or subdivisions thereof.⁷⁴

For a political trustee to qualify for FSIA immunity, it must be entitled to the status of a foreign state, and its activities giving rise to the controversy must not fall within one of the statutory exceptions for immunity, especially the exception for "commercial activities."⁷⁵

i. Is the Political Trustee a "state?" Persuasive arguments exist under U.S. law that political trustees qualify as "states" under the FSIA because they perform quintessentially governmental functions. In Kosovo, this argument was supported by the terms of the Security Council resolution setting up the political trusteeship.⁷⁶ In *Underhill v. Hernandez*,⁷⁷ decided before enactment of the FSIA, the Supreme Court held that what matters for treatment as a sovereign is not formal recognition of the defendant as a "government," but the exercise of governmental authority.⁷⁸ The KTA exercised governmental authority and therefore was entitled to immunity under the FSIA. Moreover, privatization, the activity challenged in the Kosovo lawsuit, was intertwined with exercise of these functions.⁷⁹

71. 28 U.S.C. § 1602 *et. seq.* (2000).

72. *Id.* § 1604 (2000).

73. *Id.* § 1603(a).

74. *Id.* § 1603(b).

75. *Id.* § 1603.

76. Section 11 of Security Council Resolution 1244 defines the powers of the "international civil presence" in Kosovo, to be established by the Secretary General, to include "performing basic civilian administrative functions." S.C. Res. 1244, *supra* note 16, at 3. Section 1(1) of UNMIK Regulation 1999/1 provides that "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General." UNMIK/REG/1999/1 (July 25, 1999), available at <http://www.unmikonline.org/regulations/1999/reg01-99.htm>.

77. 168 U.S. 250 (1897).

78. *Id.* at 252.

79. In his report to the Security Council on October 30, 2003, the SRSG referred to privatization as "essential" and the "only hope" for reducing 57 percent unemployment and other economic challenges. *Short-Term Outlook Uncertain, but Strong Desire of Kosovo's People for Peace, Stability is Clear, Head of Mission Tells Security Council: Press Release*, U.N. SCOR, 4853rd mtg. at 4, U.N. Doc. SC/7909 (2003). The mandate of Resolution 1244 could not have been achieved without governmental authority to alter property ownership rights. KTA is an integral part of the governmental apparatus established in Kosovo by the SRSG. UNMIK Regulation 2002/12 characterizes KTA as an "independent

Outside the political trusteeship context, the activities of privatization agencies in other states have been uniformly viewed as falling with the FSIA, although case authority is mixed on whether such activities may nevertheless produce liability under the commercial activities exception of the Act, as considered in the next section.⁸⁰

body" under § 11.2 of the Constitutional Framework. See UNMIK Regulation 2002/12; UNMIK Regulation 2001/9. Section 11.1 recognizes independent governmental bodies such as the Central Election Commission, the Kosovo Judicial and Prosecutorial Council, the Office of the Auditor-General, the Banking and Payments Authority of Kosovo, the Independent Media Commission, the Board of the Public Broadcaster, and the Housing and Property Directorate and the Housing and Property Claims Commission. UNMIK Regulation 2001/9 § 11.1. Section 11.2 provides: "The bodies and offices specified [in § 11.1], and such other independent bodies and offices as may be established by law, shall have the powers, obligations, and composition specified in the legal instruments by which they are established." Chapter 11 thus contemplates the existence of agencies, plainly governmental in character, that operate independently of UNMIK and local governmental institutions. *Id.* chap. 11. The reference to chapter 11 of UNMIK Regulation 2001/9 in UNMIK Regulation 2002/12 reinforces the conclusion that KTA's pedigree is governmental rather than private. See UNMIK Regulation 2002/12.

Section 3 of UNMIK Regulation 2002/12 defines "corporation" to include "a limited liability company or a joint stock company . . . recognized as such under the Regulation on Business Organizations." By characterizing KTA as an "independent body" rather than as a "corporation," UNMIK manifested an intent to classify KTA's functions as governmental rather than commercial.

The same conclusion flows from an examination of KTA functions, which are those of a governmental agency, not those of a commercial enterprise. The KTA, within its sphere of delegated authority under UNMIK Regulation 2002/12, exercises legislative and executive functions. Unlike a commercial enterprise or a common-law trustee, KTA enjoys more power than simply the power to contract or to administer assets. It has the power to impose legal obligations on third parties and the power to alter property rights—powers associated with governments. KTA can "modify the authority" of the governance entities such as the chairman, directors, managers, and boards of enterprises under its control. *Id.* § 6.1(c). It has authority to modify charters, by-laws and other relevant enterprise documents. *Id.* § 6.1(k). It can require employees and contractors to provide information. *Id.* § 6.1(g). It can compel persons controlling documents regarding enterprises to produce those documents. *Id.* § 6.1(h). It can establish a business registry. *Id.* § 8.3. It can suspend lawsuits. *Id.* § 9.3. It is empowered to establish bidding processes to sell off assets of enterprises. *Id.* § 10.2(b). It can seek the assistance of the police and NATO military forces. *Id.* § 26. It can impose fines. *Id.* § 27. These are inherently governmental powers, not commercial activities. Moreover, KTA, like governmental entities, but unlike commercial entities, is exempt from taxation. *Id.* §§ 23.1–23.2.

80. In *Sablic v. Croatia Line*, 719 A.2d 172, 177 (N.J. Super. Ct. App. Div. 1998), the New Jersey intermediate court held that the Croatian Privatization Fund was a foreign entity entitled to FSIA immunity. In *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1157 (D.C. Cir. 2002), the court of appeals held that the district court lacked jurisdiction to adjudicate a variety of contract claims asserted by an entity granted management rights over a state-owned uranium mining enterprise in Kazakhstan. The court held that Kazakhstan and its instrumentalities had not waived FSIA immunity. See *id.* The lawsuit alleged that the contracts were not performed because of certain decisions reached in the Kazakhstan privatization process. The plaintiff did not assert the commercial activities exception and relied instead on the waiver exception. *Id.* at 1161. The court held that certain defendants were entitled to FSIA immunity and that immunity had been waived only for certain claims that fell within the act of state doctrine. See *id.* at 1164–66. As to claims against a private corporation, which allegedly interfered with the plaintiffs' contracts, the court remanded for determination whether personal jurisdiction existed based on an alleged meeting in the United States involving that private defendant. See *id.* at 1169.

The availability of this source of prima facie immunity in other national courts would depend on the degree to which forum law⁸¹ applies sovereign immunity doctrines similar to those codified in the FSIA. Such an approach is likely because the FSIA expresses customary international law regarding sovereign immunity.⁸²

ii. Are the political trustee's acts within the commercial activities exception to immunity? The greatest weakness of the FSIA argument is that many of the actions of political trustees likely to be challenged in national courts may fall within the commercial activities exception of the FSIA. This exception withholds immunity from a foreign state when the

action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States⁸³

The purpose of the commercial activities exception is to restrict "the sovereign immunity of foreign states . . . to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform."⁸⁴

Two district court cases found privatization in other countries to be within the commercial activities exception of the FSIA. In *WMW Machinery, Inc. v. Werkzeugmaschinenhandel GMBH*,⁸⁵ the district court held that the German privatization agency (the German Treuhand) was not entitled to sovereign immunity because the privatization agency, though an entity of the state of Germany, fell within the commercial activities exception.⁸⁶ *WMW Machinery* satisfied the "direct effect" requirement of the commer-

81. Under choice of law doctrines expressed in private international law, immunity is a question to be decided by the law of the forum. See generally Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 42 (1991) (immunity is aspect of comity, which in turn is aspect of forum law).

82. See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983) (explaining history of FSIA); Michael P. Davis, *Accountability and World Leadership: Impugning Sovereign Immunity*, 99 U. ILL. L. REV. 1357, 1367 (1999) (explaining that other states and international treaties accept restrictive theory of sovereign immunity).

83. 28 U.S.C. § 1605(a)(2) (2000).

84. H.R. REP. NO. 94-1487, § 1602 (1976), reprinted in 1976 U.S.C.C.A.N. 6604 (the commercial activities exception of the FSIA expresses the so-called "restrictive" interpretation of sovereign immunity); *Verlinden*, 461 U.S. at 486-87 (explaining history of FSIA and embrace of restrictive theory of immunity).

85. 960 F. Supp. 734 (S.D.N.Y. 1997).

86. *Id.* at 742.

cial activities exception, because the contract sued on was to be performed in the United States. Other cases might be distinguishable if the challenged actions of the political trustee were entirely extraterritorial in effect.⁸⁷

In *Ampac Group, Inc. v. Republic of Honduras*,⁸⁸ the district court found subject matter jurisdiction under the commercial activities exception to the FSIA, rejecting the defendants' arguments that "privatizing a national cement industry is an action that could only be taken by a foreign sovereign, and . . . [was] thus not 'commercial activity.' [That] [p]rivatization . . . is merely the 'flip side' of nationalization, a quintessentially sovereign prerogative."⁸⁹ The district court also rejected the argument that the Act of State Doctrine applied to the "unquestionably commercial" privatization decisions by the government of Honduras.⁹⁰ It also found personal jurisdiction based on meetings held by Honduran officials in the United States.

Importantly, the *Ampac* court held that, "Engaging in a program of privatization does not *automatically* insulate Honduras from suit in the United States."⁹¹ It is well accepted that the applicability of the commercial activities exception is determined, not with reference to the purpose of the entity claiming immunity under the FSIA, but with reference to its specific activities drawn into question in the litigation.⁹² In *Ampac*, the activity in litigation was "[t]he sale of a company from its owners to the highest bidder . . . [in] a routine commercial transaction."⁹³

Arguments to avoid the commercial activities exception would be stronger in a case in which, unlike *WMW Machinery* and *Ampac*, a contro-

87. Compare *Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq*, 79 F. Supp. 2d 374, 382 (S.D.N.Y. 2000) (dismissing claim for nonpayment of commercial obligation as falling outside commercial activities exception of FSIA because no obligation to make payment in United States) with *Weltover, Inc. v. Republic of Arg.*, 753 F. Supp. 1201, 1207 (S.D.N.Y. 1991) (holding that payment of debt in the United States was sufficient to satisfy direct effect requirement of FSIA commercial activities exception), *aff'd*, 941 F.2d 145, 153 (2d Cir. 1991) (emphasizing payment in New York as factual consideration in finding direct effect), *aff'd on other grounds*, 504 U.S. 607, 619 (1992) (holding that impairment of New York's status as a "financial center" was insufficient, but that contract performance in New York was sufficient, to satisfy direct effects test).

88. 797 F. Supp. 973 (S.D. Fla. 1992).

89. *Id.* at 976.

90. *Id.* at 978.

91. *Id.* at 976 (emphasis added).

92. *Weltover*, 504 U.S. 607, 614 (1992) (issue in applying commercial activities exception is whether "particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce'"); see also *WMW Machinery*, 960 F. Supp. at 739 (finding specific activities of privatization agency within commercial activities exception; rejecting argument that overall function of privatization was governmental, not commercial, in character).

93. *Ampac*, 797 F. Supp. at 976.

versy involves an effort to litigate policy decisions made by a political trustee rather than execution of a contract to be performed partially in the United States, or another state adopting the commercial activities exception whose courts are asked to review political trustee decisions.

d. The Act of State Doctrine. When a U.S. court has jurisdiction over a claim,⁹⁴ the Act of State Doctrine obliges the courts to accept the acts of the foreign sovereign as valid.⁹⁵ The policies supporting the doctrine center on notions of international comity, separation of powers, and a desire to avoid embarrassing the Executive in its conduct of foreign relations.⁹⁶ Because of these policy considerations and because ruling on the validity of foreign sovereign acts uncomfortably approaches the political question doctrine, U.S. courts routinely avoid ruling on the validity of foreign sovereignties' acts.⁹⁷

The Act of State Doctrine is a widely-applied common law doctrine of judicial decision making rather than a statutory command.⁹⁸ In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, the Court stated that "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."⁹⁹ In *World Wide Minerals*, the court of appeals held that the Act of State Doctrine foreclosed litigation of certain claims involving privatization as to which the state of Kazakhstan and its instrumentalities had waived immunity.¹⁰⁰

Whether the Act of State Doctrine shields political trustee decisions depends on whether decisions of a political trustee are those of a state for purposes of the doctrine. Judicial deference for acts of state extends to duly authorized agents of the sovereign state acting for governmental purposes. The Court in *Underhill* held that the acts of a military commander

94. I.e., when the defendants do not enjoy immunity.

95. *Underhill*, 168 U.S. at 252 (courts of one country must not sit in judgment on acts of another government).

96. See *World Wide Minerals*, 296 F.3d at 1165 (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 408 (1990)).

97. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 727 (1976) (Marshall, J., dissenting) (ruling on foreign acts of state approaches political questions that are non-justiciable in federal courts); *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (questions involving foreign relations would require judiciary to exercise discretion committed to the Executive); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 1 reporters' note 4 (1987).

98. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964). See *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918).

99. *W.S. Kirkpatrick*, 493 U.S. at 406 (emphasis in original).

100. *World Wide Minerals*, 296 F.3d at 1164.

in Venezuela were subject to immunity.¹⁰¹ “The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, . . . must necessarily extend to the agents of governments ruling by paramount force as matter of fact.”¹⁰² “[T]he acts of the defendant were the acts of the government of Venezuela, . . . [and thus] are not properly the subject of adjudication in the courts of another government.”¹⁰³ The Court broadly extended the protection of the sovereign to all agents acting under its authority.

Agents must have a grant of authority from the sovereign that indicates the intent of the sovereign to have the agent act on its behalf.¹⁰⁴ But when the facts alone are sufficient to show that the agent was acting publicly and within the sovereign’s authority, then those agents are still entitled to the same respect in U.S. courts as the courts would accord to the sovereign.¹⁰⁵

Unless political trustees are recognized as “states” on the international stage, qualification for the Act of State Doctrine is problematic. The recognition problem is mitigated when the political trustee derives authority entirely from the United Nations because the United States has recognized the sovereignty of the United Nations as an international body,¹⁰⁶ and agencies and instrumentalities of the United Nations in Kosovo enjoy the privilege of comity in the U.S. courts.

Even if the activities of a political trustee fall within the commercial activities exception of the FSIA, this does not foreclose judicial deference under the Act of State Doctrine. A commercial activities exception is not part of the Act of State Doctrine. In *Dunhill*, a majority of the Supreme Court did not accept the idea advanced by four justices that the Act of State Doctrine extends only to governmental acts and not to commercial ones. “[W]e are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments”¹⁰⁷ Four dissenting justices reasoned that even if the restrictive theory of sovereign immunity were adopted (as it subsequently was in the FSIA), “it does not follow that there should be a commercial act exception to the Act of State Doctrine.”¹⁰⁸

101. *Underhill*, 168 U.S. at 252.

102. *Id.*

103. *Id.* at 254.

104. *Dunhill*, 425 U.S. at 691–95.

105. See *Underhill*, 168 U.S. at 252; *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *Ricaud*, 246 U.S. at 309.

106. Exec. Ord. No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

107. *Dunhill*, 425 U.S. at 697–98. Justice Stevens did not join in this part of the opinion.

108. *Id.* at 724 (Marshall, J., dissenting).

Subsequently, in *Machinists v. Organization of Petroleum Exporting Countries (OPEC)*,¹⁰⁹ the United States Court of Appeals for the Ninth Circuit observed that “[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations.”¹¹⁰ It held that price fixing activity by OPEC fell within the Act of State Doctrine.

Even when a political trustee’s decisions are “seemingly commercial,” a court is not foreclosed from applying the Act of State Doctrine. When the ultimate goals a political trustee hopes to achieve through decisions relate to the private sector and the means it must use to reach those goals, a United States court’s second-guessing of those acts implicates the same policy concerns leading to the Act of State Doctrine. Application of the Act of State Doctrine has always been within the court’s discretion. When the activities that a court must judge possess certain commercial characteristics, courts must recognize that applying the Act of State Doctrine is not only permitted, but also necessary.

Inserting U.S. courts into difficult, interrelated, and ultimately political controversies over the scope of political trusteeship and development of the private sector in the trust territory, would cripple the political trustee’s ability to build an efficient market economy in post-conflict situations. Applying the Act of State Doctrine would avoid that result.

In *Bigio v. Coca-Cola Co.*,¹¹¹ the United States Court of Appeals for the Second Circuit held that the “function of the court in applying the act of state doctrine is to weigh in balance the foreign policy interests that favor or disfavor its application The doctrine demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated.”¹¹² When the United States Government supports a political trusteeship, the Act of State Doctrine militates against litigation in U.S. courts over the conduct of the political trustee. In such a case, the foreign policy concerns are paramount, unlike *Bigio*, where the only identifiable act of state was decades old and had apparently been repudiated by the current foreign government, *WMW Machinery*, where the court found governmental policy decisions irrelevant to the issue in suit,¹¹³

109. 649 F.2d 1354 (9th Cir. 1981).

110. *Id.* at 1360.

111. 239 F.3d 440 (2d Cir. 2001).

112. *Id.* at 452 (internal quotations and citations omitted).

113. *WMW Machinery*, 960 F. Supp. at 745.

or *Ampac Group*, where the court without much analysis, found the transactions in dispute to be unquestionably commercial in nature and not linked to any Executive Branch objective.¹¹⁴

Availability of Act of State arguments in national courts other than those of the United States depends on the acceptance and interpretation of the Doctrine by those courts, which in turn is difficult to predict because the doctrine is discretionary and derived from national law of comity and customary international law rather than treaty.¹¹⁵

3. *Suits against a state sponsoring or participating in political trusteeship.* In cases in which the United Nations is not the sponsor of the political trusteeship, or in which litigants are pessimistic about their ability to overcome the immunity and act of state doctrines, they may seek to litigate against states participating in or sponsoring a political trusteeship. In such cases, immunity barriers could be overcome by waiver of immunity for administrative or constitutional review in domestic courts of the defendant state.

a. *Suits against the United States Government.* The clearest example to date of a political trusteeship established by a single state is Iraq. The U.S. Government's establishment of the political trusteeship in Iraq presents the possibility for review of trustee decisions under the Administrative Procedure Act or under various other constitutional and statutory theories limiting U.S. governmental action that infringes private rights.¹¹⁶

114. *Ampac*, 797 F. Supp. at 978.

115. See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 384 n.351 (1986) (describing debate over degree to which other legal systems apply act of state doctrine).

116. Decisions involving CPA contracts could be characterized as administration of U.S. government contracts under the Tucker Act. The Tucker Act explicitly empowers the United States Court of Federal Claims to consider breach of contract arguments. See *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1321 (Fed. Cir. 2004) (Claims Court has exclusive jurisdiction under Tucker Act to hear breach of contract claims against governmental entities). Actions under the Federal Tort Claims Act also are possible. See generally *Couzado v. United States*, 105 F.3d 1389, 1395 (11th Cir. 1997) (holding that the foreign country exception to FTCA, 28 U.S.C. § 2680(k) (2000), did not apply in case where negligent interagency coordination and training occurred in U.S., resulting in mistreatment of plaintiffs in Honduras). Intentional torts, such as the tort of intentional interference with contractual relations arising from interfering with pre-invasion or post-invasion contract rights, are unlikely to succeed because the FTCA explicitly excludes claims for intentional interference with contract and other specified intentional torts. See 28 U.S.C. § 2680(h) (2000); *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1151-52 (9th Cir. 2003) (affirming dismissal of misrepresentation claims against federal agency).

Analogous possibilities exist for national court litigation in other countries exercising direct authority in conjunction with a political trusteeship.¹¹⁷

The availability of these sources of judicial review in national courts would depend, first, on the degree to which trustee decisions are reasonably characterized as decisions by states (or their governmental officials) making up or authorizing the political trusteeship and, second, on the degree to which the national law of national courts in those states excludes from review decisions by colonial or military occupation authorities of those governments.

The following concrete hypothetical examples illustrate the possibilities:

A U.S. citizen sues Iraqi police to compel release of detained Iraqi, challenging the decision of a lower level CPA security official that the Iraqi should be detained for investigation of past Baathist Party ties.¹¹⁸

The Turkish owner of oil production equipment sues the Iraqi governing authority under the alien tort claims act for conversion, based on the decision by the new oil ministry to use the equipment without satisfying rent and debt service obligations incurred by the former Ministry.¹¹⁹

An Austrian claimant against an Iraqi company attaches assets of that company in Austria, drawing into question a determination by the CPA that the assets should be frozen pending comprehensive resolution for Iraq claims.¹²⁰

A British cellphone operator sues the CPA for awarding a major cellphone contract to another.

A Saudi subject sues the CPA for denying rights to start air service between Baghdad and Riyadh.

117. See *infra* Parts VI.B (discussing administrative review in France), VI.C (discussing administrative review in Germany), VI.A (discussing judicial review of decisions by institutions of European Union).

118. Compare *Gherebi v. Bush*, 352 F.3d 1278, 1289–90 (9th Cir. 2003) (habeas corpus review available to alien detained by U.S. military forces on U.S. controlled territory in Cuba) with *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (finding access to U.S. courts is unavailable to aliens to challenge detention by U.S. military authorities outside of U.S. territory), *cert. granted*, 72 U.S.L.W. 3171 (U.S. Nov. 10, 2003) (No. 03-343).

119. See generally *Deutsch v. Turner Corp.*, 324 F.3d 692, 705 (9th Cir. 2003) (affirming dismissal of suit for conversion, among other things, under Alien Tort Claims Act, 28 U.S.C. § 1350); *but cf.* *Bigio v. Coca-Cola Co.*, No. 97 Civ. 2858, 1998 WL 293990, at *2 (S.D.N.Y. June 5, 1998) (claim for conversion not cognizable under Alien Tort Act because not part of "law of nations"), *rev'd on other grounds by*, 239 F.3d 440 (2d Cir. 2000).

120. Cf. *Jugobanka A.D. Belgrade v. U.C.F. Int'l Trading, Inc.*, 2 F. Supp. 2d 407, 420 (S.D.N.Y. 1998) (denying motion to dismiss counterclaim by bank for seizure of assets by former Yugoslavia state bank).

The broadest basis for review, sufficient to encompass the cellphone and air-service examples, would exist under the U.S. Administrative Procedure Act. The Administrative Procedure Act waives sovereign immunity, presumes reviewability, and provides a form of action.¹²¹ The APA also could provide, in Section 706, bases for judicial invalidation of CPA and GCI decisions on substantive-irrationality,¹²² procedural-irregularity,¹²³ ultra vires,¹²⁴ and constitutional grounds.¹²⁵

In Iraq, unlike the other political trusteeships, the United States Government exercises ultimate authority through the Coalition Provisional Authority. This may open the door to judicial review in U.S. courts. The Governing Council of Iraq ("GCI"), despite its Iraqi membership, arguably is an instrumentality of the United States Government because the United States selected its membership and defined the scope of its power.¹²⁶ Controversies over CPA and GCI decisions involve, not some independent foreign government seeking to exercise authority; it involves persons exercising U.S. governmental authority.

Because the CPA and the GCI exist only by virtue of appointment by an American cabinet officer transferring authority to them, a strong argument exists that the CPA and GCI are "authorities of the United States" and therefore agencies subject to the Administrative Procedure Act. Even if the CPA and GCI are not agencies, the Secretary of Defense manifestly is an agency.

Fairly strong arguments against APA review exist, in particular that the CPA and GCI are explicitly outside the definition of agency either because they constitute the government of a U.S. territory (§ 551 (1)(C)), or because they represent the exercise of military authority in occupied territory (§ 551 (1)(G)).¹²⁷ Moreover, matters "committed to agency discretion by law" are unreviewable under the APA.¹²⁸ This category, pursuant to

121. 5 U.S.C. § 702 (2000) (waiving sovereign immunity); *id.* § 704 (authorizing judicial review); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (judicial review not foreclosed without persuasive evidence that was Congressional purpose); 5 U.S.C. § 703 (form and venue for judicial review proceeding).

122. 5 U.S.C. § 706(2)(A).

123. *Id.* § 706(2)(D).

124. *Id.* § 706(2)(C).

125. *Id.* § 706(2)(B).

126. See CPA Reg. No. 6 (July 13, 2003), available at http://www.cpairaq.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

127. See *Al Odah*, 321 F.3d at 1149 (stating that the APA did not waive sovereign immunity for alien detainees in Guantanamo Bay because of military function exception to definition of agency; emphasizing capture on military field of battle and military nature of confinement).

128. 5 U.S.C. § 701(a)(2).

Justice Scalia's opinion in *Webster v. Doe*,¹²⁹ surely extends to the foreign affairs category of decisions.¹³⁰

But these impediments to review under the APA are not assured of acceptance. What is involved in Iraq is not the exercise of military authority, but civil, executive, legislative and judicial authority, in the express words of the Administrator of the CPA.¹³¹ The decisions likely to be objected to in U.S. litigation are civilian matters and not something within the traditional inherent martial law power of the President and the military forces.

If APA coverage and reviewability could be established, many of the political-trustee decisions would be vulnerable to attack. Any of the CPA or GCI legislative acts are invalid under Section 706(2)(D) because they were not developed under any of the procedures required by Section 553. Many of the legislative acts also are invalid under Section 706(2)(A) because they are wholly unexplained and thus arbitrary and capricious under *Motor Vehicle Manufacturers*¹³² and *Citizens to Preserve Overton Park v. Volpe*.¹³³

Even if APA review is unavailable, plaintiffs also might assert a *Bivens* action against the Secretary of Defense or against CPA civilian personnel or U.S. Army personnel on the grounds that they are acting to deprive the plaintiffs of constitutional rights under the Fifth Amendment without valid authority of law.¹³⁴ Any political trustee decisions with financial impact are likely to result in deprivations of property interests of U.S. persons. Such persons cannot be deprived of property without due process of law. Substantive due process requires decisional rationality, and the CPA and GCI frequently offer no rationale for their rules and orders,

129. See *Webster v. Doe*, 486 U.S. 592, 606, 608–09 (1988) ("committed to agency discretion by law" within language of 5 U.S.C. § 701(a)(2) and encompasses political question doctrine) (Scalia, J., dissenting).

130. See *Al Odah*, 321 F.3d at 1150 (decisions by military custodian of alien detainees at Guantanamo Bay were not judicially reviewable under APA because they were committed to agency discretion by law; emphasizing capture on military field of battle and military nature of confinement).

131. CPA Reg. No. 1 § 1(2).

132. See generally *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (finding that the National Highway Traffic Safety Administration acted arbitrarily and capriciously in rescinding the passive restraint requirement).

133. See generally *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (holding that reviewing court must decide if agency action was arbitrary and capricious after it concludes that action was authorized by statute).

134. Cf. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382–83 (9th Cir. 1998) (rejecting *Bivens* action against state officers for procuring arrest in Mexico, hinting that *Bivens* claim might be available against federal officials for same sort of claim; also suggesting that alien might be able to maintain claim against U.S. officials if detention in foreign country were arbitrary under Alien Tort Act, 28 U.S.C. § 1350 (1994)).

thus violating substantive due process. While *Londoner v. City and County of Denver*¹³⁵ and *Bi-Metallic Investment Corp. v. State Board of Equalization*¹³⁶ define a fairly relaxed procedural due process standard for quasi legislative decision making, procedural due process still has meaning in the rulemaking context. At least, the CPA and GCI should afford some kind of notice of their intent to promulgate legislation and provide some opportunity for affected parties to offer their views before the CPA or GCI make a final decision—something in the nature of a legislative hearing. When they do not do so, they cannot enforce their rules consistent with procedural due process.

A *Bivens* action does not lie when there are other remedial channels, and the government would argue that the tribunals in Iraq or the Administrative Procedure Act represent such alternative channels. This argument would have greater force if the political trustee set up specialized tribunals for judicial review, as in the case of the Special Chamber to review privatization actions in Kosovo.

Persons suffering legal wrong or adversely effected are likely to include American citizens, some of whom may not—in the relevant time period—ever have left the United States. By analogy, a plaintiff could claim that revoking a contract right of an American citizen because of something someone did in another country, is like the welfare benefit in *Goldberg v. Kelly*¹³⁷ or the employment tenure expectancies in *Perry v. Sindermann*¹³⁸ and *Board of Regents v. Roth*.¹³⁹ A U.S. court may not be able to apply U.S. law to the conduct occurring in Iraq, but it surely can apply U.S. law to decisions made in the United States with effects felt primarily in the United States.

These legal pathways for review of Iraqi political trustee decisions in U.S. courts are speculative at best, but they illustrate the possibility of national court review—a possibility that would be diminished if specialized channels for review were established as a part of the political trusteeship framework.

b. Suits against European governments. European states are sponsors of political trusteeships in Bosnia, Kosovo, Afghanistan, and Iraq, ei-

135. 210 U.S. 373 (1908).

136. 239 U.S. 441 (1915).

137. 397 U.S. 254 (1970).

138. 408 U.S. 593 (1972).

139. 408 U.S. 564 (1972).

ther through their membership in the U.N. Security Council, or more directly as in the case of EU administration of "Pillar IV" in Kosovo.¹⁴⁰

The charter of the European Court of Human Rights (ECHR) permits any person to commence an action in the Court against any member of the Council of Europe alleging a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴¹ Article 1 of the First Protocol to the Convention guarantees "peaceful enjoyment of . . . possessions,"¹⁴² and this provision has been interpreted to cover cases of privatization and nationalization. States have wide latitude to determine state interests that justify alteration of property relationships, but the European Court of Human Rights has held that states must provide access to fair judicial procedures to determine the compensation due for interference with property rights. And, of course, the Convention protects a wide range of liberty interests, circumscribing detention and criminal prosecution. In addition, the Convention protects individual access to judicial mechanisms to protect private rights of all kinds.

The principal obstacle to bringing a case seeking ECHR review of a political trustee decision would be attributing responsibility for trustee action to a signatory of the Convention. In no case of political trusteeship so far has any European state taken on primary responsibility, unlike the United States in Iraq. Rather, European states have participated only collectively in political trusteeships. The fact that the European Union has assumed responsibility does not facilitate access to the ECHR because the European Union is not a signatory to the European Convention and thus is not a permissible party defendant before the ECHR.

It is difficult to find precedent for a single person—natural or juridical—being held liable for collective decisions, as of decisions by the U.N. Security Council or by a corporate board of directors.¹⁴³

140. Pillar IV is the Economic Reconstruction branch of the U.N. Interim Administration Mission in Kosovo. (UNMIK).

141. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 4, 1950, ETS No. 155 (entered into force Nov. 1, 1998), art. 34.

142. *Id.* protocol 1, art. 1.

143. See *Pereira v. Cogan*, 294 B.R. 449, 525–26 (S.D.N.Y. 2003) (implying that corporate directors may be held jointly liable for inattention to fiduciary duties). Joint liability in tort exists when persons tortiously act in concert., RESTATEMENT (SECOND) OF TORTS § 876 (1979), or when they are subject to a common duty to the victim. *Id.* § 878. Tort liability seems impermissible, however, when the alleged tortfeasors act through an enterprise that has independent legal personality and limited liability. See *Pereira*, 294 B.R. at 526–27 (considering whether appropriate to "pierce the corporate veil").

Yugoslavia has, so far unsuccessfully, sought to hold individual members of NATO liable for alleged violations of international law committed by NATO in the 1999 intervention in Kosovo. See *Banković & Others v. Belgium & 16 Other Contracting States*, App. No. 52207/99, Eur. Ct. H.R. (2001) (finding claim by Serb citizens against NATO members for damages suffered during bombing

4. *Doctrine of forum non conveniens*. When a political trustee provides for judicial review in specialized tribunals, avoidance of national court litigation is possible under the doctrine of Forum Non Conveniens in U.S. courts and in the courts of other common-law countries¹⁴⁴ such as England,¹⁴⁵ Scotland,¹⁴⁶ Canada,¹⁴⁷ and Australia.¹⁴⁸ The doctrine is unavailable in civil-law countries because it violates strict jurisdictional rules under procedure codes.¹⁴⁹ Even in those countries, however, a related doctrine, *lis pendens*, allows staying an action in favor of a similar action already pending in the court of another state,¹⁵⁰ presumably including courts established by a political trustee. The forum non conveniens and related *lis pendens* doctrines provide the strongest linkage between specialized review mechanisms for political trustee decisions and the availability of national-court review.

The United States Supreme Court applies a two-prong test to determine whether a court should dismiss a case on forum non conveniens

campaign to be "inadmissible" before European Court of Human Rights), available at <http://www.echr.coe.int/eng>; *id.* at para. 32 (summarizing French argument that bombardment not imputable to respondent States but to NATO, which had separate international legal personality); *id.* at para. 66 (ECHR applies only to signatory action taken within its own territory). In a series of cases filed in 1999 in the International Court of Justice, Serbia and Montenegro claimed that NATO members violated international law by their bombing campaign and their support of the Kosovo Liberation Army. See, e.g., Press Release, International Court of Justice, Legality of Use of Force (Serb. & Mont. v. Belg.) (Apr. 29, 1999), available at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>. The cases are still pending.

144. The doctrine permits discretionary refusal of jurisdiction in all common-law countries, but the standards for its application differ from country to country. See *infra* text accompanying notes 146–148.

145. Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, 481–82 (1994) (characterizing English version of doctrine as more focused on identifying the "best" forum).

146. Peter J. Carney, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 424–25 (1995) (doctrine originated in Scotland).

147. See Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117, 126 (1996) (describing Canadian doctrine as: first, determining whether better forum exists for trying case, and second, determining whether plaintiff would be disadvantaged by dismissal); *id.* at 133 (procedural or substantive law disadvantages for plaintiff in alternative bars dismissal on forum non conveniens grounds in Canada).

148. *Id.* at 118 (forum non conveniens doctrine routinely applied to inter-provincial litigation in Canada); Bryan P. Werley, *Aussie Rules: Universal Jurisdiction Over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 218 (2004) (offering example of application of forum non conveniens by Australian court).

149. Reus, *supra* note 145, at 489 (giving reasons for hostility to doctrine by civil law jurists); *id.* at 495–502 (discussing controversy over doctrine in Germany and other civil-law systems).

150. See Martine Stückelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference*, 26 BROOK. J. INT'L L. 949 (2001) (suggesting that eventual Hague convention on international jurisdiction and judgment enforcement will contain some type of *forum non conveniens* provision).

grounds. Under this test, the defendant moving for dismissal must show (1) that an alternative forum exists, and (2) that private and public interest factors weigh in favor of dismissal.¹⁵¹ The district court must give deference to the plaintiff's choice of forum according to a sliding scale.¹⁵² Under the sliding scale, less connection to the forum results in less deference to the plaintiff's choice of that forum.¹⁵³

A forum is "available" when the defendant is amenable to service of process in the alternative jurisdiction, except in "rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory."¹⁵⁴ In other words, the forum must be both available and adequate. A specialized judicial review mechanism established by a political trustee would be "available" if it had jurisdiction over the political trustee.¹⁵⁵

An alternative forum also must be "adequate." The procedural law basis for inadequacy refers to whether there are excessive procedural limitations imposed by the alternative forum. To be an adequate alternative, a forum need not follow the same procedures as a U.S. court.¹⁵⁶ In the Kosovo case, the specialized judicial review forum had afforded adequate procedures.¹⁵⁷

151. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 230 F. Supp. 2d 376, 387 (S.D.N.Y. 2002); *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 350–51 (S.D.N.Y. 2002) (discussing structure of forum non conveniens analysis).

152. *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28–31 (2d Cir. 2002) (reversing forum non conveniens dismissal because of undervaluing public interest in U.S. forum given extensive connections between dispute and United States and failure to give appropriate deference to representative plaintiff's choice of forum).

153. *Assicurazioni Generali*, 228 F. Supp. 2d at 351 (discussing and applying a "sliding scale" approach to determine deference to a plaintiff's choice of forum).

154. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

155. See UNMIK Regulation 2002/12 § 30.1 (granting Special Chamber "exclusive jurisdiction for all suits against the [KTA]").

156. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 199 (2d Cir. 1987) (lack of jury trial does not make forum inadequate); *Pavlov v. Bank of New York Co.*, 135 F. Supp. 2d 426, 434–35 (S.D.N.Y. 2001) (narrower scope of discovery than in U.S. courts does not make forum inadequate); *Bell v. British Telecom*, No. 95 Civ. 1972, 1995 WL 476684, at *1 (S.D.N.Y. Aug. 9, 1995) (granting dismissal on forum non conveniens grounds; unavailability of certain legal theories or procedural devices in alternative forum do not make it an inadequate forum).

157. UNMIK Administrative Direction 2003/13 § 22.7, UNMIK/DIR/2003/13 (June 11, 2003), available at http://www.unmikonline.org/regulations/admdirect/2003/ade2003_13.pdf (all documents must be in English and can also be in Serbian or Albanian); *id.* § 43.4 (discovery process is enforceable through monetary sanctions); *id.* § 35 (oral as well as written argument can be made before the court); *id.* §§ 55–57 (the parties have the option of invoking the appeals process of the Special Chamber); *id.* § 9.3 (decisions of the Special Chamber must be in writing, specifying reasons for the decision.); *id.* § 21 (parties may be represented by counsel, including foreign counsel.); *id.* §§ 19–36 (the Special Chamber allows submissions in writing and orally); *id.* § 18 (Special Chamber provides for compulsory process for obtaining testimony); *id.* § 9 (procedures for obtaining evidence located outside of Kosovo); *id.* § 43

A forum can be adequate without offering the same cause of action as a U.S. court.¹⁵⁸ Courts have dismissed cases on forum non conveniens grounds when the substantive law of the alternative forum does not provide the same remedy as U.S. law does. For example, RICO suits have been dismissed on the basis of forum non conveniens because, even though a RICO cause of action is unavailable in alternative forums, plaintiffs can gain relief on other grounds.¹⁵⁹ All that is required is for the alternative forum to provide some remedy for the underlying acts.¹⁶⁰

Finally, because U.S. courts avoid passing judgment on the worthiness of a foreign judicial system, political and social circumstances justify a finding that an alternative forum is inadequate only when the circumstances are extreme.¹⁶¹ For example, allegations that the Turkish court system is biased against U.S. parties and foreign women were insufficient to show forum inadequacy.¹⁶² In the Kosovo litigation a majority of the judges on the Special Chamber were international judges,¹⁶³ and an international judge was the presiding judge.¹⁶⁴ The Special Chamber had rules ensuring the impartiality of its judges,¹⁶⁵ which minimized any concern of local partiality. In contrast, in *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, a district court denied a motion to dismiss under forum non conveniens doctrine. It found a private insurance industry forum to be an inadequate alternative forum because it was a private dispute resolution—a “company store,” dependent on interested parties.¹⁶⁶

Forum non conveniens also requires assessment of private and public interest factors. Private interest factors include relative ease of access to evidence,¹⁶⁷ availability of compulsory process for the attendance of un-

(Special Chamber allows for compulsory production of documents); *id.* § 44 (Special Chamber allows for production of physical items and site visits).

158. PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 74 (2d Cir. 1998).

159. *Id.*

160. *Bell*, 1995 WL 476684, at *2. Litigation Chamber of the Kosovo Supreme Court provides for a number of desirable remedies including: injunctions, UNMIK Administrative Direction 2003/13 § 52, costs, *id.* at § 53, and monetary compensation equivalent to the lost assets, UNMIK Regulation 2002/13 § 10.3.

161. See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084–85 (S.D. Fla. 1997) (generalized allegations of partiality insufficient to show forum inadequacy, especially where party has chosen to transact business in the forum).

162. *Mercier v. Sheraton Int'l., Inc.*, 981 F.2d 1345, 1351 (1st Cir. 1992).

163. UNMIK Regulation 2002/13 § 3.1 (requiring three international judges and two local judges).

164. See *id.* § 3.2 (one of the international judges must be the presiding judge).

165. UNMIK Administrative Direction 2003/13 § 4 (stating that, among others, a judge may not hold any other office or have an interest in the outcome of litigation).

166. *Assicurazioni Generali*, 228 F. Supp. 2d at 353–58.

167. *Id.* at 359.

willing witnesses,¹⁶⁸ cost of willing witness attendance,¹⁶⁹ possibility of a view of premises,¹⁷⁰ enforceability of any judgment,¹⁷¹ and other factors influencing the parties' convenience.¹⁷² In *Hasakis v. Trade Bulkers, Inc.*,¹⁷³ a district court dismissed on forum non conveniens grounds, finding that the witnesses were mostly outside the local forum and that the local community had no connection with litigation.¹⁷⁴ On the other hand, the same court denied dismissal in *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, where many witnesses were in the United States and documentary evidence was scattered all over Europe and the burden of transporting it to New York was no greater than the burden of transporting it to one of many alternative forums.¹⁷⁵

Public interest factors include: local interest in having local controversies decided at home, the interest of foreign forums, administrative difficulties arising from court congestion, the avoidance of unnecessary conflict-of-laws problems, and "the unfairness of burdening citizens in an unrelated forum with jury duty."¹⁷⁶ United States courts regularly dismiss cases on forum non conveniens grounds when the center of gravity of a lawsuit is located in another country.¹⁷⁷

Another factor that can tip the scales in favor of a forum non conveniens dismissal is the avoidance of duplicative litigation, but only if the political trustee provides a forum with exclusive jurisdiction. The Southern District of New York recently explained that the public and private interest

168. *DiRienzo*, 294 F.3d at 29–30.

169. *Id.*

170. *Id.*

171. *Assicurazioni Generali*, 228 F. Supp. 2d at 363.

172. *DiRienzo*, 294 F.3d at 30; *Assicurazioni Generali* 228 F. Supp. 2d at 365.

173. 690 F. Supp. 260 (S.D.N.Y. 1988).

174. *Id.* at 262.

175. *Assicurazioni Generali*, 228 F. Supp. 2d at 359–66.

176. *Gilbert*, 331 U.S. at 508–09; *DiRienzo*, 294 F.3d at 31; *Assicurazioni Generali* 228 F. Supp. 2d at 367 n.15.

177. See, e.g., *Piper Aircraft*, 454 U.S. at 235; compare *Calgarth Invs., Ltd. v. Bank Saderat Iran*, No. 95 Civ. 5332, 1996 WL 204470, at *7 (S.D.N.Y. Apr. 26, 1996) (granting dismissal on forum non conveniens grounds because dispute has "only a minimal link to this country") and *Bell*, 1995 WL 476684, at *1 (granting dismissal on *forum non conveniens* grounds; citizens of place of alternative forum have great interest in litigation; New York community has no interest) and *DeYoung v. Beddome*, 707 F. Supp. 132, 140 (S.D.N.Y. 1989) (dismissing action on comity grounds; forum non conveniens analysis reinforces the comity conclusion due to strong foreign interest in dispute) with *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472, 480–81 (S.D.N.Y. 1989) (denying dismissal on forum non conveniens grounds; securities fraud occurred in New York, most witnesses in New York) and *Assicurazioni Generali*, 228 F. Supp. 2d at 348, 367 (concluding that public interest factors weigh slightly in favor of plaintiffs' choice of forum, given strong localized interest, based—among other things—on New York statute).

factors weighed in one direction primarily because of “the inconvenience and cost associated with potential duplicative litigation in the alternative fora of Ecuador and Italy.”¹⁷⁸ The court went on to explain that an agreement to take the dispute to only one of the two countries called for re-examination of the balance.¹⁷⁹ If a political trustee provides a specialized forum and gives it exclusive jurisdiction, respect for that exclusive jurisdiction by national courts would avoid the potential for duplicative litigation.

Though there is a presumption in favor of the plaintiff’s choice of forum, this presumption is diminished when the lawsuit is based on activity that occurs abroad. The sliding scale used to determine the deference to the plaintiff’s choice overlaps analysis of private and public interest factors.¹⁸⁰ When a political trustee’s decision has only a weak connection to the United States and considerations of convenience favor litigation in a specialized judicial review forum, U.S. courts should afford little weight to the presumption in favor of the plaintiff’s choice of forum.

If a political trustee establishes a specialized judicial tribunal to review decisions by the trustee, and the characteristics of the tribunal meet basic due process requirements, there is a strong likelihood that courts in the U.S., Britain, Canada and Australia will decline to hear cases within the jurisdiction of the specialized tribunal. Such an outcome is far less certain in civil law countries, unless a case has already been filed in the specialized tribunal.

B. Failure to Provide for Judicial Review Violates Core Principles of the Rule of Law

Political trusteeships extol rule of law but almost always lack one of the hallmarks of a rule of law in conventional democratic political systems—judicial review. Constitutionalism envisions written constitutions with judicial review of legislative acts in constitutional courts to ensure that legislatures stay within constitutional limits.¹⁸¹ By extrapolation, courts or

178. *F.D. Imp. & Exp. Corp. v. M/V Reefer Sun*, No. 02 Civ. 2936, 2003 WL 21512065, at *1 (S.D.N.Y. July 1, 2003).

179. *Id.*

180. *Assicurazione Generali*, 228 F. Supp. 2d at 351 (“[T]he greater the . . . lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that consideration of convenience favor the conduct of the lawsuit in the United States, the more deference will be accorded plaintiff’s choice of a U.S. forum . . .”) (internal quotations omitted).

181. See Gráinne de Búrca & Jo Beatrix Aschenbrenner, *The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights*, 9 COLUM. J. EUR. L. 355, 355 (2003); Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT’L L. J. 153, 154 (2001); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL. STUD. 71, 71 (2004) (criti-

other judicial bodies must be available to protect against lawless action by officers assigned to execute the law. For example, the European Court of Justice has held that national courts within the European Union must be available to review administrative decision making.¹⁸²

When conventional legislatures establish administrative agencies and delegate powers to them, conventional courts in the United States and specialized courts in France and Germany exist to review the exercise of the delegated authority—to check up on allegations of ultra vires activity when agency officials exceed their legislative mandate, to ensure that the agency acts through appropriate procedures satisfying general concepts of procedural due process, and to ensure that it acts rationally, with a linkage to legitimate purposes under the legislatively delegated statutory framework.¹⁸³

There is no judicial branch of the United Nations to exercise the same review functions over UNMIK, or other political trustees, which function as quasi administrative agencies. All of the concerns exist with unaccountable political trustees that would exist if an administrative agency were created by a state and entirely insulated from the capacity of the judiciary or any other body to review its actions.

Indeed, the Kosovo Ombudsperson¹⁸⁴ has determined that it is a violation of international human rights law for certain decisions by a political trustee not to be reviewed by an independent judicial body.¹⁸⁵

cally reviewing literature on constitutionalism); Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 1 (2001).

182. Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMP. L. 295, 334 (1994) (characterizing case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] ECR 1651 and Case 222/86 Union nationale des entraineurs et Cadres techniques professionnels du football v. Heylens, [1987] ECR 4097).

183. See *infra* Part VII.D.1 (discussing delegation doctrine).

184. The Kosovo Ombudsperson, has asserted competency to consider complaints against UNMIK. See UNMIK Regulation 2001/9 § 10.1 (giving the Ombudsperson competence to hear complaints of "abuse of authority by any public authority in Kosovo."). This is the constitutional framework document. It does not define "public authority." See *id.* The earlier regulation establishing the Ombudsperson institution, UNMIK Regulation 2000/38, gave the Ombudsperson over "actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution," a narrower mandate. UNMIK Regulation 2000/38 § 3.1. As of January 26, 2003, 9 of the 19 reports posted on the Ombudsperson's website, www.ombudspersonkosovo.org, involved complaints against UNMIK.

185. Special Report No. 1, *supra* note 27, at § 7. The Report observes that

this grant of immunity creates an insurmountable procedural bar to any legal process in any territory at any time to KFOR and UNMIK as institutions, as well as to their property, funds and assets (Sections 2.1 and 3.1 of the Regulation, respectively) to locally recruited KFOR personnel in respect of words spoken and acts performed by them in carrying out tasks exclusively related to their services to KFOR (Section 2.3 of the Regulation) and to international and locally recruited UNMIK personnel in respect of all acts performed by them in their official capacity (Section 3.3 of the Regulation).

Establishing mechanisms for reviewing political trustee decisions would enhance legitimacy because it would cause the political trusteeship to conform more closely with widely accepted norms for a rule of law.

IV. INADEQUACY OF MILITARY OCCUPATION AND MARTIAL LAW MODELS

Military occupation and martial law concepts are incomplete because they make certain assumptions about the relationship between civil and military authority that are not satisfied in modern political trusteeships. The limitations on exercise of governmental authority by belligerent occupants are too narrow, and the law of military occupation fails to provide for adequate mechanism for adjudication of claims of improper decision making by military authorities.

A. Overly Restrictive Norms

The law of belligerent occupation is reasonably well developed and emphasizes limits on the power of a belligerent occupant to change law and institutional arrangements, pending resumption of the government displaced by the occupation.

This is an unsatisfactory model for many political trusteeships that have as a core aim fundamental reform of political and economic institutions. The insufficiency of the belligerent-occupation model was one of the prime motivations for developing the concept of "political trusteeship."¹⁸⁶ But neither belligerent occupation nor political trusteeships, in and of themselves, addresses the availability of administrative law review.

B. Inadequate Mechanisms for Judicial Review

The law of military occupation provides an incomplete model for judicial review of political trustee decisions. While the "law of war" includes norms that limit the conduct of occupying forces, it does not address the availability of tribunals within which violations of those norms can be rectified. Moreover, the norms focus on human rights violations and not the

Id. at para. 21. It found however that "[t]he rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo – UNMIK) in fact acts as a surrogate state." *Id.* at para. 23. It further found that executive and legislative branches of government must be subject to oversight by an independent judiciary. *Id.* at para. 24. It also found that the yet-to-be-established Claims Commissions envisioned under § 7 of the UNMIK immunity regulation did not comply with the European Convention on Human Rights requirements for independent and impartial tribunals. *Id.* at para. 78.

186. See Perritt, *supra* note 1, at 412.

many different kinds of controversies that can arise from civilian government.

The Uniform Code of Military Justice primarily focuses on enforcement of rules for military matters, concentrating on intra-service relations.¹⁸⁷ Although it provides a limited mechanism for those outside the military service to file complaints about misconduct by service personnel,¹⁸⁸ this mechanism falls short of being an adequate mechanism to review official decision in the civilian sphere.

Much of the law about the relationship between civil courts and military occupation was developed in the context of writs of habeas corpus.¹⁸⁹ This body of law makes it clear that military power cannot supplant access to civilian courts “where the courts are open and their process unobstructed.”¹⁹⁰ One must be careful, however, about extrapolating this body of law to the political trustee context because the writ of habeas corpus is guaranteed by the United States Constitution.

Whatever duties these bodies of doctrine may impose on belligerent occupants or political trustees, the law is unsettled at best as to where violations of those duties impairing the legal interests of civilians in the trustee

187. 10 U.S.C. § 938 (2000) states:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings thereon.

188. 10 U.S.C. § 939 (2000) states:

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.

(b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

189. See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998) (history of major controversies involving military occupation in the U.S. and the writ of habeas corpus).

190. *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

territory may be redressed.¹⁹¹ Even if access to national courts for relief in the nature of habeas corpus is available, habeas is an avenue for judicial review only of confinement of natural persons, not an avenue to review the vast range of other kinds of deprivations that may be occasioned by governmental decisions.

V. CONSTITUTIONAL, COMPARED WITH ADMINISTRATIVE LAW, REVIEW

The concept of judicial review encompasses two subordinate concepts: review of legislation to determine whether it comports with a superior constitutional document, and review of the decisions of subordinate governmental bodies to see if they comport with legislation. The first can be labeled "constitutional review," and the second "administrative law review." Both levels of judicial review can exist in a political trusteeship, as they do in states such as Germany and France, where they are separated institutionally, and in the United States, where they occur in a unified judiciary.¹⁹²

Administrative law review presents many fewer difficulties for political trusteeships than constitutional review, but both are feasible. Constitutional review is easier to institutionalize if there is a written constitutional document establishing the political trusteeship, for example, Security Council Resolution 1244 for Kosovo.¹⁹³ Only if the constitutional document is reasonably specific as to the institutions and powers of the political trustee can an entity performing the functions of a constitutional court provide limited review of the legitimacy of trustee action without substituting its own political judgments for those of the trustee. As with a common-law

191. *Compare Gherebi*, 352 F.3d at 1289 (finding jurisdiction to hear habeas corpus petitions on behalf of Guantanamo Bay detainees). Judge Reinhardt states:

[W]e simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.

Id. at 1283. *But cf. Al Odah*, 321 F.3d at 1140, 1144 (aliens outside U.S. territory do not enjoy protections of Fifth Amendment, and do not enjoy privilege of litigating in U.S. courts, distinguishing residents of Micronesia, while under U.N.-authorized U.S. trusteeship).

192. Pennsylvania is an exception, where a separate "Commonwealth Court" has jurisdiction over actions to review, or appeals from, agency decisions. 42 PA. CONS. STAT. ANN. § 763(a) (2004) (granting Commonwealth Court exclusive jurisdiction of appeals from final orders of government agencies).

193. David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 889-90 (2003) (explaining role of concept of "natural right" in emergency of common-law judicial review of governmental decisions); *see id.* (constitutional review can occur even without a written constitution, as in Britain, where the common-law courts review administrative agency decisions for violation of "natural right.").

trustee, the trustee often has more power and a reviewing court less when the trust documents is specific as to trustee powers and how they are to be exercised.¹⁹⁴

Moreover, practice in western democracies provides differing guidance as to whether ordinary judicial bodies should perform constitutional review or whether bodies of a more political character—such as constitutional courts—should perform that function. Who shall decide constitutional questions raises a basic question of political legitimacy. It is not always clear, as the political culture of a state is being established, what is the most legitimate entity to decide constitutional questions. The difficulties of constitutional review in the international context have been explored in commentary relating to whether decisions by the U.N. Security Council should be subject to review by the International Court of Justice.¹⁹⁵

Arrangements for judicial review within an administrative law regime do not require a written constitution because delegations of authority to subordinate entities are necessarily written and reasonably specific. Nevertheless, defining major features of the system of administrative law represent policy choices.

In order to avoid most of the difficulties associated with constitutional review, this article focuses on administrative law review. Even if it is concluded that the decisions of a top authority in a political trusteeship, such as the SRSG in Kosovo or the Administrator of the CPA in Iraq, should not be subject to review because they are thought of as inherently “emergency” in nature and thus within exceptions for judicial review recognized in most democracies,¹⁹⁶ that does not mean that judicial review should not be available to ensure that decisions of subordinate governmental units comport with the basic law adopted by the political trustee. In other words, administrative law review is desirable even if constitutional review is not.

VI. MODELS

It is one thing to support the proposition that political trusteeships *should* make explicit provisions for administrative law review; it is another to explain how that should work institutionally, recognizing that a variety of arrangements can meet the need.

194. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (“Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers.”).

195. See generally Alvarez, *supra* note 3 (posing question in first sentence of article).

196. See *infra* Part VII.C.3 (discussing possibility of exempting emergency decisions from review).

Although the theoretical bases for judicial review of agency action are different under the common law and continental traditions, the basic grounds for review are the same: to ensure that each agency decision is legally authorized. "[E]very exercise of power by an administrative authority may be brought before the courts for testing its validity. The present legal position on the basis of judicial review of administrative action in Germany may have not been reached by the same route as in the common law but it is the same."¹⁹⁷ Deciding whether an agency decision is "authorized by law" necessitates review of constitutionality, review of statutory competence and its opposite, ultra vires action, review of decisional rationality, and review of procedural regularity and transparency. These typically are considered under the rubric of "scope of review," considered in Part VII.D.

Practices in the European Union, Germany, France, Britain and the United States differ in the institutional structure for administrative law review, but all these legal systems share some common features that can be extended to the political trusteeship context.

A. European Union

Judicial review of administrative agency decisions is a fundamental precept of European Law.¹⁹⁸ The European Court of Justice¹⁹⁹ has jurisdiction to:

review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties . . . on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."²⁰⁰

The Court routinely exercises this power to hear claims asking it to "annul" administrative decisions by the European Commission on the

197. MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 124-25 (2001).

198. Case T-348/94, *Enso Española SA v. Commission*, 1998 E.C.R. II-1875, II-1901(1998) (requirement for effective judicial review of any Commission decision that finds and punishes infringement of competition rules is general principle of Community law which follows from common constitutional traditions of Member States).

199. The European Court of First Instance has similar jurisdiction. The European Court of First Instance ("ECFI") was established in Article 222 of the Treaty Establishing the European Community. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) 33 (2002) [hereinafter EC TREATY]. Article 224 of the Consolidated Version of the EC Treaty provides "Unless the Statute of the Court of Justice provides otherwise, the provisions of this Treaty relating to the Court of Justice shall apply to the Court of First Instance."

200. *Id.* at 230.

grounds of impermissible delegation of legislative authority,²⁰¹ failure to afford an opportunity to be heard,²⁰² and inadequate justification for decisions.²⁰³

B. France

A result of the French Revolution was to interpret separation of powers as diminishing the role of the judiciary in public decision making.²⁰⁴ Indeed, a 1790 statute provided, "it shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions."²⁰⁵ Such limitations on the role of the ordinary courts made it necessary to cre-

201. See Case C-104/97, *Atlanta AG v. Commission*, 1999 E.C.R. I-6983, I-7033, I-7036-37 (1999) (*E.J.C.* 1999) (Court of First Instance erroneously failed to consider argument that Council had unlawfully delegated legislative power to Commission, but Council defined power in sufficient detail that delegation was not unlawful).

202. See Case C-135/92, *Fiskano AB v. Commission*, 1994 E.C.R. I-2885, I-I-2909-10 (1994) (annulling decision of Commission because it did not afford affected party opportunity to submit observations on proposed action); Case T-156/94, *Siderúrgica Aristrain Madrid, SL v. Commission*, 1999 E.C.R. II-645, para. 25 (1999) (Commission must afford procedural fairness in reaching decisions that may result in imposition of penalties); Arrêt du 14 mai 1998, *Enso Española*, 1998 E.C.R. at II-1900 (in making administrative decisions Commission must follow procedures that comport with fundamental notions of European law); but see *Atlanta AG*, 1999 E.C.R. at I-7035 (declining to extend right to be heard to legislative proceedings).

203. See Case T-308/94, *Cascades SA v. Commission*, 1998 E.C.R. II-925 (1998) (statement of reasons motivating Commission decision must be sufficiently clear and complete to enable a determine whether Commission decision was well founded); Case T-141/94, *Thyssen Stahl AG v. Commission*, 1999 E.C.R. II-347, II-405-06 (1999) (Commission must develop record sufficient for judicial review, but need not reply to every argument or provide oral hearing on every basis for decision); Case T-11/89, *Shell Int'l Chem. Co. v. Commission*, [1992] E.C.R. II-757, para. 39-40 (1992) (documents and arguments relied on by Commission must be part of record and available for observations by respondent).

204. Louis M. Aucoin, *Judicial Review in France: Access of the Individual under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform*, 15 B.C. INT'L & COMP. L. REV. 443, 446 (1992) ("The supreme courts of pre-revolutionary France, the *parlements*, made themselves very unpopular by opposing all reforms to the traditional legal system."); Mike Bothwell, *Nicolo and the Push to 1992—The Evolution of Judicial Review in France*, 1990 BYU L. REV. 1649, 1651 (1990) ("In pre-Revolution France, the high courts used a form of substantive judicial review to protect their power base and control the more progressive legislation. They used unwritten, fundamental laws and principles to preserve an extremely conservative power structure and way of thinking."); John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 110 (1996) (judges in pre revolutionary France, sitting on regional "Parlements," were "conscious members of an aristocracy of the robe," and interpreted royal reform legislation to deprive it of its intended effects); Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 79 (1997) (characterizing post revolutionary French approach as demeaning judges, portraying them as clerks, and reducing judges to the bottom of the scale of prestige among legal professions); *id.* at 79 n.254 (popular distrust of judges led to diminishing post revolutionary role).

205. Rogoff, *supra* note 204 at 76, n.243.

ate a tribunal, the Conseil d'Etat, within the government to supervise the exercise of delegated authority.²⁰⁶

The Conseil d'Etat is an administrative court that performs judicial review functions quite similar to those performed by the regular courts in the United States, by administrative courts in Germany, and by the European Court of Justice.

It is true that the administrative tribunals and the Conseil d'Etat are formally separate from the (ordinary) judiciary and are formally part of the executive power. It is also true that there are not called 'courts' and their members are not called 'judges.' Thus the separation of powers is formally observed, while the legality of French executive/administrative acts receives the sort of 'judicial' review of legality that democratic justice everywhere requires.²⁰⁷

The French constitutional tradition distinguishes sharply between private and public law. Administrative justice is a matter of public law and is enforced by a system of administrative courts entirely separate from the regular courts. The administrative court system includes the tribunaux administratifs, the trial courts, the cours administratives d'appel, and the Conseil d'Etat at the top.²⁰⁸ The Prime Minister of France serves as President of the Conseil d'Etat, and the Minister of Justice manages its daily affairs.²⁰⁹ A similar arrangement exists in Sweden.²¹⁰

The Conseil d'Etat and its subordinate administrative courts exercise "full jurisdiction" (pleine jurisdiction) and "annulment jurisdiction" (jurisdiction d'annulation).²¹¹ Full jurisdiction resembles federal or state tort claims acts against the government. Annulment jurisdiction encompasses challenges based on an assertion that the act performed by a government official exceeded the scope of the government's jurisdiction, that it violated procedures required by law, or that it was exercised through an error of law. Only administrative acts stemming from the legislative process or which involve relations between the French government and foreign sovereigns or international organizations are exempt from review.²¹²

206. *Id.*

207. Merryman, *supra*, note 204, at 111.

208. Farhad Ghaussy, *Who Protects the Stranger? The French Dual Court System Confronts the Politics of Immigration: A Critique of the Tribunal des Conflits' Decision of May 12, 1997*, 7 UCLA J. INT'L L. & FOREIGN AFF. 1, 8 (2002) (describing French administrative court structure).

209. Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57, 71 (1994).

210. *See Sporrong & Lönnroth v. Sweden*, 5 Eur. Ct. H.R. 35, 45 (1982) (describing system of administrative courts in Sweden).

211. Kublicki, *supra* note 209, at 68.

212. *Id.* at 67-68 (characterizing jurisdiction of French administrative courts).

The Conseil d'Etat and the subordinate administrative courts in France have developed general principles of law that allow invalidating executive acts considered to be an "excess of power."²¹³ The French administrative courts enforce the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention on Human Rights.²¹⁴

The Conseil d'Etat has taken a broader view of its power to apply general legal principles and to develop new legal principles than the regular courts in France.²¹⁵ The Conseil d'Etat not only applies general principles of law; it also scrutinizes administrative decision making for compliance with the French Constitution.²¹⁶ In 1989, the Conseil d'Etat reversed previous practice and held that administrative decisions must be reviewed for compliance with European law.²¹⁷

C. Germany

Germany, like France, inherits a legal culture with considerable respect for the capacity of the bureaucracy to make good policy and carry out law, a respect which makes it difficult to enlarge the role of ordinary courts in overseeing bureaucratic decision making.²¹⁸ Post-revolutionary French mistrust of judicial review of administrative decisions was implanted by Napoleon's conquest of the states that now comprise Germany. French skepticism about judicial review was mitigated, however, by Anglo-American ideas during the post World War II occupation.²¹⁹ German law thus embodies a synthesis of French and Anglo-American approaches. Review of administrative decisions is unavailable in the regular courts. A specialized system of administrative courts has exclusive jurisdiction over administrative agency decisions.²²⁰ This follows the French model. But

213. Aucoin, *supra* note 204, at 461.

214. *Id.* at 464.

215. Martin A. Rogoff, *The French (R)evolution of 1958-1998*, 3 COLUM. J. EUR. L. 453, 456 n.13 (1997/98).

216. Rogoff, *supra* note 204, at 76.

217. Bothwell, *supra* note 204, at 1659-60 (evaluating Raoul Georges Nicolo and Another, 1990 CMLR 173).

218. Peter L. Lindseth, *Comparing Administrative States: Susan Rose-Ackerman and the Limits of Public Law in Germany and the United States*, 2 COLUM. J. EUR. L. 589, 593-94 (1996) (characterizing German respect for bureaucracy).

219. SINGH, *supra* note 197, at 20-26 (delineating the historical development of German administrative courts).

220. *Id.* at 7-8 (identifying procedure where decisions of administrative courts cannot be questioned in other courts, but, unlike administrative tribunals in France, German administrative courts are part of the judiciary).

the administrative courts are part of the judiciary, not of the executive. This follows the English and American model.

The German Administrative Court has the following jurisdiction: "Should any person's rights be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be to the courts of ordinary jurisdiction" ²²¹

"Access to administrative courts shall be accorded in all public law disputes which are not of a constitutional nature to the extent that such disputes are not expressly assigned to some other court under Federal law." ²²²

German administrative courts are not altogether precluded from considering policy. Not only can they review both law and facts in their investigation of administrative action, they can "replace an illegal administrative determination with one of their own." ²²³

D. Britain and the United States

Historically, judicial review in Great Britain arose as the common law courts avoided sovereign immunity by focusing their jurisdiction on subordinate officers. ²²⁴ In addition, the King's Exchequer acted as an administrative court, ²²⁵ and, for a time, the Privy Council and prerogative courts fulfilled the functions of the later French Conseil d'Etat. ²²⁶ The common law courts used the writs of mandamus and certiorari to ensure that officers of the crown performed their legal duties and stayed within their delegated authority. ²²⁷

The placement of the judicial review function in the regular courts in England and the United States owes to a historic respect for the independence and universal power of regular courts to enforce natural justice, contrasted with the mistrust of regular courts in pre revolutionary France. In *Bonham's case*, ²²⁸ according to Lord Coke, "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be per-

221. Grundgesetz (Basic Law) art. 19(4) (F.R.G.); see generally SINGH, *supra* note 197, at 123 (summarizing basis of judicial review of agency action under German law). Article 95(1) of the Basic Law of Germany provides for a "Federal Administrative Court."

222. Code of Administrative Court Procedure § 40(1), as translated in SINGH, *supra* note 197, at 323.

223. Lindseth, *supra* note 218, at 613 n.85.

224. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 15 (1963) (characterizing commentators on 17th and 18th century English practice).

225. *Id.* at 9.

226. *Id.* at 13.

227. *Id.* at 16.

228. 8 Co. Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610) (cited and quoted in Paul R. Verkuil, *Cross-currents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 689 (1986)).

formed, the common law will control it, and adjudge such Act to be void."²²⁹

Natural justice review in England resembles due process review in the United States, except that natural justice review in England theoretically avoids review of policy decisions.²³⁰ In the United States, most administrative law review is accomplished within the statutory framework of the Administrative Procedure Act.²³¹ In Britain, the statutory framework is incomplete.²³²

VII. PROPOSED SYSTEM FOR JUDICIAL REVIEW IN POLITICAL TRUSTEESHIPS

It remains to synthesize from these models a possible system for administrative law review in political trusteeships. This design activity must recognize that political trusteeships are inherently extraordinary undertakings. The same relationship between governmental decisions and courts that would be acceptable in an ordinary government in the United States or Europe would be unsatisfactory for a political trusteeship. The thresholds for intervention by reviewing bodies in a political trusteeship must be relatively high and clearly defined. The system must be set up to provide relatively quick answers, so public administration is not paralyzed. Substantial deference to political decisions by the political trustee must be assured.

But none of these requirements forecloses administrative law review; it just means that its workings will not be the same as the U.S. Administrative Procedure Act or its European counterparts.

A. Basic Parameters for Administrative-law Review

Any scheme for judicial review of agency action²³³ must carefully circumscribe the role of the reviewing body; otherwise the reviewer becomes the administrator. Such circumscription is the product of the rules for standing, ripeness and exhaustion, explicit reservations of protective doctrines such as governmental immunity, and exemption of political questions and military and security decisions from review. Then once such threshold requirements for review have been satisfied, the system must specify the

229. Verkuil, *supra* note 228, at 689 (quoting Bonham's case).

230. Charles H. Koch, Jr., "Some Kind of Hearing" in *England*, 23 WM. & MARY L. REV. 219, 250 (1981).

231. 5 U.S.C. §§ 551-702.

232. See Verkuil, *supra* note 228, at 706 (noting trend toward codification of administrative law review in England).

233. Consistent with its approach to APA analogies, the article uses the term "agency" to refer to the institutions of political trusteeships.

bases for which an administrative decision can be overturned or conversely upheld, including procedural irregularity and decisional irrationality.

B. Standing, Ripeness and Exhaustion

Systems for judicial review of agency action must define a threshold for agency decision making that triggers an entitlement to judicial review. One should not be entitled to formal review of the mere thoughts or unexecuted intentions of an agency official; nor should one be entitled to review agency statements with no legal effect, or agency decisions that do not adversely affect legal interests of the person seeking review. It is helpful to think of this threshold requirement as embodying the same concepts expressed in the Article III requirements for ripeness and standing,²³⁴ and the prudential and explicit statutory requirement for exhaustion of administrative remedies. The same concepts are applied in European legal systems.

The standing and ripeness inquiries require concrete injury to legally recognized interests. Concreteness of the injury is largely a question of fact. A scheme for judicial review should identify the kinds of legal interests that, when infringed by agency action, entitle the holder of those interests to judicial review.²³⁵ "Only measures producing binding legal effects affecting the interest of the applicant by bringing about a distinct change in his legal position, are acts and decisions capable of the being the subject of an action for annulment within the meaning of Article 230."²³⁶ Decisions by European institutions to commence legal proceedings in national courts do not have sufficiently concrete effects in and of themselves to be reviewable.²³⁷

Merely because a legally protected interest has been detrimentally affected by agency action does not mean, of course, that the reviewing au-

234. See *Warth v. Seldin*, 422 U.S. 490, 498–99 n.10 (1975) (explaining relationship among Article III justiciability and ripeness and standing requirements).

235. The APA embraces this approach. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704. The APA makes no attempt to enumerate types of "final agency action." Substantial case law has developed, however, on what qualifies as "legal wrong" and "adversely affected or aggrieved." The Supreme Court interpreted the "adversely affected" branch of this section to allow review when a party seeking review can show adverse effect to interests within the zone protected by the statute under which he seeks review. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 159, 174 (1970).

236. Case C-208/03 P-R, *Le Pen v. Parliament*, 2003 E.C.R. I-07939, para.92 (2003) (dismissing petition for interim relief).

237. Case T-377/00, *Philip Morris Int'l, Inc. v. Commission*, [2003] E.C.R. II-1, para. 79 (2003).

thority should reverse the agency action. The action may be justified and therefore legally permissible.

Standing also requires that the person suffering the legal injury be the one to seek review. Third party intermeddling is not encouraged. The ripeness and exhaustion doctrines relate to timing and inter-institutional respect. If the reviewing institution declines jurisdiction until the matter in controversy has been thoroughly addressed by the governmental body to be reviewed, interference in public administration is minimized. Basic concepts of ripeness, standing and exhaustion should be applied to administrative law review of political trusteeship decisions.

Applying these threshold barriers to review requires considering both the kinds of agency actions or decisions that may trigger reviewability and identifying the kinds of legal interests that, when infringed by agency action, entitle the holder of those interests to judicial review.²³⁸

1. *Agency actions and decisions.* A typology of agency actions or decisions that might trigger judicial review includes:

Obviously, *imposition of monetary fines and incarceration* should be *prima facie* reviewable.

A taking of property. Examples might include vesting a privatization agency with complete control over property apparently owned or lawfully occupied by a natural or artificial person. Even if the mere granting of the power did not trigger reviewability, the exercise of the power in concrete cases might warrant review.

Withdrawing or withholding a privilege or power. This would include action by a political trustee to deny a radio frequency to a private entity that wants to offer Internet connection services through wireless technologies; or a protest of UNMIK selection of Alcatel as the cell phone operator, in contravention of a decision by PTK to select Siemens, after a careful tender process under the authority explicitly delegated by UNMIK earlier.²³⁹ It could also include a denial of permission by a privatization agency²⁴⁰ for a socially owned enterprise to sell stock or lease its assets to a foreign investor.

238. The APA embraces both approaches. See *supra* text accompanying note 235.

239. See UNMIK Regulation 1999/12 § 1, UNMIK/REG/1999/12 (Oct. 14, 1999) (giving PTK authority to administer postal and telecommunication facilities), available at http://www.unmikonline.org/regulations/1999/re99_12.pdf.

240. KTA is an UNMIK entity. See UNMIK Regulation 2002/12 § 1.

*Refusing to devolve power to local institutions.*²⁴¹ It could include refusal by a political trustee to transfer power to allow a municipality to grant a permit to erect a facility on land apparently owned by the municipality.²⁴² It also might include refusal by political trustee to approve a statute adopted by an elected local assembly. In this category of decisions and actions, it is important to understand that a failure to decide or failure to act can be just as harmful as affirmative decisions or actions,²⁴³ as considered in greater depth in Part VII.B.2.

Many of the controversies that have cropped up in Kosovo relate to the first category, including the very slow pace of creating the framework for privatization of socially owned enterprises, accompanied by conflicting efforts to privatize the Sharr Cement Plant and UNMIK blockage of early post-war efforts by locals—especially former KLA—to occupy and restart enterprises. Controversies also arise from frustrated efforts to open restaurants or other small businesses, when municipalities decline to grant licenses or permits for months or years without explanation.

2. *Refusals to act.* Refusals by governmental bodies to exercise their powers can be as harmful as affirmatively acting. Accordingly, any system for administrative law review in the political trusteeship context should allow review of failures or refusals to act in some circumstances.

United States administrative law distinguishes policy-based decisions to withhold agency action from refusals to act in contravention of explicit legal duty. In *Heckler v. Chaney*,²⁴⁴ the Supreme Court of the United States held that the refusal of the federal Food and Drug Administration to commence an enforcement action was not subject to judicial review.²⁴⁵ The Court established a presumption that refusals to engage in enforcement action are not reviewable under the APA.²⁴⁶ One can distinguish political trustee refusals to act in terms of broad policy and legislative action because the *Heckler* court relied in substantial part on the traditional judicial

241. Respectable arguments exist that such decisions should be unreviewable "political decisions," as considered in Part VII.C.1.

242. The text uses the word "apparently" because property ownership in Kosovo is extremely confused and complicated. See ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE MISSION IN KOSOVO, PROPERTY RIGHTS IN KOSOVO 2002-2003 3 (June 30, 2003) (explaining complexity of property law in Kosovo under U.N. administration), available at http://www.osce.org/documents/mik/2003/06/974_en.pdf.

243. 5 U.S.C. § 706(1) (reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed").

244. 470 U.S. 821 (1985).

245. *Id.* at 837-38.

246. *Id.*

abstention with respect to prosecutorial discretion.²⁴⁷ For example, in *American Horse Protection Association v. Lyng*,²⁴⁸ the court of appeals, reversing the district court, distinguished *Chaney* and held that denial by an agency of a petition to engage in rulemaking are reviewable under the APA to determine if they are arbitrary and capricious.²⁴⁹ In particular, it held that the reviewing court should “assure itself that the agency considered the relevant factors, that it explained the ‘facts and policy concerns’ relied on, and that the facts have some basis in the record.”²⁵⁰

The French Conseil d’Etat in principle refuses to order administrative agencies to act, but, on occasion, is willing to enjoin agency refusals to perform legal obligations.²⁵¹

These French and American approaches are appropriate starting points for a system of administrative law review for political trusteeships. They began by allowing the governmental body to make the resource-allocation and policy decisions incident to commencing an enforcement proceeding or beginning to write a legislative rule. On the other hand, they leave the door open for review in irrational or other egregious cases.

Also, refusing to act timely on a permit or license requirement presents different issues from refusing to promulgate a rule or to commence an enforcement decisions. License and permit decisions should be subject to greater scrutiny.

3. *The nature of the legal claim.* Judicial intervention to block or to revise governmental action surely is not appropriate unless the governmental decision is somehow “unlawful.” Beyond identifying a concrete agency decision that the challenger objects to, she also should be required to specify a legally recognized interest belonging to the challenger which the governmental act affects. She should have to demonstrate a “legal wrong.”

Sometimes an administrative agency decision is not concretely effective until the agency goes to court to enforce it. This inevitably is the case when some sort of physical compulsion is necessary to enforce the agency decision, as when the Occupational Safety and Health Administration seeks contempt penalties for refusal to allow inspection pursuant to an adminis-

247. See *id.* at 832–33.

248. 812 F.2d 1 (D.C. Cir. 1987).

249. *Id.* at 4.

250. *Id.* at 5. But see *Nat’l Customs Brokers & Forwarders Ass’n v. United States*, 883 F.2d 93, 103 (D.C. Cir. 1989) (declining to overturn denial of a petition for a rule; *Lyng* involved a clearer statutory duty to regulate; agency gave adequate reasons for its refusal to regulate).

251. Norman S. Marsh, *Interim Orders Against the State: A Comparative Note*, 67 T. Civ. L.F. 263, 266–67 (1991–92).

trative "warrant." It also may be the case if an agency imposes monetary penalties and the penalized entity does not voluntarily pay. Whenever judicial enforcement of an agency order is part of the regular process, the enforcing court is placed in a position from which it easily can review the agency's decision.²⁵²

But other administrative agency decisions, for example, denial or cancellation of a privilege such as a license, are complete once the agency decides. (Of course, subsequent judicial involvement may occur if the party denied or losing a license is charged with operating without a license.) In those instances, judicial review is available only if some justiciable *legal* claim, traditionally nominated a "cause of action," exists. At common law there were a number of such causes of action: Habeas Corpus, Mandamus, Prohibition, and Injunction.²⁵³ Now, under the Administrative Procedure Act, Section 702 of Title 5 expressly grants a right of action. Significantly, this statutory grant includes not only a prerequisite of legal injury,²⁵⁴ but also a broader kind of standing. In *Camp v. Data Processing Association*,²⁵⁵ the Supreme Court of the United States made it clear the legal inquiry under this section includes concrete injury to legal interests recognized in statutes setting up the administrative agency.

Such a formulation is relatively straightforward and non-controversial in an established legal system. Judicial review of agency action occurs in the context of a broad array of previously recognized legal rights²⁵⁶ and of an additional set of interests recognized as protectable by statutes, usually fairly closely related to the statutes creating the agency framework. But defining the interests to be protected by the judicial review process in political trusteeship context is more difficult. On the one hand, it seems reasonably clear that personal rights generally recognized in national legal systems qualify for protection against agency deprivation in any system of

252. *Compare* *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943) (rejecting judicial review of representation decision under Railway Labor Act) *with* *Leedom v. Kyne*, 358 U.S. 184 (1958) (allowing for limited judicial review of representation decision under National Labor Relations Act).

253. *See* *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1051 (D. Ariz. 2001) (noting common law writs), *vacated on other grounds by*, 305 F.3d 1015 (9th Cir. 2002).

254. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

255. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

256. The "legal wrong" phrase in 5 U.S.C. § 702 contemplates injury to a common-law right, or to a statutory or constitutional right recognized independently of the agency regime in controversy. *See* *Benson v. City of Minneapolis*, 286 F. Supp. 614, 619 (D. Minn. 1968). The European Court of Human Rights exercises jurisdiction to determine that administrative orders, such as those incident to expropriation, violate the right to peaceful enjoyment of property. *Sporrong*, 5 Eur. Ct. H.R. at 54 (finding that Swedish "expropriation permits" violated art. 1 of Protocol No. 1 of the ECHR).

judicial review.²⁵⁷ At the same time, it seems equally obvious that the political trustee should be free to supplant preexisting local law that violates generally recognized international standards, such as human rights principles. This is what UNMIK did after some initial missteps with the Milosevic-era Yugoslav laws aimed at discriminating against Albanians.²⁵⁸ Such preemption should not be subject to blocking by the judicial review process. The legislature should be able to change the law.²⁵⁹

At a minimum, in a political trusteeship, a person seeking review should be required to show that the interests he seeks to protect are interests that are recognized by some relevant legal regime,²⁶⁰ and that it is consistent with the broad policies and purposes of the political trusteeship to allow judicial review premised on infringement of those interests. Unless the political trustee has preempted the source of law asserted, the petition for review should be deemed to satisfy the legal-wrong requirement.

C. Sovereign Immunity and Related Doctrines

Political trustees, like other sovereigns, should be entitled to some measure of immunity against legal liability. Defining the boundaries and exceptions to this immunity is central to determining the scope of administrative law review.

When the United Nations is in charge of the trusteeship, the argument for immunity is strong.²⁶¹ The United Nations, its subordinate components, and its officers enjoy absolute immunity under the United Nations Convention on Privileges and Immunities of the United Nations.²⁶² Article VIII of the treaty obligates the U.N. to establish dispute resolution mechanisms for contract and "other private law claims" and claims against U.N. officials²⁶³

257. Special Report No. 1, *supra* note 27, at para. 24.

258. See UNMIK Regulation 2000/59, UNMIK/REG/2000/59 (October 22, 2000) (amending UNMIK Regulation 1999/24), available at <http://www.unmikonline.org/regulations/2000/reg.59.00.htm>.

259. *Martinez v. California*, 444 U.S. 277, 281–82 (1980) (validating power of state legislature to modify common-law rules); *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 491 (Mont. 1989) (applying "basic rule that the legislature may alter the common law").

260. In that regard, the conceptual discussion in the commentary to Restatement (Second) of Tort § 870 may be useful: "The use of the term, injury, in this Section means that the harm must be to a legally protected interest of the plaintiff. Recovery is thus limited to those cases in which the plaintiff's harm is of such a nature and seriousness that legal redress is appropriate." RESTATEMENT (SECOND) OF TORTS § 870 cmt. e (1979).

261. See Part III.A.2.a (discussing U.N. immunity in the context of possible national-court litigation over trustee decisions).

262. Convention on the Privileges and Immunities, *supra* note 60, at art. II, § 2.

263. *Id.* at art. III, § 29 provides:

"The United Nations shall make provisions for appropriate modes of settlement of:

and empowers the International Court of Justice to resolve disputes over the treaty itself.²⁶⁴

But, as when an international organization governs a territory, the appropriateness of absolute immunity is questionable. The Ombudsperson in Kosovo examined the rationale for grants of immunity in international law and concluded that the exercise of governmental powers by the U.N. in Kosovo fell outside this rationale. “[T]he main purpose of granting immunity to international organizations is to protect them against the unilateral interference by the individual government of the state in which they are located, a legitimate objective to ensure the effective operation of such organizations”²⁶⁵ It concluded that this rationale did not apply to UNMIK, which “in fact acts as a surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself.”²⁶⁶ It observed that “no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility.”²⁶⁷

It concluded that, because “the fundamental precept of the rule of law is that the executive and legislative authorities are bound by the law and are not above it,”²⁶⁸ the exercise of legislative and executive power by UNMIK “must be subject to the oversight of the judiciary, as the arbiter of legality in a democratic society.”²⁶⁹

In other words, some form of judicial review is inherent in the “rule of law.” Waiving or limiting immunity for certain types of governmental decisions suitable for review by another body does not foreclose the possibility that some other types of decisions should remain immune. A number of

(a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

264. *Id.* at art. VIII, § 30 provides:

All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

265. Special Report No. 1, *supra* note 27, at para. 23.

266. *Id.*

267. *Id.*

268. *Id.* at 24.

269. *Id.*

models exist for demarking such a safe haven for political trustee decisions: political questions, military decisions in the field, and emergencies, especially those involving public security.

1. *Political question.* The political question doctrine²⁷⁰ exempts from judicial review decisions by the President and other senior officers of the Executive Branch and by the Congress that are committed to the discretion of those officers by the Constitution or statute²⁷¹ and with respect to which the courts have no judicially manageable standards²⁷² for review.²⁷³ The force of the doctrine is especially strong when foreign affairs²⁷⁴ or national security matters²⁷⁵ are involved. Nevertheless, even in the foreign affairs arena, decisions that raise questions about the interpretation of rea-

270. A controversy is nonjusticiable—i.e., involves a political question—where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” *Baker*, 369 U.S. at 217. But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. *See id.*; *Powell v. McCormack*, 395 U.S. 486, 519 (1969). “As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.” *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (holding Senate choice of procedures to try impeachment of federal judge was a non-reviewable political question).

271. *Dalton v. Specter*, 511 U.S. 462, 476–77 (1994) (holding exercise of Presidential discretion to close military bases not reviewable under APA as it was political in nature).

272. *Schroder v. Bush*, 263 F.3d 1169, 1173–74 (10th Cir. 2001) (declining to hear challenge to agricultural policy under political question doctrine).

273. *Id.* at 1175 (“Courts are ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency”; denying, under political question doctrine, Tucker Act claim that government failed to establish favorable market conditions for small farmers); *Kwan v. United States*, 272 F.3d 1360, 1364 (Fed. Cir. 2001) (discussing political question doctrine).

274. *Kwan*, 272 F.3d at 1364 (Tucker Act claim by Korean citizen for benefits presented non-justiciable political question because it involved foreign affairs function and negotiations between the governments of the United States and Korea); *see* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 160 (2d Cir. 2000) (affirming dismissal, under political question doctrine, of claim that successor states of former Yugoslavia were liable for rent obligations incurred by Yugoslavia).

275. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1030–31 (10th Cir. 2001) (political question doctrine foreclosed judicial review of FAA decision to reserve airspace for military operations; rejecting application of APA requirements for rulemaking). *See Al Odah*, 321 F.3d at 1149 (decisions by military custodian of alien detainees at Guantanamo Bay were not judicially reviewable under APA because committed to agency discretion by law; emphasizing capture on military field of battle and military nature of confinement).

sonably specific textual requirements of treaties or other primary sources of law may be reviewable.²⁷⁶

In the political trusteeship context, the political question doctrine would shield from review fundamental decisions of the top officials by a political trusteeship with respect to the structure of local government and the pace with which power should be devolved from the trustee to local institutions. Such decisions almost certainly would be committed to the discretion of the top officials, and the exercise of that discretion would involve no judicially manageable standards.

On the other hand, once the top officials of a political trusteeship delegate power to subordinate officials and institutions, the text of the delegation instruments and the conduct of the persons to whom power is delegated narrow the scope for discretion and also provide standards ascertainable from the texts. As the level of the administrative decision declines, the appropriateness of judicial review increases.

For example, whether to embark on a program of privatization should fall well within the political question doctrine. Once a decision to privatize is made, however, decisions by privatization agencies that violate their own rules or that exceed the authority delegated to them should be reviewable.

It should not be difficult to design a system of judicial review within a political trusteeship that shapes application of the political question doctrine by explicit language regarding discretion.

2. *Military and security decisions.* The U.S. Administrative Procedure Act excludes from its judicial review provisions "military authority exercised in the field in time of war or in occupied territory."²⁷⁷ This expresses part of a broader doctrine²⁷⁸ which requires courts to abstain from deciding questions within the national security or foreign affairs function of the President.²⁷⁹

In the political trustee context, the question would be whether decisions by subordinate officials of a civil administration qualify as (1) mili-

276. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (political question doctrine did not bar judicial review of cabinet officers application of treaty requirement, presenting purely legal question of statutory interpretation).

277. 5 U.S.C. § 701 (b)(1)(G) (excluding from definition of "agency" those authorities). See *Al Odah*, 321 F.3d at 1149 (stating that the APA did not waive sovereign immunity for alien detainees in Guantanamo Bay because of military function exception to definition of agency; emphasizing capture on military field of battle and military nature of confinement).

278. See *infra* Part VII.C.1 (discussing political question doctrine).

279. See *Deutsch*, 324 F.3d at 711 (discussing need to keep courts out of foreign relations matters); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) ("[w]hen it comes to matters touching on national security or foreign affairs . . . the presumption of review 'runs aground'").

tary authority, (2) exercised in the field, (3)(a) in time of war, or (3)(b) in occupied territory. The military exemption of the APA does not apply to all military decisions;²⁸⁰ nor does it apply to decisions that are not military in character and that do not involve the military chain of command.²⁸¹ It is certainly possible to distinguish decisions by civilians²⁸² involved in civil administration, even in occupied territory, although the language of the proviso is interpreted broadly.²⁸³ Constitutional jurisprudence in the United States distinguishes between the role of civil courts with respect to purely military matters and other matters arguably related to military operations.²⁸⁴

Given the limitation of the textual exclusion from judicial review of military decisions, and the case law, it should be possible to structure judicial review in a political trusteeship to avoid interference with military decisions. Review of orders of a military character by military commanders to their military subordinates should be excluded from review. Decisions to conduct security or operations by military personnel should be excluded as well, with possible coverage for conduct resulting in unnecessary damage to persons or structures. Conversely, decisions by civilians below the

280. *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (finding that APA § 701(b)(1)(G) allowed individual challenges to military decisions if action challenged was not "exercised in the field in time of war or in occupied territory;" but declining to review Navy's decision not to award medal because no statutory standards under section 701(a)(2)).

281. *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (finding § 701(b)(1)(G) inapplicable because plaintiff was not seeking review of military commands "made in combat zones or in preparation for, or in the aftermath of, battle;" nor was he seeking to interfere in relationship between military personnel and superior officers; but challenged FDA regulation was valid).

282. *Cf. Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 128 (D.D.C. 2003) (granting injunction against involuntary anthrax vaccinations because challenged order came from Secretary of Defense not by field commanders, and challenge did not focus on military authority exercised in field).

283. *See Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002) (challenges to confinement of enemy combatants at Guantanamo Bay as not within APA's sovereign immunity because subjects were captured on field of battle and § 701(b)(1)(G) thus applied).

284. *See generally Ex parte Milligan*, 71 U.S. 2 (1866) (holding that civilian cannot be tried and sentenced by military tribunal when civil courts are open and functioning). Another court has stated:

It may be true that no one, whatever his station or occupation, can there interfere with or obstruct any of the measures deemed essential for the success of the army, without subjecting himself to immediate arrest and summary punishment. The ordinary laws of the land are there superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted. The success of the army is the controlling consideration, and to that every thing else is required to bend. To secure that success, persons may be arrested and confined, and property taken and used or destroyed, at the command of the general, he being responsible only to his superiors for an abuse of his authority. His orders, from the very necessity of the case, there constitute legal justification for any action of his officers and men. This martial rule—in other words, this will of the commanding general, except in the country of the enemy occupied and dominated by the army—is limited to the field of military operations. In a country not hostile, at a distance from the movements of the army, where they cannot be immediately and directly interfered with, and the courts are open, it has no existence.

Beckwith v. Bean, 98 U.S. 266, 293–94 (1878) (Field, J., dissenting).

top level of the political trusteeship related to their civil administration functions can be subject to review, consistent with the spirit and interpretation of the military exemption of the APA and its counterparts in other administrative law review systems.

3. *Emergencies.* While the judicial review provisions of the APA contain no exception for emergency decisions by agencies, statutes delegating authority to agencies often contain explicit or implied grants of discretion to take emergency action.²⁸⁵ Moreover, the rulemaking provisions of the APA do contain an exception to the usual procedural requirements when the agency, for good cause, finds that adhering to the procedures would be "impracticable, unnecessary, or contrary to the public interest."²⁸⁶

Any framework for judicial review of the decisions of political trustees should contain an explicit exemption for emergency decisions, although post-hoc review of the basis for the determination of emergency may be appropriate.

D. Standards for Review

For decisions satisfying threshold requirements for reviewability, any system for administrative review must include standards pursuant to which the reviewing entity should overturn decisions or, alternatively, respect them.

At its most general, any system of administrative review must assure that governmental decisions are authorized by law, that they are rational, and that they have been arrived at through fair procedure. In the political trustee context, as in the conventional administrative agency context, the political trustee should be able to demonstrate three propositions: first, that the action taken or decision made by the trustee was authorized by law; second, that it was rationally related²⁸⁷ to a legitimate state interest, the protection of which was within the trustee's mandate;²⁸⁸ and, third, that the decision was reached through appropriate procedures.

The U.S. Administrative Procedure Act, in Section 706 of Title 5, provides a good checklist for standards of review. It expresses standards of

285. See *Board of Trade v. Commodity Futures Trading Comm'n*, 605 F.2d 1016, 1021 n.6 (7th Cir. 1979) (deferring to administrative a statutory grant of discretion to determine if emergency existed what emergency measures were appropriate; no judicial review).

286. 5 U.S.C. § 553(b), 2d para. (B).

287. The burden is on the agency to establish the rationality of its decision. Rationality essentially means logical connection between articulated policy principles and factual propositions, on the one hand, and the conclusions drawn, on the other.

288. This rationality standard is developed more fully in Part VII.D.2.

review also used for administrative law review in other legal systems.²⁸⁹ While judicial review of political-trustee decisions may involve specific standards different from those developed by American courts under the APA, the basic touchstones of review should be the same.

1. *Requiring authority for the decision.* In the United States, the Delegation Doctrine²⁹⁰ expresses a fundamental precept of administrative law: the idea the subordinate government officials may act legitimately only within the scope of powers delegated to them.²⁹¹ "[T]he whole political system is founded on the idea, that the departments of government are the agents of the nation, and will perform, within their respective spheres, the duties assigned to them."²⁹² "[G]overnment officials act as agents constrained by their delegated authority."²⁹³ Reasonably implied by this idea is that the agent must not be the sole judge of whether an act falls within the scope of the agency.²⁹⁴

Section 706 (2)(C) requires that agency decisions not be *ultra vires*; in other words, that they be within in the authority or competence granted the agency. The same basic concepts are employed in other legal systems. Reviewing agency decisions on claims that they are *ultra vires* has been

289. The sections analyzing specific standards of review *infra* cite examples courts from other legal systems applying the standard.

290. The "Delegation Doctrine" in American administrative law expresses the proposition that the legislative power cannot be delegated to someone who is not legally accountable to those who are immediately accountable politically (the members of the legislature). From an initial—an unrealistic—position that legislative power cannot be delegated at all, the doctrine has evolved into a flexible basis for judicial review, insisting that the legislature provide reasonably ascertainable standards to confine the activities and authority of the delegatee, and that the delegatee remain within those limits.

More ambitious extension of the doctrine to the U.N. context would invalidate Security Council delegation of the power not accompanied by reasonably ascertainable standards, but that would require much more heroic discovery of a source of law superior to Security Council's broad authority in the UN charter, and reversal of the holding in the Lockerbie cases by the International Court of Justice, that it lacks authority to review Security Council decisions. See Alvarez, *supra* note 3, at 1 n.1 (citing and summarizing Lockerbie litigation and its connection to power of ICJ to consider claims that Security Council decisions were *ultra vires*). By analogy, the doctrine would examine UNMIK action to ensure that it remains within the confines set by Security Council Resolution 1244.

291. See *Loving v. United States*, 517 U.S. 748, 758 (1996) (characterizing modern understanding of Delegation Doctrine; upholding delegation of authority to President to determine factors to be considered in criminal sentencing). "It does not suffice to say that Congress announced its will to delegate certain authority. Congress as a general rule must also 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* at 771.

292. Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1468 (2000) (quoting Chief Justice Marshall).

293. *Id.* (characterizing John Locke).

294. *Id.* at 1469.

characterized as “the central principle of administrative law” in Britain.²⁹⁵ The French Conseil d’Etat can reverse administrative decisions for incompetence or want of authority.²⁹⁶ The European Court of Justice scrutinizes delegated legislative authority for judicially-reviewable standards constraining the exercise of the delegated power.²⁹⁷

Any system for administrative law review of political-trustee decisions should incorporate a requirement that agency decisions be validated only if they fall within authority delegated to the agency. The agency should bear the burden of identifying the source of law that authorizes a challenged decision.

This would permit the reviewing body to invalidate a political trustee decision contravening limitations expressed in basic grants to authority to the political trustee, such as Security Council Resolution 1244, in the case of Kosovo. It also would require invalidation of lower level decisions that violate delegations of authority or legislative acts by top-level political trustee authority. It is well established that agencies must follow their own rules.²⁹⁸

Section 706(2)(B) of the APA prohibits agency decisions that contravene constitutional limitations.²⁹⁹ The equivalent in the political trustee context would be a trustee decision that violates the mandate of the political trusteeship, the U.N. charter, or provisions of human rights documents such as the Convention on Civil and Political Rights. This branch of reviewability authorizes invalidating agency action that contravenes a superior source of law even though it may be consistent with the legal text that is the source of the agency’s authority.

2. *Requiring that decisions be rational: what constitutes justification?* All systems of administrative law review require that agency decisions be rational; they differ on the degree to which reviewing courts defer

295. *Id.* at 1470 (quoting Christopher Forsyth, *Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 Cambridge L. J. 122 (1996)).

296. Kurt J. Hamrock, *The ELSI Case: Toward an International Definition of "Arbitrary" Conduct*, 27 TEX. INT’L L.J. 837, 852–53 (1992) (arguing that French ultra vires review is roughly the same as ultra vires review in the United States).

297. See *supra* text accompanying note 201.

298. *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (having chosen to promulgate policy, agency must follow it); *Hamel v. Johnson*, 25 P.3d 314, 326 (Or. Ct. App. 2001) (“It is axiomatic that administrative agencies must follow their own rules.”).

299. This overlaps with constitutional review to the extent that a constitutional challenge to an agency decision is premised on a constitutional attack on the statute giving the agency authority.

to agency judgments on matters of fact,³⁰⁰ policy considerations,³⁰¹ and interpretations of law.³⁰² Merely because a legally protected interest has been detrimentally affected by agency action does not mean that the reviewing authority should reverse the agency action. The action may be justified³⁰³ and, therefore, legally permissible.

Section 706(2)(A) of the APA requires that agency decision not be arbitrary and capricious. This is a rationality requirement. The burden is on the agency to establish the rationality of its decision. Rationality essentially means logical connection between articulated policy principles and factual propositions, on the one hand, and the conclusions drawn, on the other. This principle is the substantive review touchstone for quasi legislative decision making rulemaking. It also applies, however, to decisions not channeled through formal procedures, such as a decision where to build a highway.³⁰⁴ The agency must disclose its reasoning and other bases for its decision.³⁰⁵

Reviewing and invalidating decisions found to be arbitrary and capricious is a feature of French, Italian, and, arguably, general international

300. See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) (reviewing court must be especially deferential when agency decisions represent expert determinations of scientific fact).

301. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (reviewing court should defer to agency policy judgments when agency interprets its own regulations).

302. See *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984) (reviewing court is final authority on what law means, but should defer to reasonable interpretations of authorizing statute when legislature intended to leave policy discretion to agency).

303. The Restatement of Torts explains the concept of justification in the tort context. "Tort law involves a balancing of the conflicting interests of the litigants in the light of the social and economic interests of society in general." RESTATEMENT (SECOND) OF TORTS § 870 cmt. c (1979). Interests promoted by the actor's conduct "are the ones that have become the basis for established privileges. Thus protection of oneself becomes self-defense and protection of property becomes the privilege of defense of possession or recapture. The importance of these interests to the owner and to society is a significant factor in the balancing process." *Id.* cmt. g (allowing prima facie injury if justification by defendant is established).

304. "[Judicial] review is to be based on the full administrative record that was before the Secretary at the time he made his decision . . . in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." *Citizens to Pres. Overton Park*, 401 U.S. at 420 (1974) (remanding for development of better record in challenge to decision to build highway through park).

305. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfg. Ass'n*, 463 U.S. at 43 (overturning, as arbitrary and capricious, agency decision to rescind regulation).

law.³⁰⁶ Such an arbitrary and capricious test invalidates agency action if (1) the action is not authorized by law, (2) the action is taken for an improper purpose, (3) the action is taken because of irrelevant circumstances, or (4) the action is patently unreasonable.³⁰⁷ In the European Union, the ECJ defers to general factual findings by European institutions in complex matters, as long as they do not contain manifest error, constitute a misuse of power or exceed the bounds of the discretion conferred on the institution. Thus the court defers substantially to policy judgments.³⁰⁸

In the political trustee context, agencies should be obligated to justify the content of their regulations under this standard, as well as their decisions in individual cases. The obligation extends, perhaps in weakened form,³⁰⁹ to justification of other administrative and policy decisions, including a decision not to issue a regulation, not to grant a license, or not to delegate authority to a local institution. Reviewing the last kind of decision, a decision not to delegate authority to a local institution, is the most challenging type of review because it seems entirely discretionary.³¹⁰ But in the U.S. APA context, at least one United States court of appeals has held that some decisions not to act by agencies are reviewable under the arbitrary and capricious standard.³¹¹ The Supreme Court has rejected the proposition that a basic change in policy preference is immune from review.³¹²

In the political trustee context, as in the conventional administrative agency context, justification should require that the agency demonstrate two propositions: first, that the action taken or decision made by the agency was rationally related to a legitimate state interest, the protection of which was within the agency's mandate. In Kosovo, for example, the first element of justification for UNMIK decisions should relate to the purposes identified or reasonably inferable from Security Council Resolution 1244.

306. See generally Hamrock, *supra* note 296 (analyzing Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20)).

307. *Id.* at 852 (suggesting four elements of English arbitrary and capricious review, and arguing that French Conseil d'Etat precedent embraces the same elements); *Id.* at 853 (arguing that Italian administrative law embraces same elements).

308. See generally Case 138/79, SA Roquette Freres v. Council, 1980 E.C.R. 3333 (1980) (discussing the courts reliance on agricultural policy of the Community).

309. See *infra* Part VII.B.2, considering review of agency refusal to act.

310. It thus may fall within the political question exemption from review, discussed in Part VII.C.1.

311. See *Lyng*, 812 F.2d at 6 (stating that reasons given by agency for denying petition to amend rules were insufficient).

312. See *Motor Vehicle Mfg. Ass'n*, 463 U.S. at 41-42 (suggesting that standard for reviewing decision not to promulgate rule is more deferential than standard for reviewing decision to promulgate or to rescind rule—possibly "close to the borderline of nonreviewability."

More broadly, interests recognized in the charter of the U.N. should be admissible in this branch of the inquiry.

3. *Requiring that decisions be made through adequate procedures: what procedures are required by law?* Administrative law review requires scrutiny of the processes leading up to the agency's decision or action and assessment of them against the benchmark provided by generally accepted principles of procedural fairness. Procedural requirements can be imposed on administrative decision making by testing the procedures actually used in a particular case against relatively general concepts of due process,³¹³ or they can be imposed by codes or statutes prescribed in advance as under the U.S. Administrative Procedure Act.³¹⁴

Those principles are incorporated into the concept of procedural due process.³¹⁵ English, American, and continental European concepts of procedural due process include: notice of the action or decision proposed,³¹⁶ an opportunity to present reasons why the action should not be taken,³¹⁷ an impartial decision maker, an opportunity to present witnesses, professional counsel, a statement of the grounds for the decision, referring to arguments made by the person opposing the decision,³¹⁸ the possibility of review,³¹⁹ and public access to the proceeding.³²⁰ Selection of these elements of procedural fairness depends on the factors defining a specific case.³²¹

313. See *Enso Española*, 1998 E.C.R. at II-1900 (1998) (in making administrative decisions Commission must follow procedures that comport with fundamental notions of European law); *Siderúrgica Aristrain*, 1999 E.C.R. at para. 25 (Commission must afford procedural fairness in reaching decisions that may result in imposition of penalties).

314. 5 U.S.C. §§ 553–58.

315. See *Goldberg*, 397 U.S. at 262 (termination of welfare benefits by state agency requires adherence to procedural due process).

316. See *supra* text accompanying note 203.

317. See *supra* text accompanying note 202.

318. See *supra* text accompanying note 203.

319. See *Enso Española*, 1998 E.C.R. at ¶ 2 (requirement for effective judicial review of any Commission decision that finds and punishes infringement of competition rules is general principle of Community law which follows from common constitutional traditions of Member States). See generally Koch, *supra* note 230, at 246–247 (noting strong presumption of judicial reviewability in England as in the United States). See *supra* note 47 and accompanying text.

320. See Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. Rev. 1267, 1279–95 (1975) (suggesting that traditional concepts of "natural justice" require selecting from the following elements: unbiased tribunal, notice of proposed action and grounds asserted for it, opportunity to present reasons why proposed action should not be taken, right to call witnesses, right to know evidence against one, right to have decision based only on evidence presented, right to counsel, making of a record, statement of reasons for decision, public attendance, judicial review).

321. "[T]he specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

Section 706(2)(D) requires invalidation of agency decisions made without an observation of procedures required by law. The U.S. APA has two procedural branches. A much less demanding branch is applicable to quasi legislative decision making, principally rulemaking under Section 553. A more demanding branch is applicable to adjudicatory decisions under Section 554 to 558, along with other procedural requirements that may be imposed by specific statutes.

a. Procedural requirements for legislative-type decisions. Generally, application of procedural due process concepts to quasi legislative decision making requires notice, a comment period or hearing, and a statement of reasons.³²² Section 553 procedures are modeled on legislative making procedures customarily used by legislatures,³²³ basically giving notice of a proposed law (rule), giving interested persons an opportunity to comment on the proposal, and then giving some sort of statement justifying the measures ultimately adopted, with explicit reference to comments.³²⁴ The procedures are meant to be flexible, to allow ample room for policy judgment. There are manifestly not meant to resemble adjudicatory trial procedures which are unsuitable for legislative decision making.³²⁵

Commentators have proposed greater use of notice and comment rule making by EU bodies.³²⁶ In some cases, the court has been willing to require EU institutions to consult with experts in order to examine adequately factual bases for decisions in complex scientific areas.³²⁷

The same sort of requirements seem appropriate for quasi legislative decision making by political trustees. They should be required to: publish proposed regulation and administrative directions, to receive comments on

substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

322. Verkuil, *supra* note 228, at 701-02 (explaining convergence of American and English administrative law).

323. See generally *Atlanta AG*, 1999 E.C.R. at I-7035 (declining to extend right to be heard to legislative proceedings).

324. See *ACLU v. FCC*, 823 F.2d 1554, 1581 n.45 (D.C. Cir. 1987) (finding no violation of sec. 553 requirement to justify rule and to respond to significant comments); *Formula v. Heckler*, 779 F.2d 743, 760 (D.C. Cir. 1985) (finding no violation of APA requirement for agency justification of rule).

325. See *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 244-46 (1973) (finding ICC decision on incentive per diem rates to be subject to sec. 553 rulemaking procedure rather than adjudicatory procedure).

326. See Francesca E. Bignami, *The Democratic Deficit in European Community Rule Making: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451, 479 (1999) (summarizing grounds for review of administrative decisions by E.C.J. and citing cases illustrating different grounds).

327. *Id.* at 481 (citing *Angelopharm GmbH v. Freie und Hansestadt Hamburg*, Case C-212/91, 1994 E.C.R. I-171, paras. 33-38, at I-211 to I-212).

them, and to justify the ultimately adopted regulation or administrative direction. Of course, as under the APA, emergency measures can be adopted without following the procedures, but any agency, including those of political trustees, should be required to identify the emergency and explain why it is necessary to act immediately without time to follow the procedures.³²⁸

b. Procedural requirements for adjudicatory decisions. Identifying the procedural attributes required of adjudicatory decisions involves straightforward application of the well known elements of procedural due process.³²⁹

First, an impartial decision maker is necessary. Under the APA these now are called “administrative law judges.” To avoid confusion with the regular judiciary, it would be better to revert to former terminology in the U.S., and call these “hearing officers.”

Second, when an agency contemplates official action, it must state the reasons for its intended action. Before withdrawing a privilege or a power, for example before canceling a previously existing license, a political trustee should be obligated to give the licensee notice and a brief statement of the basis for its inclination to cancel the license.

Third, the party against whom the agency is acting should be entitled to present reasons why the proposed action should not be taken. The political trustee should be required to hear (through the hearing officer) legal and factual grounds against its position. These should be presented in an informal context. The party opposing the political trustee should be entitled to be represented by counsel of the party’s choosing.

Fourth, the party should be entitled to hear arguments and evidence supporting the political trustee’s position. A political trustee should not be entitled to use secret evidence to prevail.

Fifth, if the facts are in dispute, the party opposing the political trustee should be entitled to call witnesses, although the hearing officer should have broad discretion to require the presentation of initial testimony in written form and to restrict redundant testimony. But, both the political trustee and the party opposing the political trustee should be entitled to cross examine witnesses.

328. See *infra* Part VII.C.3, for further discussion of emergency decisions.

329. The adjudication procedures from the APA requires somewhat more imagination to adapt to political trustees because they are much more specific than the rulemaking requirements in Section 553. Rather than tracing the specifics of Sections 554–58 it may be better to begin with the elements of formal adjudication, from Judge Friendly’s list, see note 320 *supra*, all of which are incorporated in the APA requirements.

Sixth, the hearing officer should be obliged to make a preliminary decision based on the evidence in the record, and only that evidence. Informal presentations should be summarized in "minutes" of the proceeding, as under the Yugoslav Criminal Procedure Code of 1974.

Seventh, the hearing officer should be obliged to make findings of fact and conclusions of law supporting his decision.

Eighth, when the decision goes to the top authority of the political trustee for ratification or repudiation, both the initial decision maker and the party opposing the decision should be entitled to present arguments in writing in support of or in opposition to the hearing officer's preliminary decision.

c. Classification of cases as legislative or adjudicatory. Often, the most difficult procedural question is whether the flexible procedures of quasi legislative decisions apply or whether the formal adjudication procedures apply. Agencies usually prefer application of the less demanding procedures under Section 553, while those opposing agency action usually prefer application of the more demanding adjudication procedures because they limit the ambit of agency discretion much more. When the agency is found after the fact to have used the wrong procedures, its decision is invalid under Section 706(2)(D).

The standard distinction characterizes rulemaking (quasi legislative decision making) as prospective in application, usually applying to a class of persons rather than to a single person and involving questions of law and policy and questions of fact that require prediction about the future more than a determination about what happened in specific past events. Legislation usually requires further procedural steps before it is concretely operative.

Adjudication is generally considered to be retrospective in its focus, to be applicable to one or a limited number of persons, and to involve application of a preexisting rule of law to factual events that already have occurred. Adjudicatory decisions are usually concretely operative without further procedural steps.

The famous pair of cases in American judicial review jurisprudence, *Londoner*³³⁰ and *Bi-Metallic Corporation*,³³¹ hold that a decision to establish a tax covering a broad category of taxpayers is legislative in character,

330. *Londoner*, 210 U.S. at 386 (due process requires basic elements of hearing before tax can be assessed against specific property).

331. *Bi-Metallic*, 239 U.S. at 445-46 (due process does not require adjudicatory hearing before general tax valuation policies are adopted; distinguishing *Londoner*).

while a decision to collect the tax or to assess it concretely against one or a limited number of taxpayers is adjudicatory.

The establishment of a speed limit for the road from Pristina to Skopje clearly falls into the rulemaking category. Determining whether someone has violated the speed limit once it is established clearly falls into the adjudication category. Adopting a new criminal code in an UNMIK regulation clearly falls into the rulemaking category. Deciding whether a new law passed by the Kosovo Assembly should be invalidated because it violates the prohibition against discrimination in UNMIK Regulation 2002/45 rather clearly falls in the adjudication category.

Some types of decision are difficult to classify under this framework. Consider licenses and property rights. The initial decision whether to grant a license enjoys special status under the APA. It is treated as adjudication,³³² even though initial licensing decisions may involve application of a criterion such as "best serves the public interest." Adjudicatory procedures clearly are appropriate when the licensing decision simply involves application of preexisting criteria that are concrete and factually oriented, such as a decision whether to issue a drivers license.

Broad decisions by political trustees about property rights may be legislative in character. A good example is UNMIK's Regulation 2002/12, establishing the Kosovo Trust Agency and giving it plenary power over all property rights associated with public and socially owned enterprises in Kosovo. This regulation imposes substantial limitations on the power of municipalities, entities, and individuals in transferring or asserting their property rights. It is accompanied by the prohibition on any conduct that might interfere with UNMIK's power³³³ similar to the automatic stay in the Bankruptcy Act.³³⁴

The fact that this automatic stay makes the UNMIK regulation concretely operative without further procedural steps and its substantial impact on property rights would, no doubt, induce most of those with property claims to argue that UNMIK could not promulgate it without exhausting adjudicatory procedures as to each of them. But to do so obviously would make it impossible to legislate in the property realm with any timeliness.

The best approach is to extrapolate from *Bi-Metallic* and treat such a broad property regulation like a law imposing a new tax. It is legislative in

332. 5 U.S.C. §558(c).

333. See, e.g., UNMIK Regulation 2002/12 § 29.1 (limiting legal proceedings against enterprises subject to KTA control).

334. See 11 U.S.C. § 362(a) (2000); *Young v. United States*, 543 U.S. 43 (2002) (applying automatic stay to IRS enforcement proceeding).

character. The automatic stay provision should be dealt with by establishing an adjudicatory exceptions procedure, allowing any adversely affected person to make application or have the automatic stay lifted. This should mean that an individual with a loan payment due from a socially owned enterprise should be allowed to apply to UNMIK for immediate payment of the loan, and to have the application handled before a hearing officer. It also means that a socially owned enterprise with a plan for privatization that it wants to proceed should have a route to apply to KTA and have the application to proceed go before a hearing officer.

Probably the most difficult category of decisions for procedural classification involves decisions not to transfer authority to local institutions. The policy nature and forward looking character of such decisions qualify them to be treated as quasi legislative in character, but a decision not to transfer power is simply a maintenance of the status quo, and therefore it makes little sense to think in terms of application of a proposed rule not to transfer power. Instead, the way to handle these decisions is to provide a mechanism for a local institution that desires a transfer of power to petition for that transfer. Such a petition would trigger a rulemaking proceeding. The model is the procedure available under the APA if an agency so provides, for a person to petition for promulgation of the rule.

E. Characteristics of the Review Forum

A variety of institutional arrangements can allow for judicial or a quasi judicial review of administrative decisions and conduct, including civil courts, criminal courts, employment sanctions by a civil service commission against wayward government officials, ombudsmen, administrative courts as in Germany, France, and Austria, and parliamentary oversight.³³⁵ The threshold question on institutional design is whether the review body should be a court or some other type of institution. If it is to be a court, questions arise as to where it should be placed in the governmental structure of the political trustee. Finally, it is necessary to decide who should establish the review body—the U.N. Security Council, the political trustee, or someone else.

1. *Ombudsmen and inspection panels.* Courts are not the only type of institution that may engage in administrative law review. Ombudsmen and inspection panels are other possibilities. Ombudsmen tend to use less formal investigatory procedures than courts, and most rely on public opin-

335. Robert B. Seidman, *Drafting for the Rule of Law: Maintaining Legality in Developing Countries*, 12 YALE J. INT'L L. 84, 111–14 (1987).

ion and the possibility of action by political institutions to remedy administrative abuses.³³⁶

Superficially, it might appear that review in regular courts is superior to other, apparently more political forms of review. Ultimately, however, the effect to be given to the decision of a reviewing tribunal depends on the political will of the executive, acting within the constraints of the applicable legal culture.³³⁷ There is no apparent difference between the level of compliance with decisions of Article III courts in the United States, administrative courts in Germany, or the Conseil d'Etat in France, despite the placement of the latter entirely within the executive. Moreover, constitutional courts in Europe are more political in their character, and less judicial, than the regular courts.³³⁸ In France, the Conseil Constitutionnel (distinct from the Conseil d'Etat, which performs administrative review³³⁹) performs constitutional review.³⁴⁰ The institution is designed to ensure political and judicial competence: "The Conseil Constitutionnel is a cross between a political arbiter and a court. It consists of nine members, ranging from politicians to distinguished professors of constitutional law"³⁴¹ Accordingly, it is conceivable that an arrangement not traditionally judicial in character could have as much force as more formal judicial arrangements for review.

Practice in Europe and under the political trusteeship in Kosovo present models for how ombudsmen might be used for administrative law review in political trusteeships. The European Ombudsman was established by the Maastricht Treaty. The Ombudsman receives complaints from EU citizens or natural or legal persons residing in or having their legal domicile in a member state and has jurisdiction to uncover maladministration in the community institutions and bodies. Internal administrative remedies afforded by the institution subject to complaint must already have been taken. The Ombudsman investigates and informs the institution concerned of its

336. Koch, *supra* note 230, at 235–36 (noting English experiment with ombudsmen, with fewer powers than Scandinavian ombudsmen).

337. See Brian M. Feldman, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 989 (2003) (noting the possibility that other branches of government might ignore decisions by judiciary; quoting Andrew Jackson: "John Marshall has made his decision, now let him enforce it.").

338. See G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1465–66 (2003) (characterizing selection of judges of civil-law constitutional courts as more political than selection of judges for regular courts).

339. See *infra* Part VII.E.2.

340. Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 379 n.58 (1982) (describing and quoting provisions of French Constitution establishing constitutional counsel).

341. *Id.* at 388 n.91.

conclusions. The institution has three months to respond to the Ombudsman recommendations, and the Ombudsman then submits a report to the European Parliament, the institution, and the complainant.³⁴²

The Kosovo Ombudsperson has asserted competency to consider complaints against UNMIK.³⁴³ For example, the Ombudsperson concluded that detention pursuant to UNMIK order contravened European human rights law³⁴⁴ and subsequently also found violative of human rights a review commission set up to review the detentions.³⁴⁵ It found no violation of human rights in the denial of a radio broadcasting license to an applicant, however.³⁴⁶ It found that a refusal by an UNMIK municipal administration to register a real property transfer violated human rights standards.³⁴⁷ The Ombudsperson also found that UNMIK Regulation 2000/47, conferring broad immunity on UNMIK and its personnel, violated recognized human rights standards.³⁴⁸

Inspectors General are another possibility.³⁴⁹ The U.N. Inspector General apparently has authority to review the conduct of U.N.-established bodies, including political trustees like UNMIK, but the limited role of this office could not plausibly be extended to judicial review in the administrative law sense. Nevertheless, the establishment and existence of the In-

342. See The European Ombudsman Homepage at <http://www.euro-ombudsman.eu.int/home/en/default.htm> for basic information on European Ombudsman.

343. UNMIK Regulation 2001/9 § 10.1. See *supra* text accompanying note 184.

344. Ombudsperson Institution in Kosovo, Special Report No. 3, para 8., *On the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards* (June 29, 2001), available at <http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr3.pdf>.

345. Ombudsperson Institution in Kosovo, Special Report No. 4, para. 17, *On Certain Aspects of UNMIK Regulation No. 2001/18 on the Establishment of a Detention Review Commission for Extra-judicial Based on Executive Orders* (Sept. 12, 2001), available at <http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr4.pdf> (review commission is not a court, as required by human rights law, because not sufficiently independent of executive (SRSG)).

346. Ombudsperson Institution in Kosovo, *Ex officio* Reg. No. 03/01, *Regarding the Denial of a Kosovo Wide Broadcasting License to Radio "Kosova e Lirë"* (Apr. 27, 2001), available at <http://www.ombudspersonkosovo.org/doc/reps/0003%20Radio%20Kosova%20e%20Lir%EB%20Report%2027-04-01%20English.doc>.

347. Ombudsperson Institution in Kosovo, *Ex officio* Reg. No. 24/2002, para. 3, *Regarding the Refusal of UNMIK to Register a Contract for the Sale of a Residential Property in Lipjan/Lipljan* (Apr. 22, 2002) (following Ombudsperson Institution in Kosovo, Special Report No. 5, *On Certain Aspects of UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo* (22 August 2001)), available at <http://www.ombudspersonkosovo.org/doc/reps/Sadiku%20Report%20final%20English%20version%2020%20April%202002.doc>.

348. See *supra* text accompanying note 185.

349. See generally Inspector General Act of 1978, Pub. L. No. 95-452 § 11, 92 Stat. 1101 (1978) (establishing Offices of Inspector General within the Departments of Agriculture, Commerce, Housing and Urban Development, the Interior, Labor, and Transportation, and other agencies).

spector General is another example of how a non-judicial body with administrative law review power could be set up. The World Bank created a three-member “inspection panel” in 1993 to investigate claims by private citizens that their interests are harmed by a bank project undertaken or implemented in violation of bank policies and procedures.³⁵⁰ The inspection panel has received 27 formal requests since it began operations in September 1994.³⁵¹

Thus designing future political trusteeships to afford administrative law review is not limited to providing for judicial review in a judiciary; it also could provide for review by ombudsmen or inspectors general.

2. *Courts and the “administration”: separation of powers.* Assuming that judicial bodies are best suited to perform administrative law review, those courts can be part of an independent judiciary, or they can be part of the “administration”—the executive branch. “Separation of powers” can be misleading as a goal in structuring governments. The executive, legislative, and judicial branches of government are not independent sovereigns; they exercise different types of power in a single, undivided sovereign. The authority of federal courts derives from the same source as the authority of the U.S. Congress—the U.S. Constitution, expressing the will of the people—or at least of the states—making up the sovereign United States. Indeed the Constitution leaves to the legislative branch most of the details of the establishment and structure of the judicial branch.³⁵²

A sovereign can establish one institution to review and to monitor the activities of another institution established by the same sovereign. In some legal systems, the bodies with judicial review authority are distinct from the regular courts and are more obviously part of the administration. The French Conseil d’Etat is the classic example.³⁵³ The Conseil d’Etat is at the pinnacle of the French system of administrative courts, separate from the regular criminal and civil courts.³⁵⁴ It was established by Napoleon in 1799,³⁵⁵ and is presided over by the Prime Minister of France and managed,

350. See *The Inspection Panel—Overview*, WORLD BANK GROUP, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WOverview/overview?opendocument> (last visited Oct. 18, 2004).

351. *Id.*

352. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.”).

353. See *infra* notes 354–357 and accompanying text.

354. See Aucoin, *supra* note at 204, at 461–62 (briefly describing French administrative courts); Kublicki, *supra* note 209, at 67–75 (more detailed description of different levels and competencies of French administrative courts).

355. Kublicki, *supra* note 209, at 70.

day to day, by the Minister of Justice.³⁵⁶ Placement of the highest court for judicial review of administrative action reflects historical French suspicion of regular courts as antidemocratic.³⁵⁷

In the United States, the congressionally established Tax Court, the archetypal "legislative court," reviews the decisions of another congressionally established institution, the Internal Revenue Service. Such "Article I courts" occupy a position similar to that of the Conseil d'Etat in France. Under American law, "Article I courts"³⁵⁸ and administrative bodies³⁵⁹ may "adjudicate any case involving public rights."³⁶⁰ In the United States, some administrative law review bodies are administrative agencies rather than Article I or Article III courts. The Occupational Safety and Health Review Commission is a good example.³⁶¹

In France, as in Germany, the institutional responsibility for review of administrative decisions is separated from institutional responsibility for reviewing legislation for its constitutionality.

The burden on independent institutions to review administrative decisions can be reduced by establishing a system of independent review tribunals providing a kind of administrative appeal.³⁶² Initial adjudicatory decisions by ALJs, followed by review in an administrative appeals body, and followed in exceptional cases by review by the top authority of a political trustee, can produce a crisper review in most cases, while still allowing the

356. *Id.* at 71.

357. Aucoin, *supra* note at 204, at 447 (describing hostility to "*government des juges*"—government by judges).

358. "Article I" courts are judicial bodies established by the Congress, such as the Tax Court, the United States Claims Court, the Court of Veterans Appeals, and the Bankruptcy Courts, which lack one or more attributes of Article III courts, such as life tenure of judges.

359. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977) ("when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law'").

360. *Crude Co. v. Fed. Energy Regulatory Comm'n*, 923 F. Supp. 222, 234 (D.D.C. 1996) (Energy Department Office of Hearings and Appeals could adjudicate dispute over compliance with crude oil allocation rules). "Public rights" cases are those "in which the Government is sued in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." *Id.* at 234.

361. *See Atlas Roofing Co.*, 430 U.S. at 445–46 (describing the review process). Under the Occupational Safety and Health Act, 29 U.S.C. § 657, the Secretary of Labor conducts inspections to determine compliance with health and safety standards. *Id.* If the inspector issues a citation, the employer may request an adjudicatory hearing before an administrative law judge of the independent Occupational Safety and Health Review Commission. *Id.* A decision by the ALJ can be reviewed by the full Commission. *Id.*

362. *See* 8 C.F.R. § 1003.1 (2004) (establishing Board of Immigration Appeals within Department of Justice); 20 C.F.R. § 422.205 (2004) (providing for appeals to "Appeals Council" within Social Security Administration); Koch, *supra* note 230, at 248–49 (noting trend in England and United States to establish administrative appeals bodies).

top-level political trustee to take into account policy dimensions when he decides whether or not to give effect to a review decision.

3. *Who should establish the review bodies?* Administrative law review bodies with competence to review decisions by political trustees can be established by the political trustee itself or by the U.N. Security Council.³⁶³ The U.N. Security Council could establish a judicial—or other—body³⁶⁴ to review decisions of U.N.-established political trustee, or all such political trustees. This approach would be problematic when the basic authority for the political trusteeship is not a U.N. Security Council resolution, as in Kosovo or East Timor, but retained sovereignty in local institutions as in Bosnia and Afghanistan, or military occupation as in Iraq

Alternatively a future political trustee could establish a tribunal to review the actions of subordinate officials of the trustee.³⁶⁵ This could take the form of an ombudsman or a specialized court reporting to the top-level authority of the political trustee. Under U.S. administrative law, the heads of agencies establish independent bodies within the agency to review the decisions of other bodies within the same agency. Administrative law judges³⁶⁶ and inspectors general, are examples.³⁶⁷ The highest-level authority of the trustee, like an administrative agency head, would have ultimate power to accept or to reject decisions of the reviewing body.³⁶⁸

363. Of course, merely establishing an administrative law review body for political trustee decisions does not exclude the possibility of review in other forums, except under comity doctrines such as *forum non conveniens*. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 478 (2003) (considering interaction of national and international judicial and political bodies along six axes); see *supra* Part III.A.4 (discussing *forum non conveniens* doctrine).

364. It is generally—though not universally—accepted that the Security Council has the power to establish judicial bodies, such as the International Criminal Court for the Former Yugoslavia. See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, para. 20–40 (Aug. 10, 1995) (reviewing legitimacy of Security Council decision creating it), available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>.

365. The Special Chamber, established by UNMIK Regulation 2002/13 is a good example.

366. 5 U.S.C. §§ 1305, 3105, 3344, 5372.

367. Often, ALJs and inspectors general are mandated by statute, but not always. In any event the details of their existence inevitably is established by rules issued by the agency head within which they function. For example, the Federal Aviation Administrator established administrative law judges and review mechanisms with power to review decisions of subordinate officials. See 49 U.S.C. § 106(f)(3)(A) (2000) (granting rulemaking authority to Administrator of the FAA); *id.* § 46102(a) (authorizing FAA Administrator to conduct investigation and enforcement proceedings "in a way conducive to justice and the proper dispatch of business"); 14 C.F.R. § 13.16(h) (2004) (providing for appeal of ALJ decision on civil penalty to Administrator of FAA).

368. See 5 U.S.C. § 557(b) (allowing for initial or recommended decision by ALJ, subject to discretionary review by the "agency").

VIII. CONCLUSION

Legitimacy of political trusteeships can be enhanced by providing for judicial review of decisions by administrative agencies established as part of the political trusteeship civil administration. Moreover, establishing judicial review mechanisms can reduce the likelihood of litigation over political trustee decisions in national courts. Models for military occupation are inadequate. Designers of future international interventions should adapt from models provided by judicial review of administrative agency decisions in the European Union, France, Germany, Britain, and the United States to establish mechanisms for "administrative law review," providing exemptions for major political decisions purely military decisions and for emergency action. Other types of decisions should be subject to review for compliance with higher-level authority, for rationality and for procedural regularity. The review can be accomplished in judicial bodies established by the U.N. Security Council or by the political trustee itself. Review also may be available through non-judicial bodies such as ombudsmen and inspection panels.