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SOME ASPECTS OF THE IMPACT OF A STATUS OF FORCES AGREEMENT UPON THE ADMINISTRATION OF MILITARY JUSTICE

by
Lieutenant Commander Oliver L. Price, USN

Thesis
P935

SOME ASPECTS OF THE IMPACT OF A STATUS OF FORCES AGREEMENT UPON THE ADMINISTRATION OF MILITARY JUSTICE

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

Lieutenant Commander Oliver L. Price, 368397
United States Navy

April 1967

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SCOPE

A study of the effect a Status of Forces Agreement and International Law will have upon the exercise of respective rights in certain areas of military justice, with particular emphasis on the recognition of the problem and specific situations such as negligent homicide cases, search and seizure and other potential problem areas.

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SOME ASPECTS OF THE IMPACT OF A STATUS OF FORCES AGREEMENT UPON THE ADMINISTRATION OF MILITARY JUSTICE

By Lieutenant Commander Oliver L. Price

I. INTRODUCTION

Anyone who has served with our armed forces knows that the disciplinary problems encountered overseas are at least as great as those arising in the United States! The Manual for Courts-Martial and the Uniform Code of Military Justice were written for just this sort of world wide application, a body of law applicable to our military forces around the world.[1]

Today the unparalleled global commitment of the United States armed forces brings to its lawyers many complex and unique problems which turn upon the interpretations of International law. These problems arise as a result of large numbers of service personnel, their families and civilian technicians being assigned to duty in foreign states. As it has always been the responsibility of the military commander is three fold. First, he is responsible for the

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1. "This code shall be applicable in all places." Uniform Code of Military Justice art. 5 (hereafter cited as UCMJ art.

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well-being of these American communities composed of civilians as well as the military establishment. Secondly, he is responsible to the chain of command for the discharge of the mission under law, and lastly though by no means of least importance, the commander is responsible to local authorities for faithful observance of treaty obligations, adherence to host nation laws where applicable and the good relations and cooperation with host nation citizens. The magnitude of this responsibility needs no explanation.

The extent to which foreign law may be applicable to visiting forces is dependent upon the legal status of the force in the host country as established by the terms of entry. These terms of entry are usually contained in international agreements which provide the authority for the presence of our servicemen.

Every day we read in our newspapers and see on television accounts of various crimes being committed, trials and hearings involving known and unknown personalities. Many of these situations involve unique legal problems and the resolution of these problems is what makes the news.

But consider a foreign environment such as Japan, Germany, Italy, or other country and raise these same legal issues, adding an International flavor and it becomes apparent that these problems now involve additional factors

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Now consider a foreign environment such as Japan,
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which make resolution more difficult. It is as if we place the boy on the corner, or the family next door, smack into a Japanese community and tell them to continue to enjoy life as they know it. Problems? They are almost inevitable! What the boy on the corner always considered "joy-riding" or "drag-racing" may evolve into most serious crimes under the laws of the host nation. That is the purpose of this paper - to consider a very few of the problem areas which our service lawyers frequently encounter.

A typical area of potential difficulty is where a serviceman being tried before a court-martial challenges the jurisdictional basis of the trial itself because of a failure to obtain a waiver from local authorities, thereby authorizing trial by United States authorities as provided for by treaty. Does the accused have standing to raise this point? What are his individual rights and obligations under a treaty?

Another problem area which has arisen is the legality of our use of evidence obtained in accordance with local law by foreign nationals but which does not meet the Constitutional requirements of our own system of law. How does the law officer rule as to the admissibility of this evidence which the accused contends was unlawfully seized? This

question may be further complicated by the addition of other factors such as whether the search was conducted "on post" and whether United States military law enforcement personnel accompanied the local police.

Interesting collateral issues may involve the securing of attendance at the trial of foreign nationals who are witnesses. Does the trial counsel's subpoena power run to civilians in a foreign country?

Although these questions may frequently appear and confront the military lawyer overseas, little attention has been paid in legal writing to this area of the law. In fact, only a few controversial judicial decisions have been rendered, although the volume of these problems is certain to increase. Therefore, it will be the purpose of this paper to consider the foregoing questions of jurisdiction, search and seizure, negligent homicide overseas, and witnesses while attempting to ascertain whether logical conclusions can be drawn in regard thereto.

It will not be the purpose of this paper, however, to develop in any detail the history of criminal jurisdiction overseas or the many types of international agreements, including the much discussed North Atlantic Treaty Organization - Status of Forces Agreement, for it is at once

discernible that much has already been written in this area.[2]

To obtain much of the information in this article I contacted several judge advocates with considerable experience in the areas noted. Some of these individuals were contacted by questionnaire, others by interview. Their comments and replies will be used throughout this paper and reference will be made thereto.

As this paper is basically concerned with specific aspects of a NATO-SOFA type agreement and its effects upon the administration of military justice, it may be helpful to an understanding of the problem briefly to consider the jurisdictional aspects of receiving and sending states and the NATO Status of Forces Agreement itself. Once this vantage point has been achieved, the specific questions stated above and other problem areas can be considered.

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2. There are several excellent sources which explain in detail the status of visiting military forces. These include Snee & Pye, Status of Forces Agreement: Criminal Jurisdiction (1957); Re, The NATO Status of Forces Agreement and International Law, 50 Nw. U. L. Rev. 349 (1955); Note, Criminal Jurisdiction Over American Armed Forces Abroad, 70 Harvard L. Rev. 1043, 1046-50 (1957); Baldwin, Foreign Jurisdiction and the American Soldier, 1958 Wis. L. Rev. 52 (1958). See also, Stanger, Criminal Jurisdiction Over Visiting Armed Forces, U. S. Naval War College, 52 International Law Studies, 1957-1958 (1965).

jurisdiction over them has already been exercised by this Army.[7]

To obtain some of the information in this article I contacted several judge advocates with considerable experience in the areas noted. Some of these individuals were consulted by correspondence, others by interview. Their comments and opinions will be used throughout this paper and reference will be made thereto.

As this paper is primarily concerned with specific aspects of a NATO-SOFA type agreement and the effects upon the administration of military justice, it may be helpful to an understanding of the problem briefly to consider the jurisdictional aspects of visiting and sending states and the NATO Status of Forces Agreement (SOFA).[8] Once this has been considered, the specific questions stated above and other problems which may be considered.

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II. CRIMINAL JURISDICTION OVER VISITING FORCES

When the actual fighting of World War II ended it was obvious to most of the countries of the world that some organization of states would be necessary to keep the peace, namely some collective security system which would provide the basis for mutual defense and at the same time provide the states concerned with a guide to the solution of problems inevitably arising from the presence of visiting protective military forces. Although some of the treaties were implemented for different purposes and therefore took different forms, a treaty which precisely defined the status of the visiting forces and specified the respective powers which the receiving and sending states might properly exercise with regard to each other was the obvious answer,[3] although at the time of their implementation considerable hue and cry was raised by Congressmen and others claiming amongst other things that "our servicemen could not receive fair trials in foreign countries" and that "we were negotiating away the serviceman's Constitutional rights."

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3. For an excellent discussion of jurisdiction see these works listed in footnote (2). Also, The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement, Vol. 51, No. 1, The American Journal of International Law (1957).

Quite naturally the question arose as to which sovereign has jurisdiction over such forces for criminal offenses - the sending state or the receiving state in which they would be stationed? Historically some courts have held that under international law a foreign force invited into a State without conditions as an ally or a guest is by implication immune from the jurisdiction of the receiving state.[4] Some writers have suggested that the proposition that a host state is obliged to grant immunity to members of a visiting force is a rule of international law,[5] while others state that any immunity visiting forces may have is determined only by agreement.[6] However, the view which has the support of the bulk of practice is that, in principle, members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise. The Agreement of June 19, 1951

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4. Dictum of Chief Judge Marshall in The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812); Coleman v. Tennessee, 97 U.S. 509 (1878); Dow v. Johnson, 100 U.S. 158 (1879).

5. See King, Jurisdiction Over Friendly Armed Forces, 36 Am. J. Int'l L. 539 (1942); King, Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces, 40 Am. J. Int'l L. 257 (1946).

6. See Re, supra note 2.

With respect to the [illegible] [illegible] [illegible] [illegible]-tion the jurisdiction [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] of the [illegible] state in which they would be [illegible]. [illegible] [illegible] [illegible] [illegible] international law, [illegible] [illegible] [illegible] [illegible] and [illegible] [illegible] [illegible] [illegible] jurisdiction in-stead from the jurisdiction of the coastal state.[2] Some writers have suggested that the [illegible] that a host state is obliged to grant immunity to members of a visiting force is a rule of international law,[3] while others state that any immunity visiting forces may have is [illegible] only by agreement.[4] However, the view which now has sup-port of the bulk of authorities is that, in principle, members of visiting forces are subject to the [illegible] jurisdiction of local courts, and that any derogations from that prin-ciple require specific agreement of the local State by treaty or otherwise. The Agreement of June 19, 1951

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2. [illegible] of [illegible] [illegible] in The Schooner Ex-change v. McFaddon, 11 U.S. 116 (1812); Coleman v. Tennessee, 97 U.S. 509 (1878); Dow v. Johnson, 100 U.S. 158 (1879).

3. See e.g., [illegible], 28 Am. J. Int'l L. [illegible] (19[illegible]); [illegible], 47 Am. J. Int'l L. [illegible] ([illegible]).

4. See Re, supra note 1.

between the Parties to the North Atlantic Treaty recognizes the general jurisdiction of the receiving State. By way of exception, the Agreement permits the jurisdiction of the sending State over the members of its armed forces which are directed solely against the property or security of that State or solely against the person or property of another member of its forces or which arise out of any act or omission done in performance of a legal duty.[7] In 1957, in three cases the Supreme Court of the United States further limited the court-martial jurisdiction of the United States overseas which had been exercised under the provisions of Article 2(11) of the Uniform Code of Military Justice.[8] These decisions in effect denied the existence of the customary international rule of implied waiver of jurisdiction by the host State when such an implied waiver is sought to be based solely on an unconditional invitation from the host State. The court held, in Wilson v. Girard, citing The Schooner Exchange v. McFaddon,[9] that "a sovereign

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7. See I Oppenheim, International Law 849 (8th ed. Lauterpacht 1955).

8. Reid v. Covert, 354 U.S. 1 (1957); and the companion case Kinsella v. Drueger, 354 U.S. 1 (1957); Wilson v. Girard, 354 U.S. 524 (1957).

9. Supra note 4.

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9. See I Oppenheim, International Law 300 (8th ed. Lauterpacht 1955).

8. Hart v. Cooper, 326 U.S. 1 (1937); and the companion cases Thornhill v. Georgia, 326 U.S. 1 (1937); Milton v. Wilson, 326 U.S. 320 (1937).

9. Insert note 8.

nation has exclusive jurisdiction to punish offenses against its law committed within its borders unless it expressly or impliedly consents to surrender its jurisdiction" and that generally the only jurisdiction which United States military authorities could exercise over its military personnel in sovereign foreign countries was that which was permitted by the express consent of the foreign government concerned. The United States has sought to negotiate detailed agreements with all foreign countries where our forces are to be stationed.

The United States has entered into several agreements, the most significant of which is the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, hereinafter referred to as the "NATO Status of Forces Agreement."[10] Probably the key article for our purposes, and the one most often cited, is article VII of this agreement which provides amongst other things that the sending state shall have "the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending

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10. 4 U.S.T. & O.I.A. 1792; T.I.A.S. No. 2846, signed at London, June 19, 1951; advice and consent of Senate obtained July 15, 1953; ratified by the President July 24, 1953 entered into force August 23, 1953.

State, but not by the law of the receiving State."[11] The pattern of jurisdiction over visiting military forces established by that Agreement was adopted in the United States - Japanese Status of Forces Agreement on 19 January 1960.[12] The NATO Status of Forces Agreement came into force on 23 August 1953 with the United States, Belgium, France, and Norway the first of many countries to sign. Since that time the jurisdictional pattern of the NATO Agreement has been adopted by virtually every nation in which United States forces are stationed.[13] The NATO Status of Forces Agreement therefore will be used as the basis for the purposes of this paper. The criminal jurisdictional provisions of the SOFAs generally provide the following:

a. The right of both sending and receiving States to exercise jurisdiction over the members of the force, in accordance with their respective laws.

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11. Article VII of the NATO Status of Forces Agreement is set forth in Appendix A of this paper.

12. Administrative Agreement between the United States and Japan, February 28, 1952; 11 U.S.T. & O.I.A. 1652; T.I.A.S. No. 4510; Article XVII, paragraphs 1 and 3 of the Japanese Agreement are the equivalent of Art. VII of the NATO-SOFA.

13. See Appendix B of this paper for list of signatories to the NATO-SOFA and other agreements.

b. Military authorities of the sending State have exclusive jurisdiction over persons subject to its military law for offenses punishable by its law and not by the law of the receiving State.

c. Authorities of the receiving State have exclusive jurisdiction over such persons for offenses punishable by its laws but not by the laws of the sending State.

d. In all other cases the right of jurisdiction is concurrent.

(1) Primary jurisdiction, except for dependents, in all of these cases is in the receiving State subject to waiver except with regard to those offenses:

(i) Solely against the property or security of the sending State;

(ii) Solely against the property or security of another member of the force or civilian component (including all dependents) of the sending State;

(iii) And those arising out of any act or omission done in the performance of official duty.

The NATO-SOFA establishes four types of jurisdiction as follows: (1) Exclusive jurisdiction - which means that one party to the agreement has the exclusive right to exercise jurisdiction over an offender; (2) Concurrent jurisdiction - which means that either party has the authority to exercise jurisdiction over an offender; (3) Primary jurisdiction - which means that with regard to an incident subject to concurrent jurisdiction, one party has the first or initial right to exercise jurisdiction over an offender; (4) Secondary jurisdiction - which means that in a concurrent jurisdictional situation, the second party has a secondary right to exercise jurisdiction if the other

party does not choose to exercise its primary right of jurisdiction.[14]

The State having the primary right to exercise jurisdiction may waive jurisdiction in any case and so also may it waive the immunity of any of its representatives. Since any immunity is predicated on an interest of the state, it is the privilege not of the person but of the armed forces as well as to our ambassadors.[15] The possibility of such a waiver is specifically noted in the Manual for Courts-Martial, United States, 1951,[16] although our present policy is not to waive jurisdiction.

In 1965 the host countries in NATO waived their primary jurisdiction in 67% of the cases. World wide, the waiver rate was 65%.[17]

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14. In the words of NATO-SOFA, Article VII 3(c) ". . . the authorities of the State having the primary right (to exercise jurisdiction) shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its rights in cases when that other State considers such waiver to be of particular importance."

15. Wilson v. Girard, 354 U.S. 524 (1957); also see 1 Hyde, International Law 819 (2d ed., 1945).

16. MCM 1951, para 12.

17. Hearings Before a Subcommittee of the Senate Armed Forces Committee on Operation of Article VII NATO Status of Forces Treaty, 89th Cong. 2nd Sess. 2 (1966) Statement of Ray W. Bronez, Director, Foreign Military Rights Affairs, Department of Defense. At the time of its consent to the ratification

party does not choose to exercise its primary right of jurisdiction.[14]

The treaty leaves the sending state no exclusive jurisdiction any waive jurisdiction in any case and so also may it waive the immunity of any of its representatives. Since any immunity is conferred as an interest of the state, it is the privilege not of the personnel of the armed forces as well as to our subordinates.[15] The constitutionality of such a waiver is specifically noted in the Manual for Courts-Martial, United States, 1951,[16] although the present policy is not to waive jurisdiction.

In 1965 the host countries in NATO waived their primary jurisdiction in 63% of the cases. World wide, the waiver rate was 53%.[17]

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14. In the words of NATO-SOFA, Article VII 3(c) ". . . the authorities of the State having the primary right [to exercise jurisdiction] shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

15. Wilson v. Girard, 354 U.S. 524 (1957); also see 1 Hyde, International Law 817 (2d ed., 1945).

16. MCM 1951, para 12.

17. Hearings Before a Subcommittee of the Senate Armed Forces Committee on Operation of Article VII NATO Status of Forces Treaty, 90th Cong. 2nd Sess., 2 (1966) (Statement of [illegible], Director, Foreign Military Rights Affairs, Department of Defense). At the time of the hearing the ratification

In the past, it has been the general practice of the United States as a sending State to ask for a waiver in all cases in which the receiving State has primary jurisdiction.[18] In some countries, we have negotiated agreements which are designed to make waiver by those governments more or less a matter of course, to be granted in all except the most unusual case.[19] Our Agreement with the Federal Republic of Germany carried this approach a step further, providing for a blanket waiver of German jurisdiction on application of the sending state, which Germany may recall in special cases.[20] Over all, it seems probable

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17. (Continued) of the SOFA, the Senate appended a statement to the text which directed Commanding Officers to press a request for waiver in any case in which it appears that a member of the American forces being tried by a foreign court might be prejudiced by the absence of safeguards similar to those provided by the Constitution of the United States. 4 U.S.T. & O.I.A. 1828-29 (July 15, 1953); 99 Cong. Rec. 8730 (1953).

18. Hearings Before a Subcommittee of the Senate Armed Forces Committee on Operation of Article VII, NATO Status of Forces Treaty, 87th Cong., 1st Sess. 26 (1960).

19. E.g., the Netherlands, para. 3 of Annex to an Agreement of August 13, 1954, Greece, Art. II, 1, of the Agreement with Greece of Sept. 7, 1956.

20. Agreement with Germany, Supplemental to NATO-SOFA 14 U.S.T. & O.I.A. 531; T.I.A.S. 5351, Article XIX with Respect to Foreign Forces stationed in the Federal Republic of Germany of August 3, 1959.

In the past, it has been the general practice of the United States [illegible] in all cases in which the [illegible] diction.[18] In more recent [illegible], as with the [illegible] agreements which [illegible] governments were [illegible] in all except the [illegible] cases.[19] [illegible] agreement with the Federal Republic of Germany [illegible] further, [illegible] juris-diction [illegible] which Germany may [illegible] cases.[20] [illegible] probable

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18. [illegible]

19. [illegible]

20. Agreement with Germany, [illegible]

that most offenses are subject to the primary jurisdiction of the receiving State, so that, with waivers normally granted in a majority of the cases, waiver has assumed a major role. Present United States policy in regard to waiver appears to be that it will not waive its rights but will ask for waivers in all cases except minor violations such as traffic offenses.[21] At this point, the reader may well question the declared United States policy to request a waiver of jurisdiction in almost all cases despite the fact that in many instances military personnel convicted of serious offenses by host State authorities are treated with more benevolence than they would be under military law, thus giving the offender a better deal.

It has been alleged from time to time that these relatively light sentences have caused discipline in the armed forces to suffer.[22] However,there have also been complaints that foreign justice is harsh or otherwise unfair.[23] In at

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21. Department of Defense Directive 5525.1, May 5, 1962, Subject: Status of Forces: Policies and Information. Hearings on H.R. 3744 and H.R. 7646, Subcommittee of the House Committee on Armed Services, 84th Cong., 2d Sess., p. 6907 (1956).

22. Ibid.

23. Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955). Mrs. Keefe claimed her husband's rights were violated by the French in that he was compelled to be a witness against himself, might have been cruelly and

least one case, an accused who would have received a light sentence for a most serious offense had foreign authorities retained jurisdiction was ultimately sentenced to life imprisonment by a general court-martial.[24]

Some writers have stated the reason for a waiver of jurisdiction is that the sanctions available to military

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23. (Continued) unusually punished by deportation to a penal colony, and was now in involuntary servitude and that therefore the Secretary of State had a legal duty to intercede and obtain Keefe's release. The position of the United States was that the record did not support Mrs. Keefe's position that her husband's rights were violated and that even her husband's commanding officer did not think it necessary to request State Department action. Also, the Senate reservation did not provide for Secretary of State intercession where American soldiers' Constitutional rights had been violated which they were not in this case, citing sec. 9, Art. VII of NATO-SOFA.

24. United States v. Grisham, 4 U.S.C.M.A. 694, 16 C.M.R. 268 (1954). Several years ago a civilian employee of the Army in France killed his wife by what was described as a "physical beating characterized by the utmost savagery." France, pursuant to the agreement then effective, had primary jurisdiction and accordingly the juge d' instruction intended to send the case to a tribunal correctionnelle, which could only impost a sentence of up to 5 years. A U. S. Senator interceded in the case, however, and as a result of discussion between the U. S. Embassy and the French Minister of Justice, a waiver of jurisdiction was obtained. The accused was tried by General Court-Martial, convicted of murder and sentenced to life imprisonment. (See Rouse and Baldwin, The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement, Vol. 51, No. 1, The American Journal of International Law (1957), page 47, footnote 91.

jurisdiction may be considerably more effective in securing compliance with the law than the sometimes less rigid sanctions of foreign courts.[25] One reason which has been cited is the different values on "crimes of passion, etc." Besides the ordinary penal sanctions available to military courts, a punitive discharge, or in the case of an officer, dismissal from the service, can be adjudged by court-martial. Non-judicial punishments may be imposed pursuant to Article 15 of the Uniform Code of Military Justice, or the accused can be transferred.

Another reason for waiver is the necessity of making a complete disposition of an offense in a single trial. For example, if a United States soldier who misappropriates an Army vehicle is involved in a hit-and-run accident in which the victim is a national of the receiving state, he has committed two separate offenses against the law of both the sending and receiving state. The sending state would have primary jurisdiction over the misappropriation, while the receiving state would have primary jurisdiction over the hit-and-run offense. If no waiver is secured and two trials are

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25. LTC Joseph H. Rouse, JAGC, and 1st LT Gordon B. Baldwin, JAGC, supra note 3.

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85. See Joseph K. Hoyer, Spec. and Leg. Problems in Wartime, 1941, Index Digs 7.

held, the soldier may use one court against the other by pleading for leniency before the first trial pointing out he faces a second trial, and at the second trial he may plead in mitigation that he has already been tried and sentenced for an offense arising out of the same circumstances. All this can be avoided by obtaining waivers of jurisdiction and trying all aspects of the case at once.

It has also been stated that the success of our military representatives in obtaining the large number of waivers of jurisdiction is primarily the result of our excellent local liaison.[26] Another author points out that the United States requests waivers in nearly all cases because the Commanding Officer must ask the receiving state to waive jurisdiction in those cases where the procedural safeguards set forth in the Constitution are lacking. The commanding officer is required to seek the waiver by the procedures set forth in the Senate Resolution of 15 July 1953.[27] It has been Army policy to obtain the maximum number of waivers possible. The percentage of waivers obtained seems to pay tribute to

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26. Supra note 17, p. 4.

27. Williams, NATO SOFA - Articles VII and VIII: An American's Trial in a Foreign Court: The Role of the Military's Trial Observer, U.S. Dep't of Army, Pamphlet No. 27-100-34, Military Law Review (1966).

the success of our judge advocates. After the waiver has been obtained new problems may arise which must be resolved if a court-martial is ordered.

III. OPERATION OF UNITED STATES COURTS-MARTIAL IN RECEIVING STATES

As pointed out earlier in this paper, the Uniform Code of Military Justice is extra-territorial and it is applicable in all places throughout the world where our armed forces may be stationed.[28] These jurisdictional powers stem from the Constitution.[29] Obviously then, the multitude of problems our military lawyers will encounter in the many foreign countries they will be required to sit are increased many fold by the fact of location alone.

The many and varied duties of the law officer of a General Court-Martial are assimilated to those of the Federal Judge.[30] In general he is responsible for the fair and orderly conduct of the proceedings in accordance with the law in all cases which are referred to the court to which he is appointed.[31] During the trial, he rules upon

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28. UCMJ articles 2 and 5. Note: An excellent discussion of General Court-Martial Jurisdiction appears in Winthrop's Military Law and Precedents (2d ed. reprint 1920) Chapter VIII, p. 81.

29. Article I, sec. 8.

30. United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

31. MCM 1951, para 39(b).

all interlocutory questions except challenges and advises the court on questions of law and procedure which may arise.[32] His rulings upon any interlocutory question other than a motion for a finding of not guilty or the question of the accused's sanity is final. The question of jurisdiction under a status of forces type agreement is such an interlocutory issue.

Suppose, for example, that prior to entering his plea the accused moves to dismiss all charges and specifications on the ground that a waiver of jurisdiction has not been obtained from the competent authorities of the foreign country as required by the Status of Forces Agreement. What action should the trial counsel and the law officer take? Certainly, a challenge to jurisdiction is a basic issue which must be resolved before the merits of the case are reached. This precise situation arose in a recent case wherein the accused contended that a waiver of French jurisdiction was not obtained in accordance with the treaty thereby violating Article VII of the NATO-SOFA Agreement.[33] The NATO-SOFA as well as those agreements which are similar to it contain provisions stating that:

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32. Ibid.

33. United States v. Carter, 15 U.S.C.M.A. 277, 36 C.M.R. 433 (1966).

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32. Ibid.

33. Motion Picture v. Cannon, 15 C.A.C.P.A. 477, 80 U.S.P.Q. 333 (1948).

> The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Counsel for the accused asserted that the SOFA, Article II and Article VII, clearly reflected that France had complete control over its own territory; that the American military have no right to act on French soil except as provided under the terms of the Agreement; that in those jurisdictional areas not covered by the Agreement, the laws of France control. The trial counsel argued that the only pertinent question was whether or not the authority to search was granted upon probable cause. He was upheld by both the law officer and the Court of Military Appeals. The Court of Military Appeals held that the basic requirement of liaison between American and French authorities was met even though by means of only a telephone call with the Verdun City Police, and that therefore there was full compliance with the terms of agreement.[34]

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34. A meeting with a commissioner of the Verdun Police, a post provost marshal and a judge advocate representative ended with the Americans being informed that they could conduct such searches as the one at hand without making prior arrangements with French authorities. It was further agreed that this meeting was to be considered as satisfying the liaison requirements set forth under the Status of Forces

It would seem then in the light of the above case that some compliance with the terms of the agreement must be made before jurisdiction can attach, but one wonders what effect the casual manner in which the affair was handled by the French authorities will have on future incidents involving a search and a seizure. In effect, in this case, the French authorities have said, "If American's are involved and no Frenchmen are, just notify us and proceed with your search." Certainly such a procedure may lead to gross abuse should the post commander fail to exercise care in ordering any search. In substance then the burden for determining whether probable cause exists for a search rests on the staff judge advocate.

The writer's interviews with many military lawyers have indicated that many waivers are obtained as a practical matter often by means of a telephone call. The common offense of public drunkenness, for example, is handled routinely and most receiving states will turn any American

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34. (Continued) Agreement. Despite this, after the post commander had given permission to search, the Verdun City Police were informed by telephone of both the need and the reasons for pending search. Again the Chief of the Verdun Police authorized the CID to proceed alone in view of the fact that only American military persons were involved.

found in that condition over to American military authorities thereby waiving jurisdiction. If the offense is such that a waiver must be obtained, the military lawyer will start up the chain taking those steps, from telephone call, personal visit to local authorities, to formal request to the "country representative," as is required. One judge advocate formerly stationed in France stated that even the more serious offenses only required a visit to the local police station in order to obtain a waiver.

Since every minor traffic violation was followed by a waiver request when the agreements first became effective, foreign authorities became irritated at the number of requests, and processing of serious cases was delayed by the mass of minor cases. As a result, most countries evolved a procedure which would eliminate the necessity of considering all but the most important cases on a high level. In some countries waivers in minor cases can be settled by local authorities directly; in other countries waivers are automatically considered as if a request had been submitted. This is the procedure in England. There, no waivers are granted in traffic violations - only the most serious cases are considered.

As we have seen, Article VII of the NATO-SOFA is the law in determining whether the receiving State will try a

member of our armed forces who violates a law of the receiving State.[35] Even so, the question still arises, however, whether a violation of the local law under Article II is ipso facto an offense under Article 134 of the Uniform Code of Military Justice so that he may be tried by the State sending the serviceman. If the receiving State tries him, the problem of double jeopardy arises in any attempt by the sending State also to exercise jurisdiction.[36] If the receiving State does not try the individual, then the problem is twofold: (1) Every violation of one of our local State laws is not in itself an offense under the Uniform Code. There must be some service discrediting facts and circumstances attendant to the violation.[37] Therefore, reasoning by analogy, if the individual is not triable under any other article of the Code, the foreign infraction does not automatically cause him to violate

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35. See Appendix A, para 3 of this paper. Traffic offenses are not specifically covered by para 3a of Art. VII of NATO-SOFA; therefore, primary jurisdiction falls to the receiving state in accordance with para 3b of Art. VII.

36. Art. VII, sec. 8, SOFA.

37. United States v. Grasso, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957); see also UCMJ art. 134.

Article 134; (2) If, however, the charge is based not on a violation of the law of the receiving State, but upon a violation by an individual of Article II of the treaty, then the question is whether a violation of a treaty, which is the supreme law of the land under our Constitution, is in itself a federal criminal offense. One aspect of this question came before the Court of Military Appeals in 1956 in United States v. Ekenstam.[38] In that case the accused was charged with a violation of Article 134 under a specification which alleged that he had violated a provision of the Administrative Agreement with Japan by selling non-appropriated fund merchandise (golf clubs) to a Japanese national. The court held that the specification did not state an offense under the Code because the Administrative Agreement with Japan bound the signatory governments and not individuals, and that in any event an individual could not commit a military offense by violating a treaty. One authority on the subject has stated that: "Where States stipulate by internation treaties certain benefits for individuals other than their own subject, these individuals do not as a rule, acquire any international rights "under these treaties," but the State whose subjects they are has

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38. 7 U.S.C.M.A. 168, 21 C.M.R. 294 (1956).

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35. ר' ש' ד' ה' ו' ז' ח' ט' י' כ' ל' מ' נ' ס' ע' פ' צ' ק' ר' ש' ת' (1966).

an obligation towards the other States of granting such favor by its Municipal Law.[39] The "binding force" of a treaty concerns in principle the contracting States only, and not their subjects. As International Law is law between States exclusively, treaties can normally have effect upon States only.[40]

Two years later in United States v. Curtin,[41] the Court of Military Appeals again held that the Japanese Administrative Agreement did not bind individuals. The exact point has not been raised in regard to NATO SOFA. If it is and it is determined that Article II, NATO SOFA, does bind individuals then the court will be faced with its dictum in Ekenstam, that such a violation of a treaty is not a violation of a federal criminal law.

But in the case of United States v. Prischolz,[42] an Army court-martial said the accused was chargeable with knowledge

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39. I Oppenheim's International Law 21, 637-638 (8th ed. Lauterpacht 1955).

40. Id. at 924.

41. 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958).

42. ACM 16766, Prischolz, 29 C.M.R. 852 (1960). The accused in this case was a Captain, possibly accounting for the court's readiness to impute knowledge.

the owner's reliance to receive consideration.

of the Security Treaty between the United States and Japan. In that case, the accused was charged with using the mails to defraud by having photographic equipment mailed to him in Japan for resale. The court-martial held the accused to be chargeable with knowledge of the Security Treaty between the United States and Japan, and the provisions of the Administrative Agreement made thereunder, stating that members of the United States Armed Forces are subject to Japanese customs laws, regulations and taxes, except for the importation of household goods, vehicles and clothing for personal use and that such goods may not be disposed of to persons in Japan. It is doubtful this case can be squared with either Ekenstam or Curtin.

Yet, in the recent case of United States v. Carter,[43] a search and seizure of contraband was conducted in the accused's French-owned offpost dwelling by United States Military authorities seeking stolen United States Military property. In this case, the court held, "The Status of Forces Agreement confers no individual right and most assuredly seeks only to preserve protections presently existing."[44]

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43. United States v. Carter, 15 U.S.C.M.A. 277, 36 C.M.R. 433 (1966).

44. Id. at 437.

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[84]. Quoted [illegible] in [illegible], 12 U.S.C.A. [illegible], 30 C.F.R. 923 (1959).

[85]. Id. at 927.

Chief Judge Quinn concurring, stated, however, "Status of Forces Agreements do not merely define relationships between the United States and the host nations, they also provide many special protections to the accused."[45] Chief Judge Quinn did not enumerate what those special protections were, although in the case of United States v. Cadenhead,[46] a minor, age twenty, pleaded guilty to a charge of robbery under Article 122 of the Uniform Code of Military Justice after having been tried before a Japanese Family Court. The defense counsel contended that under the agreement with Japan trial by court-martial was barred by the previous proceedings against the accused by the Japanese authorities. Here the accused was subjected to juvenile delinquent proceedings which were not open to the public and no counsel was provided the accused. Counsel stated, ". . . precious Constitutional rights cannot be diminished by changing names of tribunals or modifying the nomenclature of legal proceedings." He argued further that the juvenile delinquent proceeding was an "adjunct to the general system of criminal justice, and that therefore all safeguards of an accused in the criminal law, including protection against double jeopardy are applicable to this type of proceeding."

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45. Id. at 443.

46. 14 U.S.C.M.A. 271, 34 C.M.R. 51 (1963).

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45. Id. at 683.

46. 14 U.S.C.M.A. 273, 34 C.M.R. 53 (1963).

The Government's position which was supported by the testimony of a Japanese professor was basically that there was no prior jeopardy because the prior proceedings were "educative and not criminal," and that "guardianship" was the key idea. The argument that the Japanese proceeding was civil and not criminal, with the care and guidance of the accused the objective rather than the punishment of him.

When the case reached the Court of Military Appeals, the defense counsel added the argument that even if the proceedings were not a trial, the court-martial is still barred because the Japanese Government had primary right to exercise criminal jurisdiction and that right was not waived.

Appellate Government counsel argued, (1) that points not raised at the trial level cannot be raised on appeal for the first time; and, (2) that even if the United States exercised court-martial jurisdiction in disregard of the primary right of Japan, the accused has no standing to object because a violation of the agreement merely raised a diplomatic issue between the United States and Japan.

In a unanimous opinion the Court of Military Appeals held that the Japanese proceedings did not constitute a trial within the meaning of Article XVII, paragraph 8 of

the Status of Forces Agreement with Japan, thereby not barring the court-martial proceedings.

It would appear from the holding in this case that the double jeopardy provisions of the SOFA with Japan contemplate a proceedings directly intended to vindicate the penal law, that is a proceeding under the regular laws, which, if resulting in conviction, would subject the accused to the penalties authorized by the penal statutes. It is difficult to agree that the Japanese did not exercise jurisdiction over the accused because, for example, no information or indictment was returned as to the accused and that this was a contempt proceeding. The fact remains that the accused was arrested, confined, and a hearing was held. The hearing was presided over by Japanese legal authorities who ordered his release to United States authorities. The name given the proceedings should hardly have any effect on the final determination. Nor for that matter should conflicting definitions of "jurisdiction" change the picture. A close examination of the facts, in my opinion, will show that "jurisdiction" by the Japanese was exercised and that regardless of what that action might be, it is a bar to trial by court-martial.

the status of Joseph Kitajewski [illegible], thereby not meeting the constitutional requirement.

It would seem from the holding in this case that the double jeopardy provisions of the 1954 [illegible] contemplate a proceeding directly initiated to vindicate the penal law, that is a proceeding under the penal laws, which, if resulting in conviction, would subject the accused to the penalties provided by the penal statute. It is difficult to agree that the Japanese did not consider [illegible] the accused [illegible], for example, no [illegible] to the accused and that [illegible] proceeding. The fact remains that the accused was arrested, [illegible], and a hearing was held. The hearing was presided over by Japanese legal authorities who [illegible] authorities. The [illegible] given the proceedings should hardly have any effect on the final determination. Nor [illegible] should conflicting definitions of "jurisdiction" change the picture. A close examination of the facts, in my opinion, will show that "jurisdiction" by the Japanese was exercised and that regardless of what that action might be, it is a bar to trial by court-martial.

The Carter[47] case at least appears to be in line with the earlier case of United States v. Sinigar.[48] This case involved the refusal by a serviceman to testify before a Canadian Coroner's inquest for which he was cited for contempt. The Court of Military Appeals held the contempt citation and commitment were not a trial within the meaning of the NATO agreement relating to double jeopardy. The court stated that the accused was not "tried" for his refusal to testify within the meaning of paragraph 8 of Article VII of the NATO SOFA which provides in part that where an accused has been tried by the authorities of one contracting power and has been acquitted, convicted and is serving or has served his sentence, or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another contracting party.[49]

It is indeed difficult to justify the holding in Carter and Sinigar in the light of the language of paragraph 8 of

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47. Supra note 43.

48. 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1955).

49. Rule 42(a) Fed. Rules of Criminal Procedure, 18 U.S.C. provides the same protection generally as Article VII of NATO-SOFA.

U.S.C. provides the same presumption generally as Article VII of NATO-SOFA.

Article VII. Was not Carter acquitted or pardoned? Chief Judge Quinn, although concurring in the result disagreed with the construction of paragraph 8, Article VII of the SOFA, stating that this provision includes every kind of proceeding which contemplates punishment for wrongful conduct. This is the very language espoused by the defense counsel in Cadenhead![50]

It appears that one of the protections extended to an accused under the SOFA is that he may not be tried twice for the same offense although what is a trial remains an unanswered question.

A most difficult problem is encountered when attempts to reconcile those cases which attempt to define those rights which belong to the accused rather than to the government signatories to an agreement. We have seen in the 1956 case of Ekenstam and Curtin (1958) that International agreements bind governments not individuals. In the 1960 Board of Review case of Frischolz the Board held that individuals were chargeable with knowledge of the provisions of these agreements, but in the 1966 case of Carter, it appears that the Court of Military Appeals has remained with Ekenstam and Curtin in holding that International

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50. Supra note 46.

50. Same note 46.

Agreements confer no individual rights and are binding on governments only.

Although it is generally undisputed the accused has a right to raise those issues which may bar trial, the question arises as to whether or not an accused, raising the former jeopardy issue may in effect determine which sovereign will try him. In United States ex rel Keefe v. Dulles,[51] a writ of habeas corpus was sought on behalf of an American soldier imprisoned by France. The soldier had been convicted of robbery in the night and had been sentenced to a four and one half year term. The action was encouraged by an organization called the Defenders of the American Constitution, an opponent of status of forces agreements.[52] The writ was denied on the ground that the soldier was not in the custody of either the Secretaries of State, Defense, or the Army, and that there was no one within the jurisdiction of the court who was responsible for the detention. The court, however, examined the petition as one seeking a mandatory order to require the Secretary of State to obtain

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51. Supra note 23.

52. See testimony of Eugene Pomeroy, Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 84th Cong. 1st Sess. on the Operation of Article VII, NATO Status of Forces Agreement, at 66 (1955).

the soldier's release through diplomatic channels, but denied relief on the ground that the commencement of diplomatic negotiations is completely in the discretion of the Executive branch of the Government. The court stated further that in the absence of a showing that the accused's Constitutional rights had been violated no relief could be granted.

In a 1962 case,[53] the Court of Military Appeals held that when an act violates two or more statutes, the accused cannot select the statute under which he will be prosecuted and he cannot complain if he is prosecuted for violating the statute which carries the higher penalty. An earlier federal case,[54] held that when a person has violated criminal statutes of two different sovereigns, it is for the sovereigns and not for the criminal to settle which shall first inflict punishment. What effect then does the fact that there is a treaty involved have upon a trial?

The classic case and the one which aroused the most interest in this area is Wilson v. Girard,[55] the first case to

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53. United States v. Culley, 12 U.S.C.M.A. 704, 31 C.M.R. 290 (1962).

54. United States ex rel Demrois v. Farrell, 87 F.2d 957 (8th Cir. 1937), cert. denied, 302 U.S. 683 (1937).

55. 354 U.S. 524 (1957).

53. United States v. Bailey, 12 U.S.C.M.A. 206, 30 C.M.R. 390 (1961).

54. [illegible] ex rel Darcy v. Handy, 351 U.S. 454 (1956), 59th 16th Dir. 1959), cert. denied, 356 U.S. 949 (1958).

55. 350 U.S. 554 (1956).

raise squarely the issue whether a serviceman who commits an offense while in the performance of official duty has any right, constitutional or statutory, to be tried by the United States military authorities rather than by a court of the receiving State. This case arose out of a dispute between the Japanese and the United States authorities as to whether the offense involved arose out of a performance of official duty.

While on duty as a sentry guarding a machine gun and some items of clothing left nearby in Japan, Girard fired an expended cartridge case from his grenade launcher which killed a Japanese woman scavenging brass from the range. The United States argued the act was a matter of official duty and that we had the right to try him, but the Japanese did not agree. Eventually the dispute was terminated by a United States waiver of its primary jurisdiction and subsequent trial of Girard in a Japanese court.

The reader may ask, "Well, can't a sentry exercise what force is necessary to carry out his orders?" The position the United States took was that Girard's action was in accordance with his basic orders and was therefore official duty giving the United States primary jurisdiction. Girard's commanding officer certified, "Done in performance

[illegible] offense
an offense while in the performance of official duty was
and eighty, constitutional or statutory, to be tried by the
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of official duty.

While on duty as a guard watching a machine gun and
some items of clothing left during an [illegible], Girard fired
an expended cartridge case from his grenade launcher which
killed a Japanese woman scavenging brass from the range.
The United States argued that this was a matter of official
duty and that we had the right to try him, but the Japanese
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The reader may say, "Well, can't a soldier exercise
what force is necessary to carry out his orders?" The
position the United States took was that Girard's action
was in accordance with his basic orders and was therefore
official duty giving the United States primary jurisdiction.
Girard's commanding officer testified, "Some [illegible] performance

of official duty." Other facts arose as a result of further investigation, including testimony from a buddy of the accused who was assigned to guard duty with Girard. His testimony indicated Girard acted outside his assigned duties by enticing the woman into a dangerous position and then firing in order to frighten her away. This horseplay, said the Japanese, took the incident out of the official duty category.

The decision to waive jurisdiction in the Girard case was made by the Secretary of State and the Secretary of Defense and was confirmed by the President. Certainly, the rule set forth in Schooner Exchange v. McFaddon,[56] that, "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction," played an important part in Chief Judge Marshall's decision. But what of the treaty between the United States and Japan? Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant of Article XVII, section 3, paragraph (c) of the Protocol reading that:

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56. Supra note 4.

50. Supra note 9.

> . . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where the other State considers such waiver to be of particular importance.

Obviously the Japanese considered this case to be of particular importance and a matter of national pride, for it was on the front page of every newspaper in Japan as well as the United States. The real issue was whether, upon the facts of the case, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. No constitutional or statutory barrier was found to the provision which was applied in the case, therefore the wisdom of the arrangement was exclusively for the determination of the Executive and Legislative Branches. Thus the surrender of Girard to Japanese authorities was consonant with well established rules of international law and the individual has no say in the matter.

But what are the interests involved, and which of them are the more important? In the case of United States v. Copeland,[57] two American servicemen were tried by a general

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57. ACM 11674, Copeland, 21 C.M.R. 838 (1956).

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37. Ann Arbor, Michigan, 73 C.A.2d, 838 (1946).

court-martial for the rape of a 15 year old Libyan girl. The court said, that under International Law, the jurisdiction over the members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and is not a right of the individual concerned. Consequently, the court-martial of the United States which tried the accused had, not only constitutional and statutory authority to do so, but the authority of an accepted rule of international law. This is the holding in United States v. Sinigar.

Seven years after the Copeland case, a young serviceman, age twenty, was convicted by a Japanese Family Court on the charge of robbery. Subsequently the accused was tried by court-martial on the same charge and the issue of double jeopardy was raised. The court in affirming the conviction held that the Japanese Family Court proceedings did not constitute a prosecution for a criminal offense under the laws of Japan and thus were not a trial within the meaning of Article XVII, paragraph 8, of the Status of Forces

Agreement with Japan, therefore the court-martial charges of robbery were not barred by the proceedings.[58]

Finally, an accused serviceman was convicted by a Spanish Fraud and Contraband Tribunal which levied a fine on the accused based on the value of goods he introduced into the Spanish economy tax free. Subsequently he was tried by court-martial in violation of Article 92 of the Uniform Code of Military Justice. The accused did not raise the issue of former jeopardy at his court-martial. The Court of Military Appeals first held the Spanish proceedings to be administrative in nature and not a criminal court proceeding; secondly, the Court of Military Appeals held that since the former jeopardy issue was not raised at the court-martial the accused waived his rights; the Court of Military Appeals then went on to say that even if the Spanish action was a trial, the accused was still amenable to trial by court-martial. Although the agreements with Spain concerning jurisdiction over United States forces in Spain contained a provision that a member of the United States forces who commits an offense punishable under the Code was immune from Spanish prosecution for the same offense

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58. Supra note 46.

23. Supra note 14.

on the basis of a determination by United States authorities, there were no reciprocal provisions which would operate to divest United States military authorities from exercising court-martial jurisdiction over the accused; therefore, a rejection of a former jeopardy claim, if made, would properly result.[59]

In the light of the above cases, it would seem clear that there are larger interests than the personal interests of the serviceman involved and that logically a single instance whereby an individual "claims his rights" should not be allowed to interfere in the operation of international treaties and obligations, for to allow an interference of this nature would mean that those treaties would be of little lasting value. Clearly, the individuals' rights are subordinate to those of nations, and when considered in that light it can be said he has no additional rights under the SOFA. On the other hand, it must be conceded that the American serviceman has greater protection than the serviceman of any other country in the world, not only under his rights as a citizen under the Constitution, but under each and every NATO type treaty we have negotiated

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59. ACM S-21050, Reed, 33 C.M.R. 932 (1963).

59. ACLU v. Clark, 194 U.S. 472 (1904).

regardless of where he may be stationed in the world. Unquestionably the Constitution applies overseas,[60] and while courts-martial are criminal prosecutions those Constitutional protections and rights which the history and text of the Constitution do not plainly deny to the military accused are preserved to them in the service.[61] An alternative to present agreements might well be to place the constitutional rights and safeguards of the individual in the superior position in the writing of the treaties in the first instance, but one cannot but help wondering whether any other country in the world would agree to provisions which would guarantee these constitutional rights to American citizens other than Korea. Certainly the Girard case brought to light some problems we should consider in the light of developments unforeseen at the time the Constitution was written, namely, the world-wide deployment of our citizens called to duty and sent to foreign lands for extended tours of service, who may, by administrative decision of American authorities, be delivered to foreign governments for trial. "We are indeed fortunate that our experience in this area has

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60. United States v. Kauffman, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).

61. United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

60. United States v. Guffrida, 10 U.S.C.M.A. 579, 28 C.M.R. 93 (1959).

61. United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

generally been a happy one and thus to date these Constitutional problems have been largely submerged."[62]

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62. Senate Comm. on Armed Services Operation of Art. VII, NATO Status of Forces Treaty, S. Report #1041, 87th Cong. 1st Sess. 2 (1961).

personally taken to heart the need for more Greek-Turkish cultural troubles were best legally attempted."[62]

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62. Senate Comm. on Armed Services Operation of Art. VII, NATO Meeting at Ottawa Treaty, S. Report (1951), 82nd Cong. 1st Sess. 2 (1951).

IV. NEGLIGENT HOMICIDE - THE SOCIAL DILEMMA

During the period December 1, 1964, through November 30, 1965, 32,311 United States military and civilian personnel and their dependents were charged with offenses subject to the primary or exclusive jurisdiction of foreign courts; 22,151, or nearly 70 percent, of these cases were traffic offenses.[63] In Germany alone there were 6,400 minor traffic offenses involving United States military personnel.[64] Statistics do not show the number of negligent homicide cases, but it would seem safe to say that the number, whatever it is, will increase next year. Why is this so? Could it be that because the numbers of drivers and the numbers of vehicles on the congested streets and highways of the cities of the world increase each year? Is the fact that the motor

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63. Hearing Before a Subcommittee of the Committee on Armed Services, United States Senate 89th Congress, 2nd Sess. on the Operation of Article VII, NATO Status of Forces Agreement, at 3 (1966).

64. Supra, note 63, at page 5. Under the new procedure in Germany the reporting of all cases involving United States personnel is required, but only those cases over which the United States can request a waiver are included in determining the waiver rate. Waivers are not normally requested for civilians and dependents; however, 929 of the 1822 military-connected civilians and dependents who were charged with local offenses were released to United States authorities for appropriate disposition.

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vehicles on the passenger streets and highways of the states
but it would seem safe to say that the number, whatever it
is, will increase next year. Why is this so? Could it be
that because the numbers of drivers and the number of
fatalities do not show the number of accidents somewhere,[62]
traffic officers involving United States military personnel,[63]
traffic officers.[64] In Germany alone there were 6,905 minor
courts, 22,152, or nearly 70 percent, of these cases were
subject to the ordinary or exclusive jurisdiction of foreign
tenced and their dependents were charged with offenses
30, 1965, 73,711 United States military and civilian sen-
during the period December 1, 1964, through November

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62. Reporting before a subcommittee of the Committee on Armed Services, United States Senate 89th Congress, 2nd Sess. on the Operation of Article VII, NATO Status of Forces Agreement, at 3 (1966).

63. Ibid.

64. Ibid., page 63, at page 5. Under the new procedure in Germany the reporting of all cases involving United States personnel is required, but only those cases where the United States can request a waiver are included in determining the waiver rate. Waivers are now normally requested for civilians and dependents. Only of the 1965 military-connected civilians and dependents who were charged with local offenses were released to United States military authorities for appropriate disposition.

vehicle regulations are vastly different in the United States than in the other countries of the world a cause of this increase? In the opinion of the writer, this continuing increase is due to the greater number of vigorous young people reaching the age when they are able to drive motor vehicles legally. This, plus the factor of our ever increasing affluence which makes these vehicles readily available, would seem to be the fundamental cause of accidents which rise proportionally to the number of drivers and vehicles utilizing highways.

Why should an offense not recognized at common law,[65] not recognized as an offense in any state in the United States today in the absence of statute, where such statutes are actually few,[66] be made punishable under the Uniform Code of Military Justice?

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65. Perkins, Criminal Law 62 (1957). "As a matter of the common law of crimes, any killing below the grade of manslaughter is innocent homicide and for the most part this has not been changed by modern statutes. There are a few states, however, with legislative provisions for the punishment of certain homicides below the grade of manslaughter. Michigan is the leader in this field, enacting a negligent homicide statute in 1921, whereby a lesser penalty than that specified for manslaughter was provided for "any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another."

66. Ibid. Perkins lists Michigan - negligense less than gross
Oregon - ordinary negligence
Louisiana - excusable negligence except that it results from criminal negligence

vehicle manufacturers were nearly different in that United States from the other industrialized of the world a cause of this increase? In the opinion of the writer, this quantitative increase is due to the greatest number of citizens young people reaching the age where they are able to drive motor vehicles legally. This, plus the factor of our ever increasing affluence which causes these vehicles readily available, would seem to be the fundamental cause of accidents which rise proportionally to the number of drivers and vehicles utilizing highways.

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66. Ibid. Perkins lists eighteen - negligence less than gross
Oregon - ordinary negligence
Louisiana - excusable negligence except but it results from criminal negligence

In 1952, in the case of United States v. Kirchner,[67] the United States Court of Military Appeals held negligent homicide to be an offense under the Uniform Code of Military Justice and punishable as conduct of a nature to bring discredit upon the armed forces, or a disorder and neglect to the prejudice of good order and discipline in the armed forces. The court went on to say, "It is our view that unlawful homicide through simple negligence is an offense under the Uniform Code of Military Justice." If this pronouncement were literally followed, it would make any tort which proximately resulted in the death of another punishable as a crime, provided only that it was committed by a person subject to the Uniform Code of Military Justice.[68] How then does it happen that the tremendous community of soldiers, sailors, airmen, marines, coast guardsmen, and others subject to trial under the Uniform Code of Military Justice are held to such a degree of care and confronted with penal

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66. (Continued) Texas - ordinary negligence
District of Columbia - ordinary negligence

67. 1 U.S.C.M.A. 477, 479, 4 C.M.R. 69, 71 (1952).

68. 10 U.S.C. sec. 801-940 (Supp V, 1958).

sanctions[69] in the absence of its use?

Negligent homicide is defined as the unlawful causing of death of another by simple negligence. It is the unlawful killing of a person as a result of the failure to use due care and circumspection in the circumstances. The elements of the offense are: (1) the victim is dead; (2) that his death was unlawfully caused by the acts or omissions of the accused; (3) that such acts or omissions of the accused constituted negligence; and, (4) that under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[70]

A review of the existing cases seems to indicate that the element of the offense which causes the most trouble is that the conduct of the accused was to the prejudice of good

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69. In the military, sentences are not adjudged on each count of the indictment, or, to put it in military language, on each specification of each charge, and it is therefore often impossible to determine in a case involving several offenses, including negligent homicide, just what penalty attached to that individual offense. In United States v. Kirchner, 1 U.S.C.M.A., 2 C.M.R. 69 (1952), the sentence was a Bad Conduct Discharge suspended, total forfeitures and six months confinement at hard labor.

70. U.S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook, The Law Officer (1958).

order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. What is such conduct? Would eye witness testimony that the accused immediately after the accident behaved in a most chivalrous manner, or testimony from the next of kin of the victim that the collision was an unfortunate accident and that the accused was a credit to the American armed forces be sufficient to convince a court that the act of the accused was not to the prejudice of good order and discipline? To the first question it would appear such testimony would require the opinion of a witness and if such opinion were admissible it must then be determined whether this evidence would be persuasive.

On the other hand, would newspaper accounts introduced by a zealous trial counsel showing pictures of the accident and pointing out that the accused was an American soldier be of such import as to convince a court the conduct of the accused was to the prejudice of good order and discipline? Would the fact that the incident occurred in a country such as Germany, France, or Italy rather than the United States change the situation? What punishment does the law provide in negligent homicide cases in Japan, Korea, France and Germany or in other countries of the world where our

servicemen are likely to face this question?[71] In the case of the United States v. Lowe,[72] the accused who was not on duty, while operating a privately owned vehicle was involved in an accident in Germany. Subsequently, he was convicted by court-martial on a charge of negligent homicide. The military court held in that case that the mere presence

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71. Article 282 of the Revised Japanese Penal Code, 1961, provides that a person who through negligence causes bodily injury to another shall be punished by a fine not exceeding 100,000 yen or a minor fine. Article 283 provides that a person who through negligence causes the death of another shall be punished by confinement for not more than one year or a fine not exceeding 200,000 yen.

Article 267 of the Korean Criminal Code provides for imprisonment for not more than two years or a fine of not more than 25,000 hwan for negligent homicide.

Article 319 of the French Penal Code provides that any person who by lack of skill, imprudence, carelessness, negligence or failure to observe regulations, involuntarily commits or brings about a homicide, shall be punished by jailing from three months to two years and a fine of 100,000 to 2,000,000 francs.

Section 222 of the German Penal Code of 1871 provides that anybody who negligently causes the death of a human being shall be punished by imprisonment for a maximum term of 5 years and a minimum term of one day.

As might be expected, the Turkish Criminal Code provides for the most severe punishment, section 455 providing that whoever causes the death of a person through negligence or carelessness or inexperience in his profession or trade or inobedience to regulations, orders or instructions shall be punished by imprisonment for two to five years and by a heavy fine of 250 to 2500 liras.

72. CM 407757, Lowe, 32 C.M.R. 597 (1962) pet. denied, 32 C.M.R. 472 (1962).

convictions are likely to [illegible] acquittal.[90] As in the case of the United States v. [illegible],[91] the accused who was not on duty, while operating a privately owned vehicle was involved in an accident in Germany. Subsequently, he was convicted by court-martial on a charge of negligent homicide. The military court held in that case that the mere presence [illegible]

[illegible]

91. Article 209 of the revised Japanese Penal Code, 1951, provides that a person who through negligence causes bodily injury to another shall be punished by a fine not exceeding 100,000 yen or a minor fine. Article 210 provides that a person who through negligence causes the death of another shall be punished by confinement for not more than one year or a fine not exceeding 200,000 yen.

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92. US v. [illegible], [illegible] 12 C.M.R. [illegible] (1953) [illegible], [illegible] C.M.A. [illegible] ([illegible]).

of the accused in Germany pursuant to military orders was a sufficient basis upon which a negligent homicide proximately caused by him could be considered prejudicial to good order and discipline. No other evidence appeared in the record other than the accident itself. The Court of Military Appeals said:

> . . . this was actually the first of four deaths caused by traffic accidents since 1 January 1962; members of the court were aware of command efforts to prevent operation of vehicles under conditions contributing to accidents, and they acted accordingly in imposing the maximum sentence.

To this writer, it would seem certain that any civil action for damages would be defeated.

An opposite position was taken in United States v. Hunt,[73] a case which involved the accused in an auto accident in Texas. The accused was off duty and his military status was not apparent. He pleaded not guilty to the charge of negligent homicide but was found guilty by the trial court. The Board of Review "reversed," noting that the only evidence in the record to prove that the accused's conduct was of a nature to bring discredit on the armed forces related only to the accident itself, and this

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73. CM 397481, Hunt, 27 C.M.R. 557 (1958).

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79. CM 397440, Hext, 27 C.M.R. 537 (1959).

evidence was sharply conflicting. In this case, the defense counsel was able to adduce testimony to the effect that the accident did not result in discrediting the armed forces in the community in which it took place and pointed out the accident took place on a rural road.

In 1961 a United States soldier stationed in Germany[74] drove a vehicle at about 55 miles per hour in a 31 mile per hour zone. It was dark when he hit two Americal soldiers who had been drinking, killing one of them. Both the accused and the victim were in civilian clothes. The Board of Review, citing the Kirchner case[75] said, "Negligent homicide is not only discreditable to the individual but reflects unfavorably upon the reputation of the service when it becomes known that such individual is a member of the service."

In all civilian jurisdictions the offense is statutory,[76] usually a misdemeanor, and does not involve moral turpitude. It is punishable only because by mischance the alleged negligence had a fatal result. In a society where such occurrences are all too common and becoming more so each

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74. ACM 17272, Tomlin, 30 C.M.R. 933 (1961) pet. denied, 30 C.M.R. 417 (1961).

75. Supra note 67.

76. Supra note 65.

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74. _Jones_ note 65.

75. _Burns_ note 67.

76. _Jones_ note 65.

and every day, it seems unlikely that a service member's simple negligence causing or contributing to a fatal accident would have any real effect upon the reputation of the armed forces, particularly in foreign countries when it is considered that today almost every young American not only knows how to drive but owns a car - unlike most other young people in the world. Unless we are prepared to hold that it does have such an effect as a matter of law, we are reduced to making a case by case determination of this element as a matter of personal opinion.

It is submitted that it is impossible to establish objectively that an alleged fatal motor vehicle accident actually discredited the armed forces in the eyes of the general public. This appears to be true not only in the United States but also throughout the countries of the world where our forces are stationed. There is really no way in which such fact can be proved or disproved within the limitations of the rules of evidence and our trial procedure. All we have in many cases is an inference drawn from other facts that the alleged conduct is service discrediting.

In effect when we submit the question of whether the accused's conduct was service discrediting to the court as an element of the offense, we are reverting to the practice

war every day, it seems unlikely that a terrible accident's alleged facilities causing or contributing to a fatal accident would have any real effect upon the impression of the armed forces, particularly in foreign countries when it is considered that today almost every young American not only knows how to drive but owns a car - unlike most other young people in the world. Unless we are prepared to hold that it does have such an effect as a matter of law, we are involved in making a case by case determination of this element as a matter of personal opinion.

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In effect when we submit the question of whether the accused's conduct was service discrediting to the court as an element of the offense, as was prevailing in the practice

of an earlier time when members of a court-martial were the judges of facts and law - under such a doctrine an act is service discrediting whenever a court-martial and a convening authority consider it so.[77]

In jurisdictions outside of the United States the concept that criminally punishable negligence must be on a plane higher than simple negligence is also generally recognized. In the case of United States v. Schultz,[78] the accused, a civilian, was tried by a General Court-Martial in Japan on the charge of involuntary manslaughter and found guilty of negligent homicide. The Court of Military Appeals upheld the conviction of the lesser offense on the basis that it was an offense under Japanese law. However, in first determining that negligent homicide is not a violation of the law of war, the court stated:

> A careful perusal of the penal codes of most civilized nations leads us to the conclusion that homicide involving less than culpable negligence is not universally recognized as an offense. Even in those American jurisdictions still relatively few in number - which have given statutory recognition to either negligent

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77. See opinion of Board of Review member Crooks, in United States v. Hunt, 27 C.M.R. 557 (1958) at page 61.

78. 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

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77. See opinion of Douglas and Burton concurring, in United States v. Bhoni, 77 C.M.A. 537 (1956) at page 63.

78. 3 U.S.C.A. 202, 6 C.M.A. 104 (1953).

> homicide or vehicular homicide, the degree of negligence required is often held to be culpable or gross - the same as required for involuntary manslaughter. Imposing criminal liability for less than culpable negligence is a relatively new concept in criminal law and has not as yet been given universal acceptance by civilized nations.

The court apparently did not consider the Civil Law jurisdictions of the world which have generally provided that death or injury resulting from simple negligence is punishable under their penal codes,[79] and the victim's family had to rely on civil redress.

The Judge Advocate General of the Navy, Digest of Opinions, June 1951 - January 1954, Part A. Homicide, sec. 115.1, p. 418, stated that:

> In order to establish criminal liability for negligence it must be shown that the negligence was aggravated, culpable, gross, or reckless and the evidence must show that the accused knew, or ought to have known that death would likely result from his conduct. Criminal liability may not be predicated on every act negligently performed merely because such carelessness results in the death of another. (citations omitted)

No mention of the offense of negligent homicide appears in the 1928 Manual for Courts-Martial. The first appearance of this offense being specifically mentioned in the 1949 edition which also provided a sample specification in Appendix 4,

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79. Supra note 71.

79. Supra note 71.

page 330, and provided a maximum punishment for the offense in paragraph 117c, page 140.

Although Winthrop[80] makes no mention of the crime of negligent homicide in referring to the general article he states that:

> . . . where such crimes are committed upon or against civilians and not at or near a military camp or post, or in breach of violation of a military duty or order, they're not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.

However, if treated as a civil offense, negligent homicide would generally not be punishable but, with the exception of the Hunt case, supra, the Courts have simply not addressed themselves to this problem or have merely passed over it by indicating that negligent homicide is per se service discrediting conduct. It is incongruous to hold that certain conduct brings discredit upon the armed forces when it does not generally bring discredit upon the individual doing the act. And what is the "prejudice" and "discredit" which is necessary to convict?

It is the writer's opinion that if unlawful homicide through simple negligence is an offense under the Uniform Code of Military Justice, the court is holding military personnel to a degree of care far exceeding that required of

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80. Winthrop's Military Law and Precedents (2d ed. reprint 1920) Chapter XXVIII, p. 724.

other citizens regardless of whether the incident occurs overseas or in the United States. The question arises, however, as to whether greater burdens are imposed upon our servicemen by such treaties as the NATO-SOFA. It would appear that a soldier who has negligently caused the death of a foreign national would become subject to the jurisdiction of the host government, a situation which the United States has attempted to avoid in almost all instances. Why? Certainly in a negligent homicide case the authorized penalty in the civil law countries is roughly similar to what American courts can award. It must be concluded then that the primary reason is the strong desire on the part of the American treaty makers to retain jurisdiction if at all possible in an American system of law thereby providing as much as it is possible those safeguards guaranteed every American by the Constitution. Although great differences in procedure exist between the civil and common law practices, section 9, Article VII, of the NATO-SOFA has provided those basic safeguards to our servicemen overseas.

The only remedy to limit the application of negligent homicide is the enactment of legislation including within the Uniform Code of Military Justice to provide a specific offense of negligent homicide with appropriate limitations

on its coverage. It is difficult to conceive of a solution for the American stationed overseas in the light of the existing legal systems with their high regard for personal property, physical injury and high feelings of nationalism.

V. SEARCH AND SEIZURE CONTINENTAL STYLE

Article VII, paragraph 6(a), of the NATO treaty provides for the international cooperation in the securing of evidence and reads:

> The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. . . .[81]

Our law officers have admitted real evidence seized by foreign investigators when such evidence would have been clearly inadmissible if seized by American investigators. These decisions have been upheld on review.[82] The pertinent portion of the Manual for Courts-Martial concerned with this topic reads as follows:

> Evidence is inadmissible against an accused if it was obtained as a result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States . . . . All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible.[83]

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81. See Appendix A for complete text.

82. Supra note 24.

83. MCM 1951, para 152.

Nowhere does the Manual define or discuss what constitutes an unlawful search although examples are given of searches which are lawful. Nor does the Manual define either "search" or "seizure."[84] For clarification of this very brief Manual discussion, resort must be had to paragraph 137 of the Manual to provide the necessary clue as to where to pursue the inquiry. Paragraph 137 states that:

> . . . so far as not otherwise prescribed in this Manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules at common law will be applied by courts-martial.

Therefore, it may be concluded that those searches considered unlawful in federal trials of criminal cases are of the same types as those considered unlawful in military trials. This in turn requires a consideration of the Fourth Amendment to the Constitution of the United States which reads thusly:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

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84. NCM 58-00130, Millan, 26 C.M.R. 771 (1958) for a "flashlight search and seizure" and subsequent apprehension of the accused; also, United States v. Summers, 13 U.S.C.M.A. 573, 33 C.M.R. 105 (1963, "suspicious individuals.")

place to be searched, and the persons or things to be seized.

It may be concluded that the Manual term "unlawful" is equated to the Amendment term "unreasonable" in reference to searches. Thus, in both civilian and military practice, an unreasonable search and seizure is an unlawful one and the fundamental inquiry in each instance where evidence is sought to be excluded on the ground of an unlawful search or seizure must be whether the search was reasonable.[85] As to seizure of evidence, it must be (1) a fruit or instrumentality of the crime; (2) contraband; (3) weapons, or a means of escape.[86]

Evidence is inadmissible in a military court if obtained as the result of an illegal search conducted by or on behalf of the United States by its officers acting in the enforcement of its laws,[87] and a person (CID agent) duly assigned to law enforcement duty making or participating in a search for the sole purpose of enforcing

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85. United States v. Doyle, 1 U.S.C.M.A. 545, 4 C.M.R. 137 pet. denied, 4 C.M.R. 174 (1952); ACM 15962, Williams, 28 C.M.R. 736 (1960), and an excellent discussion in Hillan, supra note 84.

86. Abel v. United States, 362 U.S. 217 (1960); United States v. Rhodes, 3 U.S.C.M.A. 73, 75, 11 C.M.R. 73, 75 (1953).

87. Supra note 83.

military law is acting under the authority of the United States.[88] A search conducted by one having direct disciplinary authority over the accused is likewise a search under the authority of the United States inasmuch as the problem of law enforcement is often a problem of military command.[89]

A search has been considered to be one "instigated by" the United States where the mere presence of military investigators at the scene occurred.[90] It appears that a higher degree of participation by federal officials is required in an overseas area, since the presence alone may not be sufficient to make the fruits of such search inadmissible.[91] Obviously the law of search and seizure, admittedly complicated is further made so when the overseas factors of foreign law and international treaties are added to the picture.

The typical situation overseas is where certain evidence obtained by local civilian police during a search of the

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88. United States v. Volante, 4 U.S.C.M.A. 689, 16 C.M.R. 263 (1954); ACM 17070, Moore, 33 C.M.R. 868 pet. denied, 33 C.M.R. 436 (1963).

89. United States v. Volante, supra note 88; United States v. Doyle, supra note 85.

90. United States v. Doyle, supra note 85.

91. United States v. Doyle, supra note 85.

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90. United States v. Valente, 352 U.S. 884 (1956).

91. United States v. Toscanino, supra note 15.

accused's house is turned over to the American trial counsel for use at a general court-martial. The standard objection by the defense counsel - that the evidence was unlawfully seized even though the local civilian police acted according to the local law, is made. Is the proof offered by the trial counsel that the local police conducted the search strictly in accordance with local law relevant? What law is relevant? These questions have arisen in two cases, one a 1954 case arising in France,[92] and the other a 1962 case arising in Germany,[93] two civil law countries, but with different results.

A French criminal investigator acting under letters rogatory issued by a French magistrate interviewed the accused, an American soldier suspected of being a "pusher" for a counterfeit American Express Traveler Checks ring. The French agent was accompanied by an American MP who had been made available on request. The American representative searched the accused's Bordeaux apartment where the American found evidence which tended to incriminate the accused. When confronted with this evidence, the accused confessed

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92. United States v. DeLeo, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954).

93. CM 407443, Rogers, 32 C.M.R. 623 (1962).

to the American after compliance with the provisions of Article 31 of the Uniform Code of Military Justice. Subsequently, at his trial by court-martial the accused objected to the admission of the evidence obtained from the search on the grounds that the search was unlawful, and to the admission of his confession on the grounds that it fell within the "fruit of the poisonous tree" doctrine. His objections were overruled and the evidence was received. On appeal, the Court of Military Appeals held the evidence was properly admitted, citing paragraph 6(a) of Article VII of the NATO Status of Forces Agreement,[94] which states as we have seen that there is a duty to "cooperate with foreign agents in the investigation offenses committed by servicemen and in the collection of incriminating evidence." Thus, the court reasoned that the American agent's presence was legal, and dismissed his participation in the search as merely incidental - in no way changing the fact that the entire episode was instigated by the French and was "primarily" their investigation. In dissenting, Judge Latimer stated that the fact that the armed forces are scattered throughout the world makes no difference to a serviceman's military judicial

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94. See Appendix A for complete text.

rights inasmuch as the Uniform Code of Military Justice controls courts-martial wherever they are held and that the law should be interpreted and applied without regard to venue. He contended that when persons subject to military law are tried by courts-martial, the law should apply equally and not geographically and that the United States has a duty to protect the men it sends overseas, particularly since an American serviceman's home is entitled to be protected from invasion by other Americans regardless of where this home is situated.

Judge Latimer then pointed out that the French letters rogatory did not identify the accused, describe the premises, or the property to be searched, left the time of expiration indefinite, and therefore did not meet the standards of our law with respect to search warrants. He argued further that any search conducted pursuant to a warrant invalid by reason of failure to measure up to federal standards is not reasonable. Judge Latimer drew an analogy between a federal-state venture in the United States and the same acts overseas, saying that if the degree of participation is sufficient to support a finding that it is a federal venture to obtain evidence in the states, he would make the same finding for the same acts overseas.

The majority held that the enterprise was initiated by the French inspector and the motive for its existence emanated wholly from the French police, with the American present a no more than incidental element, therefore, the search was not an American one. Consistent with this view is the American's testimony that the French inspector had originally investigated the contents of the accused's writing box and that thereafter the former solely by chance glimpsed a slip of paper containing a signature which was vital to the case. To this specific bit of evidence, Judge Latimer stated he could not escape the conclusion that the American participated upon the chance, which subsequently materialized, that something would be uncovered of official interest to him as a military law enforcement officer.

In the 1962 case of United States v. Rogers,[95] the court held that the legality of a search of the accused's off-post quarters in Germany incident to apprehension of his German wife by German authorities and an American CID agent, must be determined under the laws of the United States and United States military law in the absence of any formal proof of German law. The Board of Review held that the record

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95. Supra note 93.

15/ Supra note 13.

supported a conclusion that military authorities both instigated and participated in a search of the accused's quarters where it showed that a military officer received information that the accused's German wife had attempted to sell cigarettes of the same brand as those stolen from an exchange and that she had sheets and silverware. The officer notified the Provost Marshal and a CID investigator, who in turn notified German authorities the accused's wife was expected to attempt further sales that night, and subsequently the Provost Marshal, his assistant, a CID agent and the German authorities observed the accused's wife carry a sack out and across the street to a bar, whereupon the German authorities apprehended her in the bar, and that military personnel accompanied German authorities to the accused's apartment and while the accused was present commenced a search. When the accused asked for a search warrant he was informed that none was necessary since the search was being conducted by the Germans. The search uncovered some silverware and bed sheets and when the accused kept interfering with the search a military police patrol was called to remove him. The German and American police authorities remained to complete the search after which all of the seized property was taken to the CID office.

of the United Kingdom have taken to the CID office.

At the subsequent court-martial, the defense counsel argued: (1) that the search was a military search conducted at the instigation of, in the presence of, for the purpose of, and in close association with the American authorities; even had this not been an American search the items seized would be inadmissible in a federal or military criminal proceeding; (2) appellant's two pretrial statements were the fruit of the unlawful search and seizure, and therefore, inadmissible; (3) use of tainted statements substantially prejudiced the substantial rights of the accused with respect to all offenses charged and that therefore, reversal is required. The trial counsel took the position that the reasonableness of the search was supported by the laws of the United States if not German law, arguing that the search was a German one, pursuant to German law and not an American search at all.

The Board of Review, in dismissing the charges and specifications, held that since the initial arrest and search of the accused's wife was instigated and participated in by persons acting on behalf of the United States, and such arrest and search were unlawful, it follows that the same taint of unlawfulness for lack of probable cause attaches to the subsequent search made by the German and American police authorities in the accused's apartment.

What then are the rules which were set forth in these cases? Certainly the factors which surround the obtaining of the evidence should be carefully examined in determining whether American investigators participated, particularly since a close working relationship exists in most cases between American and foreign authorities. The distinction between these two cases is obviously that in the former case, the search, at least based upon the evidence in the record, was instigated by the French and the American was along only incidentally, while in the latter case, it was an American military officer who notified the Provost Marshal who in turn notified German authorities. It can be said that in each instance the foreign and American authorities were merely complying with the terms of paragraph 6a, Article VII, of the NATO-SOFA.

Two interesting cases are United States v. Carter[96] and United States v. Bial.[97] In the former case the facts of which are not relevant here, incriminating statements obtained from an accused by coercion were held to be inadmissible without regard to whether the coercion was

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96. Supra note 33.

97. 9 U.S.C.M.A. 700, 26 C.M.R. 480 (1958).

exerted by a government agent or a private individual. In the latter case, a confession taken by a Texas policeman without a preliminary warning and under such circumstances that under Texas law the accused should have been given such warning was not rendered inadmissible before a court-martial inasmuch as the members of the Houston Police Department are not subject to the Uniform Code of Military Justice and no evidence was produced to show the police officer acted for or on behalf of the military service. The court stated:

> . . . military courts may convene in all States and foreign countries, and we are not disposed to have military law vary according to the laws of each jurisdiction. . . . article 31b is the controlling Federal statute in this case and the scope of the preinterrogation warning there provided is confined by its literal terms and extends only to persons subject to the Code and those acting for and in concert with them. . . .[98]

It would appear that under the provisions of paragraph 152, MCM 1951,[99] a search with United States military law

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98. "No person subject to this code shall interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." UCMJ article 31(b).

99. "A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation

enforcement personnel accompanying the local foreign police would be entirely lawful under United States law. Even if the search was illegal by our laws the evidence obtained from such a search would be admissible in a court-martial trial so long as the search was not managed or controlled by federal agents so as to make it a federal undertaking.[100] Although the off-post dwelling of military personnel in the United States may not lawfully be searched without a warrant, paragraph 152, MCM 1951, prescribes a different rule for foreign countries. Under this rule, it appears that a legal search of property may be effected, (1) if the property is located in a foreign country; (2) it is used by a military person, and (3) if the search is one authorized by the Commanding Officer. The court in DeLeo[101] considered that such a search would be reasonable within the meaning of the fourth amendment, with the result that there could be no problem of possible inconsistency between the manual and that amendment, assuming that the latter is to be accorded

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99. (Continued)or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer having jurisdiction over the place where the property is situated, or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. . . is a lawful search."

100. Supra note 92.

101. Supra note 92.

[illegible]

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99. (continued) or a foreign country or in several territories and in general, used, or occupied by persons subject to military law or to the law of war, within which posts have been established by a commanding officer having jurisdiction over the place where the property is situated," or, if the property is in a foreign country or in unoccupied territory, many persons subject to military law or to the law of war in the place where property is situated, " is a lawful seizure."

100. Supra note 99.

101. Supra note 99.

extra-territorial effect. The court went one step further when the consent of the Commanding Officer was inferred from his silent acquiescence. As noted, the NATO-SOFA[102] goes even further in providing for the mandatory assistance between law enforcement personnel in investigations and the collection and production of evidence including the seizure. It would seem that in the light of a strict interpretation of the agreement a contrary result would be required in the Rogers[103] case, particularly since the case involved a violation of German law.

In the recent case of United States v. Smith,[104] the treaty was given full support where American CID agents accompanied the German police in an apprehension of a serviceman suspected of murder as he was returning to off-post quarters with his wife who was a German national. At the time of the apprehension, no explanation for the arrest was made to the wife. The following day, CID agents and German police met at the accused's home, and one of the German policemen told Mrs. Smith, "We came with the CID and they make

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102. See Article VII, para 6(a) of Appendix A.

103. Supra note 93.

104. 13 U.S.C.M.A. 553, 33 C.M.R. 85 (1963).

extra-legal arrests. The court went one step further when the consent of the Commanding Officer was inferred from his silent acquiescence. As noted, the NATO-SOFA[104] goes even further in providing for the mandatory assistance between law enforcement personnel in investigations and the collection and production of evidence including the seizure. It would seem that in the light of a strict interpretation of the agreement a contrary result would be required in the Gordon[105] case, particularly since the case involved a violation of German law.

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104. See Article VII, para 6(a) of Appendix A.

105. Supra note 73.

106. 13 U.S.C.M.A. 553, 33 C.M.R. 85 (1963).

a house search with you." A second German policeman said, "There would be a search." The German police had no warrant and did not participate in the search which was conducted by the CID. The CID agent asked if he could search and Mrs. Smith "consented" although she had not been told the purpose of the search. During the search a pair of boots was seized. Two days later, the CID agents returned and told Mrs. Smith, "We are back here, we'd like to search your house again." She replied, "Very well, come on in." The agents had no warrant, had not secured the accused's permission, and had not informed Mrs. Smith of the charge against her husband. During the search, a pair of bloodstained shoes was seized. The court declined to decide the question of whether a wife has implied authority to consent to a search of her husband's property, finding that the Government had failed to show consent to the search by "convincing evidence" or "clear and positive proof." Assuming that under the facts shown, Mrs. Smith's "consent" amounted to no more than mere submission to the color of authority of law enforcement officers or acquiescence in their announced purpose to search, the Court held that the admission of the evidence was not prejudicial error.

In both the Smith and Rogers cases, United States military law enforcement officials conducted, in coordination with local police, searches of "economy" houses rented by servicemen. It appears that this coordination, although not set forth in step by step detail in paragraphs 6a and 10a of Article VII of NATO-SOFA, is generally provided for. Various letters received by the writer indicate local policy may differ not only from area to area but from country to country as well. These Staff Judge Advocates overwhelmingly stated that their own local arrangements saved time and were most effective. The NATO-SOFA specifically provides for local liaison with those authorities and in so far as is necessary to maintain discipline and order among the members of the force.[105] The aforementioned cases have involved off-post searches. Would it have made a difference if the accused's house had been "on post"? To find the answer we must again refer to Article VII of the NATO-SOFA. Although not specifically covered, paragraph 6a does state, "The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations. . . ." On the other hand, paragraph 10(a) provides

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105. Supra note 102.

103. Burns supra 109.

only that the sending State shall have the right to police its camps or other premises which they occupy as the result of an agreement with the receiving State. Paragraph 10(b) specifically limits the employment of military police outside of the premises, camps, etc., only subject to arrangements with the authorities of the receiving State and in liaison with those authorities.

Paragraph 6a of Article VII of the NATO-SOFA also provides for the "handing over" of any evidence seized by the law enforcement agents of the sending State to the receiving State "in proper cases." Nowhere is a "proper case" defined or an explanation of who will make this determination apparent. Suppose that United States law enforcement officials obtain "evidence" unlawfully, may they turn it over to the local police in a concurrent jurisdiction situation? Is there a conflict with our own Federal Rules of Criminal Procedure? In the case of Rea v. United States,[106] the facts briefly stated were that a Federal narcotics agent obtained narcotics from the accused under a search warrant issued in violation of Rule 41a of the Federal Rules of Criminal Procedure. The accused was subsequently prosecuted by the District Court,

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106. 350 U.S. 214 (1955).

but when the evidence was suppressed, the indictment was dismissed. Thereafter, the accused was charged with possession of marihuana in violation of New Mexico law and was convicted although the accused filed to enjoin the federal agent from testifying in the state action relative to the illegally obtained evidence. On appeal, the Supreme Court held in granting the injunctive relief asked for by the accused, that the policy of the Federal Rules of Criminal Procedure governing searches and seizures is defeated if the federal officer can use the fruits of an unlawful search either in federal or state proceedings. Another more recent case involving the same point is Cleary v. Bolger.[107]

How then can we justify this same action on an international scale that has been ruled illegal in the United States to the detriment of our citizens. In the United States we say, no, this illegally obtained evidence must be suppressed, although it may still be used in the state courts, while "anything goes" overseas as long as we can justify the matter by a provision of the international agreement, at least as far as our military courts go. Possibly this is necessary because of military necessity, or maybe we have

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107. 371 U.S. 392 (1963).

seen a few of the early decisions on the subject which may well change as we gain time and experience with international treaties. Time alone may provide the answer to these questions.

Two recent cases of considerable import in this area concerning civilian employees of the armed forces in Japan are Gaylor v. United States,[108] filed in the United States Court of Claims June 15, 1966, and Powell v. Zuckert,[109] decided July 28, 1966 in the United States Court of Appeals. Because I believe these cases are of such importance, I will state the facts of each in this paper.

Ralph Gaylor was a civil service employee of the United States Air Force in Japan who was suspected of misconduct and fraud. Subsequently, two OSI agents armed with a general search warrant signed by an Air Force Colonel named Wilson whose status was undisclosed authorized them to search Gaylor's person, his two automobiles and his quarters located at Washington Heights Military Compound near the center of Tokyo under the jurisdiction of the Air Force, and to "seize any property pertinent to such investigation." No probable cause was

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108. 35 U.S. L. Week 2006 (Ct. Claims June 15, 1966) recommended decision of Commissioner Day.

109. United States Court of Appeals for the District of Columbia Circuit No. 19,793 decided July 28, 1966.

indicated to the Colonel who signed the "warrant", no oath was given, and there was no limitation of matters to be seized. The agents, after reading the Fifth Amendment and Article 31 of the Uniform Code of Military Justice to the accused, advised him of his right to counsel and proceeded to search and seize all documents in his home, his office, his autos, commingling them into a pile three inches high.

On the basis of the seized documents Saylor was removed from his job although at the hearing, Saylor was given an opportunity to view each document and did not object to its admission into evidence. Saylor, who was entitled to the benefits of the Veteran's Preference Act of 1944, brought suit for back pay by reason of his alleged unlawful removal from his civil service position. The issue before the court was whether by failing to object to the admission of this evidence Saylor waived his right to do so.

The Air Force defendant justified the search complained of by its statement that the search occurred at a military installation in Japan where no American court is available and empowered to issue warrants. It was also argued that the plaintiff being a civilian employee serving with the military overseas is subject to the Uniform Code of Military Justice.[110]

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110. UCMJ art. 2. "The following persons are subject to this chapter: (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by or accompanying the armed forces outside the United States."

[illegible]

[illegible]

While the language of the Code expressly includes persons "employed by" the armed forces outside the United States, it also included those accompanying such forces. The Supreme Court, in 1957, held that wives of servicemen serving abroad were entitled to all of the protections of the Constitution including the right to be tried by a jury.[111] The Supreme Court held, in those capital cases, that the Uniform Code of Military Justice did not apply to the wives "accompanying such forces," or rather, it held that Congress in enacting the Code and including that language could not deprive those wives of their Constitutional right to a trial by jury in a civilian court. Although those were criminal cases and this is a civilian pay case, the parallel would seem to be that Congress could no more deprive a civilian employee of the Army, serving in Japan, of his Constitutional right to be secure in his Japanese home, albeit on a military reservation abroad, from the unreasonable search and seizure, guaranteed to him by the Fourth Amendment. The Government cited a number of cases for the long held proposition that a military commander, under the Uniform Code, has the authority to conduct searches and seizures on a military

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111. Supra note 8.

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installation, even though occupied as a residence, as an indispensable element to the maintenance of order and discipline.[112] Ultimately, the Fourth Amendment stood as the only bulwark remaining against unreasonable search and seizure of his private papers in his house and automobiles, and against any search except pursuant to a warrant issued upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized. The court held the only compliance with the requirements of the Fourth Amendment was that the quarters were identified as were the automobiles. The warrant was, therefore, held to be a nullity and the search under it unlawful. The accused was entitled to recover pay and emoluments since his removal from his position was of no force or effect.

In Powell v. Zuckert, the appellant was an employee of the Air Force in Japan who was removed from his position for various violations of regulations. Sixteen months later he filed suit contesting his removal, claiming the reason for the delay was his abject poverty. The facts of the case were undisputed even as to the search of the accused's off-base

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112. Best v. United States, 184 F.2d 131 (1950), cert. denied, 340 U.S. 939 (1951); Grewe v. France, 75 F. Supp. 433 (1948); United States v. Grigsby, 335 F.2d 652 (1964).

private dwelling. Armed with a Japanese search warrant obtained pursuant to a request by the Air Force Office of Special Investigations, the OSI agents and Japanese officers searched appellant's home. The search was a general one, the Japanese warrant reciting that objects to be seized in the search included, "typewriters, United States property, official documents, memos, diary, documents, everything in relation to the case." The agents went through thousands of his private papers including letters from his deceased mother. Five charges were subsequently pressed against appellant. The first and third charges were proved by evidence or affidavits based on evidence seized from appellant's home despite objection by counsel that the search and seizure was unlawful. Appellant had objected to the search and seizure once during the hearing.

The court citing Seylor v. United States and the Fourth Amendment said that the Fourth Amendment is violated by a general search such as the one in this case.

The Government's position is that the search was made lawful by paragraph 6a, Article XVII, Agreement under Article VI of the Treaty of Mutual Cooperation and Security, 11 U.S.T. 115, which provides:

> The military authorities of the United States and the authorities of Japan shall assist each other

> in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, handing over of objects connected with an offense.[113]

This, appellee contends, made lawful the presence of Air Force agents "as observers during the execution of a valid Japanese search warrant for appellant's off-base residence." Citing Reid v. Covert, as in the Saylor case, the obvious answer was made that no agreement with a foreign nation can confer power on the Congress or on any other branch of Government which is free from the restraints of the Constitution.

In holding for the appellant the court held that the record conclusively demonstrated that OSI agents requested the search and actually conducted it.

Clearly these two cases stand for the rule that the Fourth Amendment overshadows in importance any international agreement, Air Force or other regulation as well as the Uniform Code of Military Justice at least as far as civilian employees are concerned when the issue of search and seizure is raised.

One wonders for what reason have we entered into treaties and agreements throughout the world when it was fairly obvious that the agreed upon provisions might well be declared

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113. This provision is identical with para 6a of Article VII of NATO-SOFA.

unconstitutional in their application to American citizens, be they in uniform or not. Of what value are such agreements which while conforming to the standards of the host country limit the constitutional rights of our citizens and if when the test is made, the treaty must fall to the Constitution! Why not enter into agreements which conform to the Constitutional safeguards in the first instance? Are not the drafters of our international agreements aware of Article VI of the Constitution which reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Is this another example of Constitution-bending to seek a temporary solution or a desired result?

Certainly the power of search and seizure of the Commanding Officer overservicemen is necessary. It is necessary for the morale and discipline of the armed forces. But what effect on that same morale does the fact that the Constitutional guarantees apply to the civilians accompanying the military overseas while they do not apply to the serviceman who works alongside that same civilian at a much lower rate of pay?

What then is the solution to these problems? It is doubtful that the United States could ever impose the requirement upon the receiving states of the world that our Constitutional safeguards to our citizens must be complied with when those nations do not apply those same safeguards to their own nationals. Since as a practical matter we cannot "up date" our Constitution or that we would want to, why not amend the Uniform Code of Military Justice, or better yet, reverse those poor decisions which have altered the already existing provisions of the Uniform Code of Military Justice by restoring to the Commanding Officer the power to take what action he deems necessary in regard to search and seizure. As insurance, let us require him to comply with the same mandates a judge in the United States is required to meet, that is, that the search warrant be based upon probable cause with the limits of search set forth in the document itself. Additionally, let us adhere to Article 2, Uniform Code of Military Justice, as originally written and once again make it applicable to civilians and dependents, not only during time of war, but whenever they accompany our armed services. Since the United States is entirely a creature of the Constitution, it can only act in accordance with all the limitations imposed by the

Constitution. Our Constitution gives the power and authority to the United States, but let us interpret its provisions in a sane and logical manner as its drafters intended!

VI. SECURING THE ATTENDANCE OF FOREIGN CIVILIAN WITNESSES

It is the duty of the trial counsel to insure the presence of those witnesses who are necessary to the trial of the issues involved in the case.[114] These witnesses include those requested by the defense. The trial counsel is authorized to subpoena as a witness, at government expense, any civilian who is to be a material witness and who is within any part of the United States, its Territories, and possessions, and can compel the attendance of such a civilian.[115] Civilian witnesses usually are willing to attend a trial voluntarily when it is clearly understood that their expenses plus a fee will be paid. Consequently, unless there is reason to believe that the witness will not attend without personal service of a subpoena, all that is necessary is that subpoena in duplicate be mailed to him with a request that he sign his acceptance of service on the copy and return the signed copy to the trial counsel. Tender of fees and mileage may be made in advance. Personal service

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114. MCM 1951, para 115.

115. UCMJ art. 46.

of laws and diligence may be made in advance. Personal evasion
with a reluctance that he risk non-compliance of neither on the
ease and notice the client avoid to the trial counsel. Under
which a reluctance that he risk non-compliance of neither on the
necessary to that subpoena to duplicates be mailed to his
address without personal service of a subpoena, all that is
unless there is reason to believe that the witness will not
that their presence also - fee will be paid. Commonwealth,
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and patience, and can compel the attendance of even a
who is within any part of the United States, its Territories,
peace, and dignity who is to be a material witness and
is entitled to subpoena as a witness, is punishable ex-
language thereby declared by the defendant. The trial counsel
of his legal interest by the case."[114] Their attendance

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113. Manual, supra 115.

114. Ibid, para 116.

should be made upon the witness in those cases in which it is believed that the witness will be unwilling to attend trial voluntarily.[116]

Although it appears that the obtaining of witnesses before a court-martial convened in the United States, its Territories, and possessions seems a rather elementary exercise, such is not the case when the witnesses required are foreign nationals in their own country for obviously the trial counsel has no subpoena power over them. How then are witnesses secured in a receiving state? A survey of Judge Advocate Officers located in seven countries in which we have servicemen stationed was conducted by the writer to find the practical approach to this and other questions. The major conclusion which the writer was able to deduce was that a different situation arose not only in different countries but also within different areas of the same country.

Article VII, 1(a) of the NATO Agreement provides that "the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of

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116. Supra note 114.

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118. Supra note 111.

that State." This means the right of courts-martial of the sending states to sit in the receiving state has been considered and provided for.

In the case of civilian employees whose presence is desired at a court-martial, they are merely asked to appear at a designated time. Usually the superior of the individual is approached and arrangements made for his release without penalty from his work. None of the commands surveyed indicated they had ever had any difficulty in these situations.

The attendance of dependents as witnesses at a court-martial appears to be no special problem. Usually a request from the appropriate authority is all that is necessary to insure their presence.

As noted earlier in this paper, Article VII, paragraph 6(a) contains a general provision which requires reciprocal assistance "in the collection and production of evidence." One author on this subject has stated that it was contemplated that under this provision receiving states would be obligated to compel the attendance of their nationals.[117] It appears that only the United States[118] and the United

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117. Snee and Pye, Status of Forces Agreement: Criminal Jurisdiction at 95 (1957).

118. Service Courts of Friendly Foreign Forces Act, 22 U.S.C. 703.

Kingdom[119] have implemented the obligation. One Staff Judge Advocate replied to the above matter by stating,

> On rare occasions when witnesses are needed, we just ask them if they will attend, which they usually do and of course we pay those authorized allowances to them. If the witnesses were not willing to attend we would request the aid of the police in obtaining a subpoena. There does not appear to have been any problems in this field.

Another Staff Judge Advocate in Spain replied:

> With regard to witnesses we do have problems. Spanish nationals have a reluctance to testify at our courts-martial and unless they are vital, we normally don't use them. When we must have them to perfect a case, the local police or Guardia Civil have been most cooperative and helpful in accordance with our agreement with them. The witnesses are of course compensated in accordance with our regulations for witness fees, etc. In actual practice, if the Spanish "victim" doesn't come willingly, we tend to use Commanding Officers Non-Judicial Punishment as an expedient wherever possible. Quite naturally we try not to raise any major issues, but where we must have a witness and he refuses to cooperate, we forward a request to the Mixed Commission via the country representative.

Where a member of a visiting force is tried in a court of the receiving state he is, on the other hand, entitled "to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving state."[120] The receiving state can summon members of the

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119. Snee and Pye, supra note 117 at 97.

120. See Art. VII, para 9(d) Appendix A.

119. Same case, [illegible] same as 27.

120. See art. VII, para 4(b) [illegible] s.

visiting force as well as its own nationals, though it may need the assistance of the commanding officer to effect service on a base.[121] It would seem then, a member of a force may be more effectively protected when tried by a foreign court than when tried by a court-martial.

May a foreign national called as a witness before a United States court-martial refuse to testify on the grounds that his testimony may tend to incriminate him? In a 1956 case tried in Japan,[122] a Korean national called as a witness did just that. The Korean had charges pending against him in a Japanese court. The law officer properly overruled the witness and ordered him to testify pointing out that Article 31 extends only to prosecution under the laws of the United States, that the witness was not subject to the territorial jurisdiction of any American court, and that the privilege is personal to the witness and the accused cannot complain. This holding appears to be logically sound for several reasons: First, it is not the duty or power of one State, or of its courts, to be concerned in the criminal law of another State. It could not be otherwise!

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121. Snee and Pye, supra note 117 at 94.

122. Cf., United States v. Murphy, 7 U.S.C.M.A. 32 21 C.M.R. 158 (1956).

Secondly, the courts of one State know little of the policies and rules of other legal systems even though those States may have civil or common law histories; further, a State risks error and adds great burdens in attempting to master another State's systems. Thirdly, the Constitution prohibits an invasion of privacy only in those proceedings over which the Government has control. Our Government has no control over the proceedings, say, in Japan. Lastly, a law officer cannot as a practical matter judicially note Korean, Japanese or the law of any other foreign sovereignty. To attempt to do so would not only be foolhardy but it would impose too great a burden on our military judges.

Under the NATO Agreement, the United States has assumed the obligation of assisting the authorities of the receiving State in the collection and production of evidence for use in trials by the receiving State. Certainly it can be argued that orders to give such testimony to a foreign court is either actually or potentially in compliance with the obligations assumed under the treaty to assist the foreign authorities in the collection and production of such evidence. In the case of United States v. Murphy,[123] Judge Quinn expressly referred

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123. Supra note 122.

[13]. Supra note 2127.

to the similar provisions of the Japanese Administrative Agreement[124] in reserving judgment on this precise question. The Administrative Agreement under Article III of the Security Treaty with Japan provides that "the authorities of the United States and Japan shall cooperate in making available witnesses" for criminal proceedings in their respective tribunals. Judge Quinn, in referring to this provision, said:

> If this provision extends to the use of the process of one government to compel a witness, not otherwise amendable to the process of the other government, to appear and testify, I doubt that such a witness can be forced to incriminate himself.

Certainly to cooperate in making available witnesses does not contemplate requiring those witnesses to testify, for to do so would be a clear violation of our Fifth Amendment. Judge Quinn is absolutely correct.

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124. Supra note 12, 3 U.S.T. 3354, Art. XVII, sec. 3(e).

15/ Ibid., 1 Tim 2:2. [illegible]

VII. CONCLUSIONS

The fears and doubts that our servicemen would be tried by "kangaroo courts" or that the signatories to the NATO-SOFA would refuse to waive jurisdiction in concurrent jurisdiction type situations, as well as a host of other imagined evils did not materialize when the NATO-SOFA came into effect. These doubts were expressed not only in Congress but throughout the United States wherever Americans gathered because these same doubts were reflected in our news media.

While the agreements have not proven to be the panacea for all of the problems which have arisen as a result of the global dispersion of our armed forces, all available evidence indicates our visiting forces have been treated fairly, impartially and often more leniently than they might have been at home.[125] The agreements have done the job for which they were intended. Thus the early attacks on SOFA have been proven to be unjustified.

The SOFA have at least provided a workable device with which our visiting military forces have been able to function although sometimes only because of the combined efforts of host State officials and our military representatives. As

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125. Supra note 63 at 18.

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[153]. Ibid., note 47 at 68.

long as United States military personnel are not in fact subjected to unfair treatment or incarcerated for acts which violate our own principles of justice, these agreements are in the best interests of the United States. In almost every instance the agreements while taking into consideration local problems, have evolved into mutually satisfactory arrangements.

The problems which have been encountered in the administration and implementation of the treaties and agreements should not be unexpected for this is a relatively new kind of law. New to all who must work with it. The area of waivers, it seems clear to the writer, is one which may well be improved. Possibly a clearer definition or classification of offenses would expedite the determination as to which country has jurisdiction, and thus dispel the occasional difficulties which have arisen over this question in the past. All too often the fact that the SOFA resolve problems of jurisdiction and not the guilt or innocence of the accused is overlooked. However, it is now clear substantial justice is achieved and this was the primary goal.

In case after case one fact is most apparent, and that is the outstanding performance of duty of the service lawyers.

As long as the armed forces of this country continue to utilize the competent service lawyers in the implementation of these agreements, the cooperation of foreign officials will continue to be nutured and problems minimized!

As long as the armed forces of this country continue to utilize the competitive service schools in the implementation of these requirements, the compensation of foreign officials will continue to be matured and problems minimized.

APPENDIX A

Article VII, NATO SOFA Agreement

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction converred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

2. (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise

jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the other State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

5. (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.

(c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

6. (a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by one authority delivering them.

(b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.

(b) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its forces for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled-

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charges made against him;

(c) to be confronted with witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;

(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.

(b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State, and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.

11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

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