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CONSTITUTIONAL LAW—EXECUTIVE AGREEMENTS—INTERNATIONAL LAW—Executive Authority Concerning the Future Political Status of the Trust Territory of the Pacific Islands

The Trust Territory of the Pacific Islands (TTPI) is a United Nations (UN) trusteeship which has been administered by the United States since 1947.[1] The trusteeship agreement under which

59. *See* note 1 *supra*.

60. FTC v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962); Falsone v. United States, 205 F.2d 734, 739 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953). *See also* Katsoris, *supra* note 24, at 61-64; Comment, *Accountants, Privileged Communications, and Section 7602 of the Internal Revenue Code*, 10 ST. LOUIS U.L.J. 252 (1965).

61. Colton v. United States, 306 F.2d 633 (2d Cir.), *cert. denied*, 371 U.S. 951 (1963).

62. Falsone v. United States, 205 F.2d 739, 741-42 (1953).

63. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

1. The Trust Territory of the Pacific Islands (TTPI), which is located in the southwestern Pacific, encompasses over 3,000,000 square miles of ocean and some 2,000 islands. The TTPI is part of Micronesia ("the sea of small islands"), which is geographical nomenclature for an area in the southwestern Pacific encompassing many island groups. It has a population of approximately 100,000 natives of Micronesian stock. For a broader view of the TTPI than can be presented in this brief discussion, *see* W. PRICE, AMERICA'S PARADISE LOST (1966); R. TRUMBULL, PARADISE IN TRUST (1959); Kahn, Micronesia (pts. 1-3), THE NEW YORKER, June 11, 1966, at 42, June 18 at 42,

the TTPI is governed provides that the inhabitants of the islands must be allowed to choose their future form of government.[2] Thus the question arises whether the President may formulate a program to determine the future political status of the TTPI without obtaining prior congressional authorization.[3] This issue was brought into

June 25 at 56; *see also* L. THOMPSON, GUAM AND ITS PEOPLE (1947); T. YANAIHARA, PACIFIC ISLANDS UNDER JAPANESE MANDATE (1940); D. RICHARD, I & II UNITED STATES NAVAL ADMINISTRATION OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS (1957); P. CROWL, THE UNITED STATES ARMY IN WORLD WAR II: THE WAR IN THE PACIFIC: CAMPAIGN IN THE MARIANAS 53-55 (1960); Chovanes, *Patents, Trademarks and Copyright in the Trust Territory of the Pacific Islands*, 42 J. PAT. OFF. SOC'Y 254 (1960); Codding, *The United States Trusteeship in the Pacific*, 29 CURRENT HIST. 358 (1955); Jacobson, *Our "Colonial" Problem*, 39 FOREIGN AFFAIRS 56 (1960); Kahn, *The Small Islands*, SAT. REV., Sept. 8, 1966, at 45; Skinner, *Self-Government in the South Pacific*, 42 FOREIGN AFFAIRS 137 (1963).

The following primary sources are recommended for more extensive readings: TTPI HIGH COMMISSIONER, ANNUAL REPORT TO THE SECRETARY OF THE INTERIOR; UNITED NATIONS VISITING MISSION TO THE TTPI, REPORT TO THE TRUSTEESHIP COUNCIL (triennial; the latest visit was in 1967); UNITED STATES ANNUAL REPORT TO THE TRUSTEESHIP COUNCIL OF THE UNITED NATIONS; annual debate in the Trusteeship Council upon submission of this report; ANNUAL REPORT OF THE TRUSTEESHIP COUNCIL TO THE SECURITY COUNCIL; annual debate in the security council following submission of this report. The *Visiting Mission Report* is the most concise and informative of the primary sources. *See also* DEP'T STATE BULL. (Material on the TTPI is found in various issues)

2. Trusteeship Agreement for the Former Japanese Mandated Islands [hereinafter Trusteeship Agreement], art. 6, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. Presidential approval was authorized by joint congressional resolution on July 18, 1947, 61 Stat. 397. *See generally* S. REP. No. 471, 80th Cong., 1st Sess. (1947); H.R. REP. No. 889, 80th Cong., 1st Sess. (1947); H.R. DOC. No. 378, 80th Cong., 1st Sess. (1947). The Trusteeship Agreement is only one of a series of international agreements affecting the TTPI. The first was the Treaty of Spain with Germany, June 30, 1899, 92 STATE PAPERS 113, 32 MARTENS N.R.G. (2d series) 66, whereby the islands were ceded by Spain to Germany. On Dec. 17, 1920, Japan was given a "C" mandate over the islands by the League [*see* UNITED STATES DEPARTMENT OF STATE, TREATY OF VERSAILLES AND AFTER: ANNOTATIONS OF THE TEXT OF THE TREATY 101 (1947)] which was recognized by the United States in the Treaty with Japan, Feb. 11, 1922, 42 Stat. 2149, T.S. No. 664. Japan renounced all claims over the TTPI in 1951, Treaty with Japan, Sept. 8, 1951, [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45. Also worthy of note is the Treaty of Paris, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343, whereby Spain ceded Guam to the United States. Although Guam is geographically part of the TTPI (it is the largest island in the Marianas), it is not legally part of the TTPI. Under the Treaty of Paris, Guam became an unorganized American possession over which the United States holds sovereignty.

3. Thus far, resolution of the TTPI problem has been left in the lap of Congress. *E.g.*, N.Y. Times, Oct. 30, 1967, at 1, col. 4; *id.* at 38, col. 108; *id.* Nov. 5, 1967, p. 11, col. 1. No harm will be done if Congress takes prompt action, assuming *arguendo* that Congress is constitutionally empowered to do so. *But see* notes 6 & 54 *infra*. However, the Executive Branch would do well to assert its power if it has the constitutional authority to do so. First, Congress has done little in the past to carry out the Trusteeship Agreement's obligations. Second, congressional action will be slower than executive action. (Most Congressmen probably have not heard of the TTPI.) Third, International political implications demand quick action as the following discussion illustrates.

The TTPI may become the last trusteeship in the near future. Of the eleven original trusteeships, only three remain, the TTPI, Nauru, and New Guinea. Eight others have become independent within the past ten years. U.N. REV., March 1964, at 40. These excerpts from recent United Nations press releases are fair appraisals of the

sharp focus when, on August 3, 1966, the Congress of Micronesia[4]—the native legislature of the TTPI—adopted a joint resolution which states:

> The Congress of Micronesia believes that this generation of Micronesians should have an early opportunity to determine the ultimate constitutional and political status of Micronesia; and . . .
>
> BE IT RESOLVED by . . . the Congress of Micronesia . . . that the High Commissioner, and through him the Secretary of the Department of the Interior, be and are hereby enjoined to use their good offices to petition the President of the United States *to establish a commission to ascertain their wishes and views, and to study and critically assess the political alternatives open to Micronesia;* and . . . report its findings to the President . . . no later than December 31, 1968.[5]

Whether the President has the power to appoint such a commission depends upon his authority under the Constitution independently

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attitude various nations take toward the TTPI's continuance:

> In a report issued on 1 June, the [1967] Visiting Mission . . . has stated that the main obstacles to freedom and self-determination are [excessive economic dependence upon the United States] . . . and the lack of public understanding of the possible alternatives.
>
> The Mission was confident . . . that the time was not too far distant when its people would feel ready to assume responsibility for deciding their own future. . . . [T]he Visiting Mission recommended . . . [association of] . . . the Congress of Micronesia, with all preliminary steps. It added that the role of the United Nations in these matters also should not be forgotten.

U.N. Press Release WS/296, June 2, 1967, at 12-13. The following is a capsule of the ensuing debate upon the Visiting Mission's Report:

> The Chairman of the Mission said . . . [the TTPI] was not far removed from self-determination. . . .
>
> The representative of the United States said . . . their Government recognized that the time was approaching for the Territory to determine the form of government and life it wanted. . . .
>
> The representative of China said the Territory had "come of age," and hoped that the Territory would soon exercise its right of self-determination. . . .
>
> The representative of the Soviet Union said that, after 20 years of United States administration, there had been no political, economic, social or educational progress and that the [United States] had deliberately tried to absorb the Territory for its own military and economic advantages.
>
> The representative of Liberia said the [United States] must make sure that the Micronesia people are continually aware of their right and goal of self-determination. . . .

U.N. Press Release WS/298, June 16, 1967, at 10-11. Is independence the only answer? See N.Y. TIMES, March 7, 1967, at 5, col. 3. The article notes the apparent outrage felt by some of the newly formed nations because Britain granted only free association to certain West Indies islands.

4. The Congress of Micronesia was established by order of the Secretary of the Interior, Sec. Int. Order No. 2882, Sept. 28, 1964.

5. Congress of Micronesia, H.J. Res. No. 47, 1st Cong., 2d Sess. (1966). Subsequent to this resolution, the President wrote Congress asking for a joint resolution to establish a commission. 57 DEPT. STATE BULL. 363 (1967). The Senate has passed such a resolution [S. Res. 106, 90th Cong., 2d Sess.; *see* CONG. REC. 6656 (daily ed. May 29, 1968)] but as of the time of this writing the House had not acted.

to formulate and implement a plan to achieve self-determination in the TTPI.[6]

I. The Source of Executive Authority

Executive authority to achieve a resolution of the future political status of the TTPI cannot be based directly on any specific legisla-

6. Any restrictions on the President's power are imposed by the Constitution's enumeration of exclusive congressional powers. Fortunately, because most enumerated congressional powers are aimed only at matters of domestic concern within the United States, there is little possibility of a constitutional conflict between the enumerated powers of Congress and the Executive authority in question, which necessarily will be directed almost exclusively toward the conduct of foreign affairs. Of the constitutional restrictions, two readily come to mind. First, any funds earmarked for the Trust Territory, including appropriations for any program to resolve its future political status, must be appropriated by Congress. Congress is not expressly granted the Appropriation Power by the Constitution. However, the principle that the legislature must control the "purse strings" is so basic to our concept of government that the power was early implied and assumed to rest exclusively in Congress. *E.g.*, 1 W. Willoughby, The Constitutional Law of the United States § 62 (2d ed. 1929). Second, the Constitution would require congressional authorization of any portion of the Executive's program which would impinge upon Congress' enumerated powers. For example, in the absence of either express or implicit congressional authorization, an Executive order purporting to revise duties on TTPI imports to the United States would impinge upon the enumerated power of Congress "to regulate Commerce with foreign Nations," and would undoubtedly be unconstitutional. *See* U.S. Const. art. I, § 8; United States v. Guy W. Capps, Inc., 204 F.2d 655, 658-60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Some TTPI imports have in the past been given preferential treatment. Int. Rev. Code of 1954, § 4513(b)(1), *repealed*, 76 Stat. 77 (1962). But, in most part, the TTPI is treated exactly like a foreign country for customs purposes, 1 M. Whiteman, Digest of International Law 814-15 (1963). Article 9 of the Trusteeship Agreement permits the United States to bring the TTPI into a bilateral customs union pursuant to appropriate legislation. *See* M. Whiteman, *supra*, at 812-13.

The President's powers in the domestic arena are limited by those of Congress:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring). The exception to this principle is quite limited:

> Although the foreign and domestic powers of Congress are extremely broad, there may exist certain areas in which the President's constitutional power to conclude international agreements may be exercised to produce domestic consequences beyond the pale of congressional regulation. In these areas, the President could enter into such international agreements, as he might desire, unrestricted by any power in Congress either to limit him in advance or to overrule subsequently the domestic consequences of his action. Similarly, the President and two-thirds of the Senate could conclude treaties in this residual area. and Congress would be powerless to override their domestic effects.
>
> This reasoning leads to the conclusion that the "domestic effects" doctrine must be qualified: it is not categorically true, as has been so often argued, that Congress can abrogate the domestic effect of any international agreement; rather, Congress can overrule an agreement only when it concerns a subject with respect to which Congress could have legislated domestically. In the vast majority of cases this limitation on the power of Congress will not be pertinent; the constitutional powers of Congress have been recognized to be increasingly broad in recent years.

Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 Yale L.J. 345, 380 (1955). The President's broad, perhaps plenary, powers

tive mandate. Most congressional enactments, such as appropriation bills, relating to the TTPI do not purport to authorize such execu-

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in the conduct of international affairs are limited when their consequences fall upon areas in which Congress is given paramount authority. But the TTPI is "foreign territory" because the United States does not possess sovereignty thereover, Neely v. Henkel, 180 U.S. 109 (1900); *see* note 20 *infra*. Consider Congress' authority in light of the following language:

> Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings, and compacts, and the principles of international law. . . .

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). *But see* Vermilya-Brown v. Connel, 335 U.S. 377 (1948); Green, *Applicability of American Laws in Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781 (1955). Assuming *Vermilya-Brown* to be correctly decided [*but see* Note, *Application of Federal Statutes to Non-Continental Areas*, 44 ILL. L. REV. 247 (1949)], Congress has authority to extend our laws to leased bases on foreign soil by virtue of the Territory and Property clause. Congress' authority thereover would seem to be paramount by virtue of its origin in the Territory and Property clause. *See* 1 W. WILLOUGHBY, *supra*, §§ 243-49, 252-60.

The *Vermilya-Brown* "sole control" test has not been extended beyond the context of leased bases (which are best considered "possessions" only in the sense of "property" under governmental proprietory ownership and qualitatively analogous to art. I, § 8, military establishments within the United States). Such an extension to all territorial entities over which the United States holds "sole control," but not sovereignty, would seem improper. For example, it has been the practice under the Constitution for the President, not Congress, to have paramount and almost exclusive authority (save for appropriations) over territory occupied under the international law of belligerent occupation. *See* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES (1921); WHITE, EXECUTIVE INFLUENCE IN DETERMINING MILITARY POLICY IN THE UNITED STATES (1925); 1 W. WILLOUGHBY, *supra*, §§ 252-55, 1038-40; Gabriel, *American Experience With Military Government*, 37 AM. POL. SCI. REV. 417 (1943); O'Rourke, *War Powers*, 8 GEO. WASH. L. REV. 157 (1939); Tansil, *War Powers of the President of the United States with Special Reference to the Beginning of Hostilities*, 45 POL. SCI. Q. 1 (1930). But, extension of the "sole control" test to this case would mean congressional paramountcy.

The President was certainly paramount in the Trust Territory, before it became so, when the TTPI was first ruled by a military government from 1944 to 1947. Because of the Trusteeship Agreement's limitations on our government, the amount of "sole control" has actually diminished from that possessed by the military government. Why would Congress suddenly gain authority under the Territory and Property Clause to legislate for the Trust Territory (the Territory not having been brought into any closer association with the United States by virtue of the Trusteeship Agreement than by virtue of the laws of belligerent occupation), when Congress did not have such authority before the agreement was made?

The authority to pass legislation affecting the TTPI is undoubtedly based upon the Necessary and Proper clause. In a situation which was very nearly on point with that of the Trust Territory (that of Cuba, 1899-1902), the Supreme Court in Neely v. Henkel, 180 U.S. 109, 121 (1901), held that the congressional power to legislate for Cuba was a valid exercise of the "necessary and proper" clause in aid of treaty obligations. The Trust Territory case is complicated by the fact that our obligations therein arise as a consequence of an executive agreement. However, that distinction should not be talismanic on the issue of whether the "necessary and proper" clause serves as a *source* of authority to legislate—the clause is a valid source of authority where there are *no* international agreements in the picture, as in the case of some belligerent occupations.

The ultimate question which the trusteeship presents is the permissible *extent* of congressional legislation under the "necessary and proper" clause. Its answer is beyond the scope of the present discussion.

tive action.[7] The two statutes relating to presidential authority with regard to the TTPI have only tangential bearing on this specific issue. The first of these—the Joint Resolution of July 18, 1947—provides: "the President is hereby authorized to approve, on behalf of the United States, the trusteeship agreement between the United States of America and the Security Council of the United Nations . . . which was approved by the Security Council . . . on April 2, 1947."[8] This resolution ostensibly granted the President only the power to approve the trusteeship agreement, and this is borne out by the legislative history, which demonstrates that both the President and Congress assumed that subsequent legislation would be necessary to implement the trusteeship agreement.[9]

A subsequent statute, Public Law 451, gives the President broad discretionary power over the internal affairs of the TTPI:

> [U]ntil Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority *necessary for the civil administration* of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize.[10]

Until Congress decides otherwise, this enactment gives the President a free hand to conduct the islands' civil administration. For example, Public Law 451 can fairly be construed to give the President discretion to create all-native executive, legislative, and judicial departments. Regardless of how important formation of an all-native government would be to the ultimate goal of self-determination, it would represent only a change in the *domestic* framework of the TTPI government. However, Public Law 451 does not authorize the President to change the *international* political status of the TTPI by bringing about self-determination by its inhabitants.

It may be argued, however, that the Constitution not only

7. Thus far, most congressional enactments affecting the TTPI have been those concerned with appropriations and auditing procedures therefor. 48 U.S.C. §§ 1681-87 (1964). The only executive agreements authorized by the United Nations Participation Act, 22 U.S.C. §§ 287(d) (1964), are those to effectuate art. 43 of the Charter.

8. 61 Stat. 397 (1947).

9. *See* H.R. REP. No. 889, 80th Cong., 1st Sess. (1947).

Although the President continued to administer the Trust Territory for the next seven years, no one questioned the constitutionality of his conduct in so doing. During this period, the President ordered decisive changes in the structure of the TTPI administration. In 1951, the Department of the Interior was placed in charge of most of the islands in the Trust Territory, Exec. Order No. 10,265, 16 Fed. Reg. 6419 (1951), leaving the Navy in control of the Northern Marianas, Exec. Order No. 10,470, 18 Fed. Reg. 4231 (1953). The entire TTPI was brought under the Department of the Interior's control in 1962, Exec. Order No. 11,021, 27 Fed. Reg. 4409 (1962).

American military government in the TTPI began in 1944. Thackrey, *Military Government in the Pacific: Initial Phase*, 60 POL. SCI. Q. 90 (1945). There is no question of the Executive's power to conduct a belligerent occupation without Congress' authorization. In so doing, the Executive power is broad and almost exclusive. C. ROSSITER, THE SUPREME COURT AND THE COMMANDER-IN-CHIEF 120-25 (1951).

10. Act of June 30, 1954, 68 Stat. 330, 48 U.S.C. § 1681 (1964).

authorizes but requires the President to achieve a resolution of the international political status of the TTPI. The President has a duty under the faithful execution clause to "take care that the Laws be faithfully executed."[11] Thus, it is arguable that an international executive agreement is the "law of the land" which the President is obliged to execute. There is authority for this theory,[12] even though such agreements, unlike treaties, do not require legislative approval. In any event, although the TTPI trusteeship agreement was an executive agreement, it was approved pursuant to a joint congressional resolution, and it therefore seems appropriate to look upon it as a "law of the land."[13]

The theory that the President may derive powers, and indeed duties, directly from international agreements, be they executive agreements or treaties, appears to be in accord with practice. The American administration of the Ryukyu islands is a case in point. A belligerent occupation preceded the treaty which authorized American administration of the Ryukyus.[14] That treaty grants the United States no sovereignty over the islands, and it provides that the administration is to be temporary.[15] Congress has not authorized the Executive either to administer the islands or chart their political future.[16] The President's authority to administer the Ryukyus arises from his duty faithfully to execute the obligations which the United States assumed under the Japanese Peace Treaty,[17] and he has not purported to rely upon any other source of authority.[18] It is true that the President has concerned himself only with the domestic administration of the islands and has not attempted to use the faithful execution clause of the Constitution to carry out the American obligation to return the islands to Japan. However, in regard to the power granted to the President by virtue of the obligations in an international agreement, any attempt to distinguish between obliga-

11. U.S. CONST., art. II, § 3.

12. *See* Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 367 (1955); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 248 (1945).

13. *But see* Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 644 (1945). The *Restatement of Foreign Relations* takes the position that Congressional-Executive agreements, such as the Trusteeship Agreement, are to be treated exactly like treaties, except that they do not provide an independent constitutional basis for an act of Congress. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 146 (1962) [hereinafter RESTATEMENT]. Under § 120, a Congressional-Executive agreement is constitutional, in the absence of an independent Executive power, only if Congress, in enacting the statute authorizing Executive approval of the agreement, acts pursuant to an enumerated power.

14. Treaty with Japan, *supra* note 2.

15. *See* George, *The United States in the Ryukyus: The Insular Cases Revived*, 34 N.Y.U.L. REV. 785 (1964).

16. *See id.*

17. *See id.* at 787 n.11, 799 n.90.

18. Exec. Order No. 10,713, 22 Fed. Reg. 4007 (1951).

tions such as internal administration of a territory and formulation of a political program for the same territory—both of which were assumed under the same international agreement—seems untenable.

Another example is the interim executive administration of the Canal Zone. Intitally, Congress expressly authorized the Executive to administer the Canal Zone. Subsequently, Congress failed to renew this grant, but the President continued to govern the Canal Zone. Congress reinstated his authority some eight years later.[19] The authority for the President's interim administration appears to have come from his duty to fulfill obligations imposed by the Treaty with Panama.[20] The only alternative source of authority would be the President's independent powers in the field of foreign affairs. But, if these powers were utilized in the Canal Zone, they seem equally applicable in the TTPI situation. The practical result of applying either of these theories would be the same: in either case the limits on the President's authority would be set by the terms of the treaty or executive agreement.

It is fair to conclude that the President, even in the absence of express congressional authorization, has constitutional authority—indeed, a constitutional duty—to carry out those obligations assumed under the Micronesian trusteeship agreement. Execution of this agreement lies within the scope of the authority given the President by the faithful execution clause and by his independent constitutional powers in the area of foreign policy. Thus, it is next necessary to determine the scope of the president's authority under the trusteeship agreement.

II. The Scope of Executive Authority

The primary obligation imposed upon the United States by both the United Nations Charter and the Micronesian trusteeship agreement is "to promote the political, economic, social, and educational advancement of the inhabitants of the trust [territory], and [its] progressive development towards self-government or independence . . . ."[21] If the commission requested by the Congress of Micronesia acts in conformity with the purposes expressed in the islands'

19. Panama Canal Act of Aug. 24, 1912, 37 Stat. 560. *See* C. Berdahl, War Powers of the Executive in the United States 253 (1921); W. Taft, Our Chief Magistrate and His Powers 98-103 (1938).

20. Treaty with Panama, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431 (1905).

21. U.N. Charter, art. 76. The language of Trusteeship Agreement, art. 6, is substantially the same. The United Nations Charter could be viewed as imposing the same "faithful execution" clause duties on the President as does the Trusteeship Agreement, since the Charter is itself a treaty. 59 Stat. 1031; T.S. No. 993 (1945). Hence, the President could be regarded as being doubly obligated and empowered to see that the Trust Territory advances "towards self-government or independence." For purposes of this Note, the existence of obligations under the Trusteeship Agreement is sufficient to justify the result reached herein, without need of considering the possible effects of the Charter upon the problem.

legislative resolution and examines the political alternatives available in the future, the United States will certainly be advancing self-determination, as it is obligated to do under the trusteeship agreement. As a first step, therefore, the President should establish the commission and delegate appropriate authority to it. No congressional action would appear to be required other than granting the necessary appropriations.[22] Appointment of such a commission is probably the easiest case in which to justify executive authority under the faithful execution clause. Once this initial step has been taken, however, application of the faithful execution clause and other sources of authority for independent executive action to meet other potential problems concerning the TTPI becomes more difficult.

To illustrate some of the more complex issues which may confront the President, assume that, after complete study, the commission reports to the President and makes the following suggestions. First, three political alternatives seem to be feasible: independence, free association with the United States,[23] or annexation to the United States. Second, the choice between these alternatives would best be made through a plebiscite administered or supervised by the United Nations.[24] These hypothetical recommendations present at least three questions: Does the President have authority to enter into supplementary international agreements to arrange the plebiscite? Does the President have authority to declare that the trusteeship agreement is terminated upon the exercise of self-determination by the TTPI's inhibitants? Does the President have authority to relinquish American interests in the TTPI if independence is

22. Congress seems to have granted routinely the appropriations required for administration of the TTPI. *See* note 7 *supra*. The commission's members would seem to fall within the "special Presidential envoy" exception and would not need Senate confirmation. *See* McDougal & Lans, *supra* note 12, 206-07, and sources cited therein.

23. Free association would undoubtedly give rise to international obligations which would *require* utilization of Congress' enumerated powers to be accomplished. It would not seem feasible to discuss the constitutional problems raised by free association until the nature of that association is developed more fully. However, insofar as free association would affect regulation of trade between the TTPI and the United States, congressional authorization of that phase of the program would certainly be required. In short, the free association alternative does raise more constitutional problems than either outright independence or annexation. If annexation seems unfeasible, it would appear that independence might be the best solution, followed by free association at a later date. The obvious advantage gained is that negotiations toward free association could be pursued by the governments of the United States and the then independent TTPI. At present, the negotiations toward any alternative must be three-sided, with many different viewpoints being shown within the third party, the United Nations.

24. Self-determination has been expressed in two ways by trusteeships: plebiscite and declaration by the territory's government. *See* 1 M. WHITEMAN, *supra* note 6, 897-911. Plebiscite obviates the defense which might have to be made if certain countries contended that the choice was made by a "puppet government," especially if the TTPI chooses annexation to the United States. United Nations supervision would prevent credible accusations that the plebiscite was "rigged."

chosen, or, in the alternative, to bring the TTPI into closer political association with the United States if either of the latter two alternatives is chosen? The following analysis is only intended to provide a framework which might serve as a guide to resolution of these and other specific questions as they arise. Thus, no attempt has been made to imagine all the possible supplementary executive agreements or actions which may be necessary to achieve execution of the primary obligation set forth in the trusteeship agreement.

A. *Supplementary International Agreements*

Exclusive authority in the Executive to negotiate and formally approve international agreements insures that the purely procedural steps in the agreement-making process will not raise legal barriers to the executive action in question.[25] Furthermore, the faithful execution clause authorizes the President to enter into supplementary international agreements[26] without seeking congressional authorization: "Incident to the power to see that the laws are faithfully exe-

25. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). The international agreement-making process involves at least four steps: (1) policy formulation; (2) conduct of negotiations; (3) validation or authorization pursuant to a constitutional source of authority; and (4) formal approval. *See* McDougal & Lans, *supra* note 12, at 202.

26. For those who are not familiar with classification of international agreements, the following serves as a simple guide to the nomenclature used to identify the various international agreements to be encountered in the following discussion.

A. *Treaties.* Procedurally, a treaty is an international agreement authorized by a 2/3 majority of the Senate and executed by the President. Substantively, a treaty may encompass any subject-matter which lies within the constitutional treaty power. As a practical matter, this subject matter is virtually unlimited, save as it might conflict with express constitutional prohibitions, such as the Bill of Rights, with rights given exclusively to the states, or with powers of the federal government lying outside the ambit of the Senate or the President, such as the appropriation or judicial powers.

B. *Executive Agreements.* Executive agreements fall into four catagories which differ in both their procedural and substantive aspects:

(1) *Agreements Based on Congressional Powers.* Procedurally, these agreements are executed by the President pursuant to authorization by a majority of both Houses of Congress. Substantively, their subject matter is limited to the constitutional powers of Congress, an obviously broad substantive expanse.

(2) *Agreements Based on Presidential Powers.* Procedurally, these agreements are executed by the President without authorization by either the Senate, Congress, or an underlying authorizing treaty or another executive agreement. Substantively, they are limited to the constitutional powers of the President, again a broad substantive expanse.

(3) *Agreements Supplementary to Treaties.* Procedurally, these agreements are executed by the President pursuant to an express or implied authorization to do so, contained in a prior treaty. An example would be a migratory bird treaty authorizing the President to set up a binational commission to determine the locations of bird sanctuaries. Substantively, their subject matter cannot exceed the scope of the treaty's authorization. Obviously, the maximum scope of this authorization cannot go beyond the substance of the treaty in which it is contained.

(4) *Agreements Supplementary to Executive Agreements.* Procedurally and substantively, these agreements follow the analysis of agreements supplementary to treaties, except that an executive agreement, which may be of any of the four categories here set forth, provides the underlying authorization instead of a treaty. Obviously, there might well be considerable overlap between the permissible subject

cuted [the President] has power to enter into agreements with foreign countries necessary to their enforcement."[27]

Executive agreements supplementing existing executive agreements should be and apparently are awarded the same weight as those supplementing treaties,[28] although the former are certainly less common. Still, most of these agreements supplementing executive agreements could be explained as being based upon an independent source of executive power; thus, their force as precedent is somewhat limited. One example is the Boxer Protocol of 1901.[29] In 1900, the United States entered into an executive agreement with six other powers to maintain conditions of commercial equality in all areas of China in which the signatories had spheres of influence.[30] In 1901, to effectuate the goals of the agreement of 1900, the same powers made a second executive agreement to occupy temporarily certain Chinese ports, to modify various other treaties, and to exact a large indemnity from China.[31] Congress did not authorize American participation in either agreement. The agreements in aid of the Samoan condominium arrangements of 1879 and 1889 provide another set of examples.[32] Finally, executive agreements which supplement armistice agreements with former belligerents or with allies

matter in any of these categories with that permissible under another. For example, if the subject matter of a proposed agreement falls within both the President's and Congress' constitutional powers, either a "Congressional" executive agreement or a "Presidential" executive agreement would be appropriate and constitutional.

A problem arises when the wrong procedure is used to form an executive agreement whose substance is clearly justified under the Constitution. For example, an executive agreement whose subject matter falls within an exclusive congressional power, no such power being given the President, but which is executed without congressional authorization, would certainly seem to be unconstitutional. However, an incorrect procedure would not seem to inevitably lead to an agreement's unconstitutionality. For example, an executive agreement whose subject matter falls within an exclusive Presidential power, no such power being given to Congress, but which is executed by the President pursuant to congressional "authorization," would appear to be constitutional since the President would have been empowered to conclude the agreement without congressional approval. In the latter case, Congress has merely accomplished an unnecessary and possibly misleading act, though looking to the agreement's procedural aspect might well lead one to believe that the agreement stands as a precedent for congressional power over the subject matter of that agreement. The present Trusteeship Agreement would appear to fall within the latter category.

27. *Hearings on S.J. Res. 1 & S.J. Res. 43 Before a Subcomm. of the Comm. on the Judiciary*, 83d Cong., 1st Sess. 711-12 (1953) (statement of Judge Parker). *See also* Wilson v. Girard, 354 U.S. 524 (1957); S. CRANDALL, TREATIES 117-19 (2d ed. 1916); RESTATEMENT § 122.

28. *See* Mathews, *supra* note 33, at 366; McDougal & Lans, *supra* note 33, at 248. Not only may executive agreements become the "law of the land" in much the same manner as treaties (RESTATEMENT §§ 146-47), but they also give rise to exactly the same kind of international obligations as do treaties. *See* McDougal & Lans, *supra* note 33, at 195-210.

29. 2 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1776-1909, at 2006 (1910).

30. 1 W. MALLOY, *supra* note 29, at 244.

31. This second agreement is the Boxer Protocol.

32. *See* McDougal & Lans, *supra* note 12, at 265.

are also common. These agreements have generally been entered into to implement the conduct of belligerent occupations following an armistice. The uniform practice has been for the President to enter into both the armistice, which is a form of executive agreement, and the subsequent supplementary agreements without congressional authorization.[33]

Closely akin to these examples, where the sequence was simply executive agreement followed by supplementary executive agreement, is the Security Treaty of 1951 with Japan.[34] This treaty *expressly* authorized an administrative agreement, which in turn was considered to be the basis for the protocol agreement with Japan whereby Japan consented to American military jurisdiction in certain cases.[35] The protocol agreement was executed by the President without congressional approval. This example is very similar to the TTPI situation if the UN Charter, which is a treaty,[36] is considered to have authorized, albeit implicitly, the Micronesian trusteeship agreement.[37]

It is also important to note that the Executive has exclusive power to determine whether an agreement is supplementary, that is, whether it is in aid of obligations imposed by an underlying international agreement. Only the President, because of his exclusive power to conduct foreign relations, may determine the extent and character of the obligations assumed by the United States under an international agreement.[38] Of course, the Supreme Court retains exclusive authority to interpret such agreements when they are applied as domestic law and presented in the context of litigation.[39] However, this does not circumscribe the executive's interpretive power: if the President interprets the TTPI trusteeship agreement as imposing certain obligations upon the United States—obligations which may be executed by means of a supplementary executive agreement—who is to say that such an interpretation is erroneous?[40]

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33. *See* Mathews, *supra* note 12, at 354-55; Gabriel, *American Experience With Military Government*, 37 AM. POL. SCI. REV. 417, 419-30 (1943).

34. Security Treaty with Japan, Sept. 8, 1951, [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491.

35. *See* McLaughlin, *The Scope of the Treaty Power*, 42 MINN. L. REV. 709, 760 (1958).

36. *See* note 21 *supra*.

37. While the Charter does not expressly authorize the TTPI Trusteeship agreement, it does specify that trusteeships may be granted *only* by virtue of agreements. Because the inclusion of the "strategic" trusteeship provision in the Charter (art. 82) was an American innovation which was most likely intended to apply to the TTPI (which is the only "strategic" trusteeship), one may infer that conclusion of the Trusteeship Agreement was within our government's contemplation at the time the Charter was approved. *See* 1 M. WHITEMAN, *supra* note 6, at 733-39.

38. *See* RESTATEMENT § 149.

39. *See* RESTATEMENT § 150. The Court has given great weight and even conclusive effect to Executive interpretation in the context of domestic litigation. *See* RESTATEMENT § 152 and examples therein cited.

40. The President might feel restrained in the exercise of his power if Congress

B. *Termination of the Trusteeship Agreement*

Termination of the trusteeship agreement by the Executive raises no difficult constitutional problems. It is well established that the paramount—although not the exclusive—authority to terminate international agreements resides in the Executive.[41] An international agreement may be terminated by a presidential declaration of termination, a presidential declaration of termination followed by either Senate or congressional approval, or a Senate or congressional request for termination followed by a presidential declaration of termination.[42] On the basis of practice, it is fair to assume that all are constitutionally permissible, depending upon the situation presented. One commentator lists the following situation where the termination of treaties can clearly be accomplished by a presidential declaration alone:

> Many terminations, of course, leave no room for disagreement among the President, Senate, and the Congress. In a case *where:* (1) the treaty expires in accordance with its terms, (2) *the object of the treaty has been accomplished,* or (3) the termination procedure is initiated by the other party to the treaty, *the transaction* [*of termination*] *seemingly falls within the routine diplomatic business of the President and the Department of State.*[43]

The same principles should also apply to the termination of congressionally authorized executive agreements. While the Micronesian trusteeship agreement does not contain a termination provision,[44] it certainly has a primary objective—determination of the islands' future political status by the inhabitants of the TTPI.[45]

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had power to act and utilized it to move in an opposite direction. Such is the role of "constitutional understandings":

> The constitutional understandings are based on the distinction between the possession of a power and discretion in the exercise of that power. The law of the constitution decides what organs of the government possess the power to perform acts of international significance and to make valid international commitments, *but the understandings of the constitution decide how the discretion or judgment implied from the possession of power ought to be exercised in given circumstances.* The power given by law to various organs often overlap. Even more often, two or more organs must exercise their powers in cooperation in order to achieve a desired end. In such circumstances, were it not for understandings, deadlocks would be chronic. The law is the mechanism, the understandings the oil that permit it to run smoothly.

Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 8 (1922) (emphasis added).

41. *See* Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice,* 42 MINN. L. REV. 879 (1958).

42. W. MCCLURE, INTERNATION EXECUTIVE AGREEMENTS, DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES, 16-30 (1941); McDougal & Lans, *supra* note 12, at 888-89.

43. Nelson, *supra* note 41, at 890 (emphasis added); *see also* RESTATEMENT § 163.

44. The only provision in the agreement relating to termination indicates merely that the United States must approve termination. It does not specify which agency in our government has power to do so. Trusteeship Agreement, art. 15: "The terms of the . . . agreement shall not be . . . terminated" without consent of the United States.

45. *Id.* art. 6; U.N. CHARTER art. 76, § b; Sayre, *supra* note 20, at 279-81.

Once the inhabitants choose one of the various political alternatives, the objective of the trusteeship agreement will be completely accomplished. Therefore, once a plebiscite is held, executive action to terminate the trusteeship agreement without congressional authorization should be valid. There is no problem of congressional pre-emption,[46] since the joint resolution authorizing presidential approval of the trusteeship agreement does not contain any provision whereby Congress retained control over the continuance of the agreement. Moreover, since interpretation and definition of the trusteeship agreement's objectives are vested exclusively in the President, he alone determines when those objectives are accomplished.

Because the interest of the United States in the TTPI is dependent upon the existence of the trusteeship agreement which set forth our present rights and obligations, termination of that agreement will also relinquish American interests arising from it. Thus, in the instant case, authority to terminate is also authority to relinquish. It might be argued that the United States also has a surviving interest in the islands arising from its original belligerent occupation. However, this does not hinder presidential termination; it is quite clear that the President may terminate a belligerent occupation without seeking congressional approval of his action.[47] A more complex problem is whether, after relinquishing American interests, the President may annex the territory without prior congressional approval.

C. *Annexation*

There are more examples of annexation by executive action alone than there are of annexation by virtue of the treaty power, which the President shares with the Senate.[48]

In 1850, without congressional authorization, President Fillmore entered into an executive agreement with Great Britain to annex Horseshoe Reef.[49] Similarly, the acquisition of the Eastern Samoan

46. Whether there could be congressional pre-emption is doubtful. See note 6 *supra*. The instances where Congress has retained power over termination have generally been agreements where Congress possessed enumerated power to make the agreement in the first instance. *See* Nelson, *supra* note 61, at 893-95, for examples.

47. *See* Gabriel and others cited, *supra* note 6.

48. There have been only two annexations by virtue of Congressional-Executive agreements, Texas in 1845 and Hawaii in 1898. The congressional enactment authorizing the Texas annexation can be justified constitutionally because by the terms of the agreement, Texas was to be immediately admitted as a state. Only Congress may admit new states. U.S. CONSTITUTION, art. IV, § 5. Though the question of whether Congress had constitutional authority to annex Hawaii was hotly debated at that time, the contemporary arguments in favor of that authority hardly seem compelling. *See* 1 W. WILLOUGHBY, *supra* note 6, § 239. It is not at all obvious by what authority under the Constitution Congress was empowered to authorize American acceptance of a Trusteeship.

49. S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 114 (2d ed. 1916). Consider also the "quano island" authorizations, 11 Stat. 119 (1856); McDougal & Lans, *supra* note 12, at 265. The "quano island" acquisitions were held constitutional in Jones v. United States, 137 U.S. 202 (1890).

Islands may also be regarded as an executive annexation because the actual agreements under which the island chiefs transferred sovereignty to the United States were executed solely by the President without congressional authorization.[50] Another series of acquisitions by means of international executive agreements occurred after the Spanish-American War. American possession of Puerto Rico was initially guaranteed by the Armistice Protocol of 1898, which was negotiated and approved by the President and was never submitted to Congress for approval.[51] In 1899, the Archipelago of Jolo came under American sovereignty by virtue of an executive agreement which was not authorized by Congress.[52] And, in 1915, the Archipelago of Sulu was brought under American sovereignty in the same fashion.[53] Therefore, it seems too late to argue that the President has no authority to annex territory, especially outlying islands such as the TTPI, by virtue of executive agreements not authorized by Congress.[54]

III. Conclusion

Given the trusteeship agreement's requirement that the inhabitants of the TTPI be given a choice of self-government or independence, the Executive is empowered and obliged to formulate a program—with or without congressional authorization—which will give them that choice. The Executive's authority to act alone is a consequence of his duty faithfully to execute our obligations under the trusteeship agreement and the UN Charter.

In order to perform his duty under the faithful execution clause, the President should first appoint the survey commission requested by the Congress of Micronesia. As further stages in the "progressive development" of the TTPI "toward self-government or indepen-

50. 1 W. Willoughby, *supra* note 6, § 240a; McDougal & Lans, *supra* note 12, at 265:

> . . . In 1879, the United States, Great Britain and Germany negotiated an agreement with several native chiefs providing for joint administration of the island of Apia. This condominium, which lasted until 1887, was never approved as a treaty or ratified by Congressional action. In 1889, another agreement was entered into between the three powers and various native chiefs providing for extension of the condominium; this time the agreement was referred to and ratified by the Senate as a treaty. In 1899, a compact was entered into between the United States, Germany and Great Britain providing for allocation of spheres of influence over the Samoas between the three powers; the tripartite agreement was submitted to the Senate and ratified as a treaty. *However, the actual agreements by which . . . a division of governmental responsibilities, unique in our national history, was established, were not submitted to Congress for ratification by joint resolution until a quarter of a century after their negotiation.* [Footnotes omitted and emphasis added.]

51. *Id.* at 267.

52. *Id.*

53. *Id.*

54. Of course, in what appears to be the better view, Congress could immediately alienate the territory by legislative act. *See* 1 W. Willoughby, *supra* note 6, § 237 for pros and cons of this congressional power. One could visualize a wonderful game of constitutional ping-pong if the President then decided to re-annex the territory. Fortunately, such "ultimate" constitutional questions lie outside the range of probability.

dence" are reached, the President apparently possesses authority to enter into supplementary executive agreements designed to achieve this primary objective of both the trusteeship agreement and the UN Charter. Moreover, when the inhabitants of the TTPI finally exercise their right to self-determination, the Executive has authority to terminate the trusteeship agreement. Finally, the Executive also appears to have authority to enter into an agreement to annex the TTPI to the United States.

The Executive's authority is not unlimited. Obviously, only Congress can appropriate funds to bring about self-determination in the TTPI. Moreover, the Executive may not take action in any area which has been pre-empted by Congress by virtue of its constitutionally enumerated powers. However, given Congress' apparent disinterest,[56] the future international political status of the TTPI lies almost exclusively in the hands of the Executive. The President should take prompt action to implement a feasible program to give the inhabitants of the TTPI an opportunity to choose one of the available political alternatives.

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55. *See* note 3 *supra*.