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The Return of United States Servicemen for Offenses Committed Overseas

Stanley D. Metzger

*John P. McMahon**

I. INTRODUCTION

EXTRADITION HAS always been a timely subject, but rarely has it been more in the forefront of public discussion and dispute than in the current season of hijackings and related acts of violence. It is peculiarly appropriate to consider, in this connection, the legal

problems involved in returning United States servicemen to the place where they are alleged to have committed criminal offenses while serving in foreign countries.

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There are over one million members of our armed forces stationed in some 384 facilities and 3,000 minor installations overseas.¹ While the great ma-

majority of servicemen stationed on foreign territory are law-abiding soldiers anxious to complete their tours of duty honorably and to return to their education or other peaceful pursuits, inevitably there are those who violate the local laws. Some do so inadvertently while performing their official duties or conducting their personal activities. But a small, although significant, minority commit deliberate crimes of malice against members of the local population. The much publicized allegations of "war crimes" in Vietnam are examples of offenses committed in the hostile environment of armed conflict. As the statistics compiled by the Department of Defense indicate, however, a substantial number of servicemen commit serious crimes un-

* The views expressed herein are those of the authors and do not necessarily reflect the views of the Judge Advocate General's Corps or those of any other agency of the United States Government.

¹ Symington, *Congress's Right to Know*, N.Y. Times, Aug. 9, 1970, § 6 (Magazine), at 62.

der noncombat circumstances, in the areas surrounding bases and in cities far removed from hostilities. Taking as examples some offenses which are normally extraditable under United States treaties,² in the 5-year period from December 1, 1963, to November 30, 1968, American servicemen stationed abroad were alleged to have committed 980 homicides, 1,258 rapes, 78 arsons, 7,772 robberies and larcenies and 2,891 aggravated assaults.³ These statistics represent only those offenses which were subject to the host countries' primary jurisdiction under agreements with the United States; offenses which were subject to the primary or exclusive jurisdiction of the United States, such as offenses committed in the performance of official duty, are not included.

Considering the large number of offenses committed, it is not surprising that sometimes an individual accused of an offense is no longer in the host state's territory when the local authorities decide to prosecute him. He may have been transferred to another place or discharged from the service before the offense, or his connection with it, was discovered. And as a recent case shows,⁴ administrative errors will sometimes result in the transfer of a serviceman from the host country while his prosecution is pending. Moreover, in this jet age, it is not inordinately difficult for a United States serviceman, without leave from his superiors, to depart from the host country to avoid prosecution.⁵

This article analyzes the issues which arise if the accused serviceman escapes to or is transferred to the United States, and the foreign country in which he allegedly committed the offense demands his return.⁶ While there is limited authority on the issues raised, sev-

² See 39 AM. J. INT'L L. SUPP. 743-56 (1935).

³ Dep't of Defense, Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel, for the periods Dec. 1, 1963-Nov. 30, 1964, Dec. 1, 1964-Nov. 30, 1965, Dec. 1, 1965-Nov. 30, 1966, Dec. 1, 1966-Nov. 30, 1967, and Dec. 1, 1967-Nov. 30, 1968. See also S. REP. NO. 651, 91st Cong., 2d Sess. (1970); S. REP. NO. 1630, 90th Cong., 2d Sess. (1968); S. REP. NO. 946, 90th Cong., 1st Sess. (1967); S. REP. NO. 1881, 89th Cong., 2d Sess. (1966); S. REP. NO. 707, 89th Cong., 1st Sess. (1965).

⁴ Williams v. Rogers, Civil No. 1027 (D.N.D., May 6, 1971), appeal No. 71-1249 (8th Cir., filed May 10, 1971).

⁵ See United States *ex rel.* Stone v. Robinson, 309 F. Supp. 1261 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970).

⁶ Throughout the text, the discussion of the "return" of U.S. servicemen should be understood as referring to the return for the purpose of trial in a foreign court or to serve a sentence imposed by a foreign court. The use of the term "extradition" should not be taken to mean that such "return" is extradition in the usual sense of the term. Indeed, whether the return of a serviceman in such circumstances is or is not extradition is one of the central issues discussed.

eral recent cases make a discussion of the topic particularly timely and appropriate.

In *United States ex rel. Stone v. Robinson*,⁷ a member of the United States Air Force was convicted of robbery and attempted rape by a Japanese court and sentenced to 6 years confinement at hard labor. He remained in the custody of the United States military authorities pending a decision on his appeal. On August 29, 1969, the Supreme Court of Japan affirmed his conviction. Stone had not been confined by the U. S. military authorities, and on September 12 he departed for the United States without leave. When the military police apprehended him in Pennsylvania, he petitioned for a writ of habeas corpus, asserting that he was no longer in the Air Force because certain extensions of his service were neither consented to by him nor validated by the administering to him of the oaths required by law.

In denying Stone's writ, the district judge was aware that the Japanese Government had requested Stone's return to Japan and that the Air Force intended to return him there to serve his sentence; however, the legality of the impending extradition was not raised by counsel nor considered by the court. The court stated:

Since the United States Government had an obligation to retain custody of the petitioner pursuant to the SOFA [Status of Forces Agreement] with the Government of Japan, and the petitioner had an obligation to make himself available when wanted by the Government of Japan, neither the Government of the United States could breach its obligation to Japan, nor could the petitioner after the appellate proceedings became final, suddenly leave the jurisdiction of Japan. When he did leave the jurisdiction of Japan, it was incumbent upon the United States Government to arrest and seize him, wherever it could find him, and return him. I therefore conclude and hold that the arrest by the Armed Forces of the petitioner as of the time when he was arrested was a valid arrest and that the Government of the United States is entitled to his custody for the purpose of returning him to the jurisdiction where it was bound to hold him in custody.⁸

The Court of Appeals for the Third Circuit affirmed the denial of Stone's writ.⁹ Citing *Girard v. Wilson*,¹⁰ the court felt that the

While much of what will be said herein is applicable to a situation where a serviceman has committed an offense in one foreign country and extradition is then requested while he is in another foreign country, such a case is dissimilar in certain critical respects from the type of case under discussion and is, for reasons of clarity and brevity, best left for separate analysis.

⁷ 309 F. Supp. 1261 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970).

⁸ *Id.* at 1268-1269.

⁹ 431 F.2d 548 (3d Cir. 1970).

only question for its decision was whether Stone's enlistment extensions were valid. Although it noted Stone's claim that denial of the writ would result in his being returned to Japan to serve a 6-year sentence imposed by a Japanese court, the court of appeals, as had the district court, did not consider in its opinion the question of extradition and the applicability of the extradition treaty with Japan.¹¹

In *Buskers v. Seaman*s,¹² a member of the United States Air Force stationed in the Azores was arrested while on leave in Spain and charged with possession of a significant quantity of hashish. The Spanish authorities released Buskers to the custody of the United States Air Force at Torrejon Air Force Base in Spain, where he was confined to the base. During this confinement, he received orders from another Air Force command changing his station to McGuire Air Force Base in New Jersey, where he was to be separated from the service. "[I]n some fashion not entirely clear [Buskers] acquired the necessary travel documents and obtained air transportation from Torrejon to McGuire."¹³ He was in the process of being separated from the service when he was apprehended by the military police. The airman then sought a writ of habeas corpus alleging that he had sufficiently completed the separation process as to have been finally separated from the service and that it was the intention of the Air Force to return him to Spain and turn him over to appropriate Spanish authorities for judicial proceedings. The court held that the petitioner had not been discharged and was therefore still a member of the United States Air Force. In his denial of Buskers' writ, the district judge did not address himself to the question of whether the action contemplated by the Air Force was extradition. He granted a stay of 1 day to permit the petitioner to apply to the United States Court of Appeals for the Third Circuit for appropriate relief. On September 18, 1970, the court of appeals denied Buskers' application for a stay of his transfer to Spain by the Air Force.¹⁴ On September 19, Mr. Justice Blackmun denied a similar petition for a stay.¹⁵

¹⁰ 354 U.S. 524 (1957); see text accompanying notes 54-57 *infra*.

¹¹ Treaty with the Empire of Japan Concerning Extradition of Criminals, April 29, 1886, art. VII, 24 Stat. 1015 [1886], T.S. No. 191; see note 136 *infra* and accompanying text.

¹² Civil No. 1208-70 (D.N.J. Sept. 17, 1970), *stay denied*, No. 19,270 (3rd Cir. Sept. 18, 1970), *stay denied*, Memorandum Order (U.S. Sept. 19, 1970) (Blackmun, Cir. J.).

¹³ *Id.*, Transcript of District Court's Oral Opinion at 6.

¹⁴ No. 19,270 (3d Cir. Sept. 18, 1970), *stay denied*, Memorandum Order (U.S. Sept. 19, 1970) (Blackmun, Cir. J.).

¹⁵ Memorandum Order (U.S. Sept. 19, 1970) (Blackmun, Cir. J.).

In *Williams v. Rogers*,¹⁶ another member of the United States Air Force was accused of an offense which, under an executive agreement between the United States and the Philippines,¹⁷ was subject to the primary jurisdiction¹⁸ of the Philippine authorities. He was released to the custody of the Clark Air Base commander, who, in accordance with the procedures established under the agreement, acknowledged in writing that Williams would be made available for purposes of investigation and would be brought before the Philippine courts when they so requested. Through an oversight, Williams was not placed on administrative hold, as required by applicable military regulations, and he was subsequently transferred to the United States. The Government of the Philippines demanded his return. At the request of the Deputy Secretary of Defense, the Secretary of the Air Force directed that Williams be returned to the Philippines. After orders were issued reassigning Williams as directed, he filed a complaint in the United States District Court for the District of North Dakota alleging *inter alia* that his reassignment was, in effect, extradition to the Philippines which, in the absence of an extradition treaty between the Philippines and the United States, violated his constitutional rights. Suggesting that it might deal with the extradition issue asserted by Williams, the district court granted his request for a preliminary injunction against his transfer by the Air Force.¹⁹ On May 6, 1971, however, the court dissolved the preliminary injunction and, failing to meet the extra-

¹⁶ Civil No. 1027 (D.N.D. May 6, 1971), *appeal pending*, No. 71-1249 (8th Cir., filed May 10, 1971).

¹⁷ Agreement Relating to the Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 10, 1965, [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851.

¹⁸ For a discussion of the concept of primary jurisdiction, see text accompanying notes 64-69 *infra*.

¹⁹ Civil No. 1027, Memorandum and Order Granting Preliminary Injunction (D.N. D. May 22, 1970). In his memorandum accompanying the order granting a preliminary injunction against Williams' return to the Philippines, the district judge looked behind the ostensible reason for the order and recognized the real purpose and effect of Williams' return:

It is undisputed that the sole avowed basic purpose of the Defendants in ordering the return of Williams to the Philippines is to fulfill their obligations under the Military Bases in the Philippines — although it is argued that such purpose is merely to correct an administrative error. Certainly, in fairness to the parties, the Court must look beyond form and to substance. *Id.*

In his subsequent ruling on the merits, however, the district judge indicated that his order granting the preliminary injunction was based on Williams' allegations that his reassignment to the Philippines would violate existing Air Force regulations and Williams' constitutional rights. Finding that Williams' return would not violate Air Force regulations, the judge dismissed the case without mentioning the "avowed basic purpose" of the reassignment — extradition — to which he referred in the memorandum above. *Id.*, Memorandum and Order, at 3-4 (May 6, 1971).

dition question, simply ruled that Williams' reassignment to the Philippines did not violate an Air Force regulation proscribing the reassignment of a serviceman to overseas duty within 12 months of his return from such duty.²⁰

In resolving the question of extradition which the above three cases left undecided, the following issues will be considered: first, whether the United States military authorities have an inherent power to compel a member of the armed forces to return to a foreign country for prosecution and possible punishment; second, whether status of forces agreements between the United States Government and its various allies create an obligation to return and surrender a serviceman in the absence of an applicable extradition treaty; finally, the interrelationship of arrangements concerning criminal jurisdiction over United States servicemen stationed abroad and the extradition treaties.

II. THE POWER OF THE ARMED SERVICES TO RETURN A SERVICEMAN IN THE ABSENCE OF TREATY OR STATUTE

It is well established that, as a matter of United States law, the power of the Government to grant a request for the surrender of a civilian fugitive to a foreign country is dependent upon the existence of a treaty or statute authorizing such action. The Supreme Court has held that under international law there is no duty to extradite unless such an obligation is created by treaty.²¹ As a matter of United States law the Government has neither an obligation nor the authority to seize a fugitive and deliver him to a foreign state in the absence of treaty or statute.²² The federal statute which establishes the procedures for extradition is premised on the existence of an applicable treaty creating an obligation to extradite.²³ The only exception to what thus can be said to be the rule that extradition is dependent upon the existence of a treaty is the statutory authorization for the surrender of fugitives to the military governor or other chief executive of a foreign country, or any part thereof, which is occupied by or under the authority of the United States.²⁴

²⁰ *Id.*, Memorandum and Order (May 6, 1971).

²¹ *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

²² *See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

²³ 18 U.S.C. § 3181 (1964). *See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9-10 (1936).

²⁴ *See* 18 U.S.C. § 3185 (1964).

As a matter of policy, the United States has not looked with disfavor upon the extradition of its own nationals who have committed crimes abroad.²⁵ Unlike that of certain other countries,²⁶ our domestic law does not absolutely prohibit the extradition of United States citizens. On the other hand, the case law clearly provides that the power to extradite a United States citizen does not exist except as affirmatively granted by treaty or statute.²⁷ Since the federal extradition statute is silent regarding the surrender of United States nationals, such power must be granted by the terms of an applicable extradition treaty. In *Charlton v. Kelly*,²⁸ the Supreme Court held that a citizen of the United States may be extradited under a treaty requiring the United States to extradite "persons" without specifically referring to "citizens." The Court rejected the contention that United States nationals are excluded from the operation of extradition conventions unless specifically included.²⁹ In *Valentine v. United States ex rel. Neidecker*,³⁰ the Supreme Court faced the question of whether a grant to the Executive of discretionary power to surrender citizens of the United States could be implied from the terms of the treaty before it. While holding that the treaty language in question — "Neither of the contracting Parties shall be bound to deliver up its own citizens under the stipulations of this convention." — could not be so construed, the Court did not preclude the possibility of implying such a power in an appropriate case.³¹

Against this case law and statutory background respecting the extradition of United States *civilian* nationals, the question arises whether an individual's status as a member of the armed forces subjects him to a different dispensation: May the armed forces return their military personnel from the United States to a foreign country for a criminal prosecution in its courts in the absence of an extradition agreement between that country and the United States? Otherwise stated, does the power of the armed forces to return their members to a foreign nation for trial rest on foundations different from the general United States law on extradition?

²⁵ 6 M. WHITEMAN, DIGEST OF INT'L L. § 18, at 871 (1968); IV G. HACKWORTH, DIGEST OF INT'L L. § 318, at 55 (1942). See RAFUSE, THE EXTRADITION OF NATIONALS 11-31 (1939).

²⁶ 6 M. WHITEMAN, *supra* note 25, at 865, 871.

²⁷ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936).

²⁸ 229 U.S. 447 (1913).

²⁹ *Id.* at 467-68.

³⁰ 299 U.S. 5 (1936).

³¹ *Id.* at 11-13.

At the outset, it seems well settled that the armed forces have no authority to seize and return a *former* member of the armed services.³² In 1957, a situation arose in which a member of the United States forces in the Philippines was transferred to the United States and discharged from the service while criminal proceedings were pending against him in the local courts. In response to a demand for his return, authorities of the United States Navy informed the Philippine Government that the individual was beyond Navy control and that nothing could be done to return him to the Philippines for prosecution.³³

Where the alleged offender is still in the service, the threshold question is whether his return constitutes extradition. As noted above, in *United States ex rel. Stone v. Robinson*,³⁴ the Court of Appeals for the Third Circuit did not deal with the issue of extradition; it indicated that the only question before it was the validity of Stone's enlistment extensions. Conceivably, the *Stone* court did not believe that the question of Stone's return was properly before it on appeal since this question had been neither raised by counsel nor considered by the lower court. Alternatively, the court of appeals may have taken into account in its ruling the fact that the denial of his writ would result in Stone's being returned to Japan for imprisonment, but considered extradition of civilians to be wholly different from the return of servicemen. The court may have thus concluded that upon finding Stone's enlistment extensions to be valid, the Air Force had unquestionable authority to return and surrender him, at least in such a case where the serviceman had fled the country of prosecution without leave.

Assuming that the latter view above might well have been that taken by the *Stone* court, a contrary argument can be made that in the absence of some authorization by statute or treaty, the armed forces lack the power to return their members to a foreign government for prosecution. This argument, as discussed below, is based on the view that the return of *any* United States citizen to a foreign country, whether by nonmilitary or military authorities, constitutes extradition.

³² The lack of military jurisdiction over discharged servicemen is exemplified by *Toth v. Quarles*, 350 U.S. 11 (1955). See Baldwin, *Foreign Jurisdiction and the American Soldier*, 1958 WIS. L. REV. 90-91.

³³ See generally, Comment, *Philippine Jurisdiction Over the George E. Roe Case*, 32 PHILIPPINE L.J. 403 (1957); Valeros, *Jurisdiction of Philippine Courts Over Personnel of the United States Military Reservations in the Philippines*, 4 UNIV. OF THE EAST L.J. 18 (1961). See also Baldwin, *supra* note 32.

³⁴ 431 F.2d 548 (3d Cir. 1970); see text accompanying notes 7-11 *supra*.

The Supreme Court has defined extradition generally as "the surrender by one nation to another of an individual accused or convicted of an offense outside its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender."³⁵ More recently, Marjorie Whiteman has described extradition generally as follows: "Extradition is the process by which persons charged with or convicted of crimes against the law of a state and found in a foreign state are returned by the latter to the former for trial and punishment."³⁶ In each instance the essence of the definition of extradition is the return and surrender for trial and punishment. It can therefore be argued that as a matter of principle, the return and surrender of any individual — even if he is a serviceman — to a foreign country for trial or punishment is extradition and that consequently, the United States law respecting extradition must be applied in determining whether such action is lawful.

Moreover, there is broad language in the *Valentine*³⁷ case quoting with approval Moore's statement that "there is no authority vested in *any department* of the government to seize a fugitive criminal and *surrender* him to a foreign power."³⁸ The *Valentine* Court stated that such a principle

rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.³⁹

Although the Court was not considering the power of military authorities, its statement respecting the lack of any governmental prerogative to surrender a citizen to a foreign government in the ab-

³⁵ *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). See also *Stevenson v. United States*, 381 F.2d 142 (9th Cir. 1967).

³⁶ 6 M. WHITEMAN, *supra* note 25, § 1, at 727.

³⁷ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

³⁸ 299 U.S. at 9 (emphasis added). See also *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957); *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959).

Surrender in the sense of transporting an individual from the United States in order to avail him to foreign authorities should be distinguished from surrendering a serviceman who is in the territory of a foreign state for trial by the local authorities. The latter type of surrender was approved by the Supreme Court in *Wilson v. Girard*, 354 U.S. 524 (1957). The decision was premised on the exclusive jurisdiction of the territorial sovereign over persons and activities in its territory. The *Wilson* decision therefore may not be relevant to a case in which the individual has returned to the United States and his return and surrender are thereafter sought by the country of prosecution.

³⁹ 299 U.S. at 9.

sence of a statute or treaty creating that power is broad enough to apply to the military.

In general, the armed services, like other agencies of the Government, are subject to the restrictions of the Constitution and applicable statutes.⁴⁰ As Mr. Justice Douglas stated in *Winters v. United States*,⁴¹ “[a] member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.” No one will disagree with the validity of Mr. Justice Douglas’s statement as a general principle, but it cannot be denied that the rights of individuals serving in the armed forces are, to some presently undefined extent, circumscribed by the nature of the military establishment and the exigencies for which the military must be prepared. Although judicial relief is available where the military exceeds its lawful authority in certain functions,⁴² with respect to the assignment of military personnel, as with so much else of military life, the courts have consistently followed the rule established in *Orloff v. Willoughby*.⁴³ There the Supreme Court held that because of the potential impact on military operations, the courts cannot review personnel assignments by the armed forces.⁴⁴

The Supreme Court has not, however, been asked to review a serviceman’s assignment to a foreign territory where he will be prosecuted by the local authorities. The validity of such an assignment was squarely raised before the district court in *Williams v. Rogers*.⁴⁵ There Williams had to be reassigned to the Philippines because his return to the United States, although the result of an administrative

⁴⁰ See *Harmon v. Brucker*, 355 U.S. 579 (1958); *Reed v. Franke*, 297 F.2d 17 (4th Cir. 1961). See also *Winters v. United States*, 89 S. Ct. 57 (1968) (Douglas, Cir. J.); *Van Bourg v. Nitze*, 388 F.2d 557 (D.C. Cir. 1967); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 182 (1962).

⁴¹ 89 S. Ct. 57, 60 (1968) (Douglas, Cir. J.).

⁴² See, e.g., *Harmon v. Brucker*, 355 U.S. 579 (1958) (Secretary of the Army could not base his denial of an honorable discharge on servicemen’s preinduction conduct); *Van Bourg v. Nitze*, 388 F.2d 557 (D.C. Cir. 1967) (Navy Review Board must adhere to Navy regulations requiring that its review of a serviceman’s discharge be based on findings of fact disclosed to the serviceman).

⁴³ 345 U.S. 83, 94 (1953) (commissioning of drafted doctors and their assignment as Army doctors is within the discretion of Congress and the President and not that of the courts).

⁴⁴ For applications of the *Orloff* rule, see *Noyd v. McNamara*, 378 F.2d 538, cert. denied, 389 U.S. 1022 (1967); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966), aff’d, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); *Cooper v. Barker*, 291 F. Supp. 952 (D. Md. 1968). See also *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 314 (D.C. Cir. 1967).

⁴⁵ Civil No. 1027 (D.N.D. May 6, 1971), appeal pending, No. 71-1249 (8th Cir., filed May 10, 1971); see text accompanying notes 16-20 *supra*.

error, was a valid assignment, unlike Stone's absenting himself from Japan without leave and Buskers'⁴⁶ unauthorized departure while he was restricted to an Air Force base in Spain. Nonetheless, the district judge in *Williams* failed to meet the extradition issue and simply found that the order to reassign Williams to the Philippines was not proscribed by Air Force regulations.⁴⁷

If the *Valentine* principle — that no department of the Government has authority to surrender a United States citizen to a foreign power for prosecution except as that authority is granted by statute or treaty — is applicable to the armed forces, the validity of a military order requiring a serviceman to return to a foreign country where he will be prosecuted or punished can be challenged where no treaty or statute authorizes such a return. This is certainly true where the sole purpose of the order is to effect the serviceman's surrender to the foreign country for prosecution or punishment, since a valid military order must rest on a legitimate *military* purpose.⁴⁸ Such a challenge may be complicated, however, by the fact that, while the effect of the reassignment of an individual may be his subjection to prosecution in a foreign court, the order may on its face have a legitimate military purpose. For example, in the *Williams* case, the order reassigning Williams to the Philippines was ostensibly issued to correct the administrative error by which he was inadvertently assigned from Clark Air Base to duty in the United States.⁴⁹ And in a case such as *Stone*, where a serviceman departs without leave from his place of assignment in order to avoid prosecution or punishment by the local courts, his return may be rationalized as a mere return to his unit.

But regardless of the asserted military purpose of a serviceman's return to a prosecuting country, there is authority to support the argument that the military has no inherent authority to order such a return if that action is tantamount to extradition. In *Sayne v. Shipley*⁵⁰ and in an unreported case,⁵¹ the Panamanian Government re-

⁴⁶ *Buskers v. Seamans*, Civil No. 1208-70 (D.N.J. Sept. 17, 1970), *stay denied*, No. 19,270 (3d Cir. Sept. 18, 1970), *stay denied*, Memorandum Order (U.S. Sept. 19, 1970) (Blackman, Cir. J.); see text accompanying notes 12-15 *supra*.

⁴⁷ Civil No. 1027, Memorandum and Order, at 3-4 (D.N.D. May 6, 1971); see note 19 *supra*.

⁴⁸ See *United States v. Kapla*, 22 C.M.R. 825 (1956). Even where a military order has a legitimate military purpose, the order must not violate an individual's constitutional rights. *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); *United States v. Levinsky*, 30 C.M.R. 641 (1960). See generally W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 575-77 (2d ed. 1920).

⁴⁹ See note 19 *supra*.

⁵⁰ 418 F.2d 679 (5th Cir. 1969).

quested that certain servicemen be extradited from the Canal Zone. In the *Sayne* case the Governor of the Canal Zone determined that extradition was appropriate and ordered that Sayne, a Marine, be taken into custody for delivery to the Panamanian authorities. Presumably, if the Marines had held inherent authority to surrender him to Panama, no such gubernatorial proceedings would have been required. In the unreported case, an opinion of the Office of the Legal Adviser of the Department of State similarly indicates that the Governor of the Canal Zone exercises the power to surrender fugitive servicemen to Panama, and that while he will probably be governed by the desires of the military commander concerned, such commander has no authority in the matter.⁵² And an 1876 opinion of The Judge Advocate General of the Army, regarding the Mexican Government's request for the surrender of a serviceman by the military commander in Texas, indicates that unless an applicable extradition treaty authorizes him to do so, a military commander may not take action on a request for the surrender of a serviceman; rather, the request should be referred to the State Department.⁵³

In the *Stone* case, the Court of Appeals for the Third Circuit assumed that under *Wilson v. Girard*,⁵⁴ Stone's return and surrender to the Japanese Government was authorized.⁵⁵ In *Girard*, the Supreme Court found no constitutional objection to the surrender of a serviceman, held by United States Air Force officials in Japan, to the Japanese Government for prosecution. The decision rested upon the principle that the territorial sovereign has the exclusive jurisdiction over offenses against its laws committed within its borders, unless the sovereign waives that exclusive jurisdiction.⁵⁶ Because the serviceman in *Girard* remained in Japan from the date of the crime until the date of his surrender to that country's authorities, the case does not establish the position that the armed services may return a serviceman from the United States and surrender him to the prosecuting country.⁵⁷ But, on the other hand, when read with

⁵¹ See IV G. HACKWORTH, *supra* note 25, § 338, at 193.

⁵² *Id.*

⁵³ DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 626-27 (1912).

⁵⁴ 354 U.S. 524 (1957).

⁵⁵ 431 F.2d at 550 n.2; see text accompanying notes 9-11 *supra*.

⁵⁶ 354 U.S. at 529, *citing* *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 135 (1812).

⁵⁷ *But see* Baldwin, *supra* note 32, at 87-90, where the author notes that the agreement between Japan and the United States in *Girard* contained no requirement that the serviceman be in Japan at the time of his surrender to that country.

Orloff v. Willoughby, it affords support for the proposition that it is a valid personnel assignment, not reviewable by the courts, to return a serviceman for the purpose of prosecution for a crime ordinarily within the jurisdiction of the sending state when committed. A contrary result could adversely affect essential political and security relationships of the United States, and would penalize the United States Government for administrative error or reward chicanery. In short, the national interests which underlie the decision in *Wilson v. Girard* are as great whether the serviceman is on foreign soil or has returned to the United States, and those interests are precisely the same in the absence of a specific agreement, such as a status of forces agreement,⁵⁸ as they are in the presence thereof.

The foregoing analysis indicates that the question of whether the armed services have the power to return a serviceman to a foreign country and surrender him for prosecution in the absence of a treaty or statute authorizing such action has not been finally decided. On the one hand, the Third Circuit has recently permitted two such actions without advertent to "extradition," which would indicate that that court regards the return of a serviceman to be outside the scope of extradition law. On the other hand, as a matter of principle such an action might fall within the definition of extradition. The rules formulated by the Supreme Court with respect to the power to extradite are extremely broad, and they could arguably apply to all United States citizens, military and nonmilitary alike. Moreover, it is fairly clear that membership in the armed forces cannot deprive an individual of his constitutional and statutory rights except where the exercise of those rights is incompatible with the legitimate needs of the armed forces.⁵⁹

⁵⁸ See section III of the text, *infra*.

⁵⁹ See notes 40-42 *supra* & accompanying text.

The authors have different views as to how the question of the armed forces' power to return their personnel should be resolved. Professor Metzger is of the view, apparently accepted *sub silentio* in *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261 (W.D. Pa. 1970), that it is a corollary of *Girard v. Wilson*, 354 U.S. 524 (1957), that a serviceman who violates the law of a host country may be surrendered summarily by the armed forces of which he is a present member, whether he is physically present in the host country when the request is made (as in *Girard*) or in the United States (as in *Stone*). Capt. McMahon takes the contrary view discussed in the text, and, in addition, is of the opinion that the armed forces lack the power to conduct a hearing adequate to satisfy the due process requirement discussed in the text accompanying note 129 *infra*.

III. RETURN AND SURRENDER OF SERVICEMEN UNDER STATUS-OF-FORCES AGREEMENTS

If we were to assume *arguendo* that the armed forces lack the authority to return and surrender their members to a foreign country absent some authorization by treaty or statute, do the status-of-forces agreements, which govern the relationship of our armed forces with the authorities of our allies, operate as a treaty creating an obligation to return servicemen and thereby authorize the armed services to execute such obligation?

A brief outline of the status of American forces stationed overseas will put the present discussion in its proper perspective. For purposes of United States law, the Supreme Court's decision in *Wilson v. Girard*⁶⁰ settled the long-standing controversy regarding the extent to which members of visiting armed forces are subject to or immune from the jurisdiction of the territorial sovereign. The *Girard* Court recognized that to the extent that Girard's rights were not violated thereunder, the agreement between the United States and Japan controlled the question of jurisdiction over Girard's crime. Thus the Court rejected any argument that the host state's consent to the presence of a foreign force in its territory implies a waiver of criminal jurisdiction over members of the visiting forces in relation to offenses against the host state's laws. In the absence of an international agreement, the law of the host country governs. Where there are such agreements, they govern criminal jurisdiction over members of the armed forces stationed in foreign countries.

Commentators have described three basic types of jurisdictional agreements.⁶¹ Only one type of criminal jurisdiction arrangement will be considered here — the so-called "NATO formula,"⁶² which is the basis for the division of jurisdiction between the host government and the United States military authorities in 18 countries.⁶³

⁶⁰ 354 U.S. 524 (1957).

⁶¹ See G. STAMBUK, AMERICAN MILITARY FORCES ABROAD 53 (1963); 6 M. WHITMAN, *supra* note 25, § 15, at 379. It should be noted that Stambuk's three categories of agreements differ somewhat from those described in the materials reprinted in Whiteman's work.

⁶² See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, [1953] 4 U.S.T. 1798, T.I.A.S. No. 2846.

⁶³ The following 13 countries are parties to the NATO Status of Forces Agreement: Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, and the United Kingdom. In addition, the basic NATO criminal jurisdiction provisions are contained in the status of forces agreements with Australia (May 9, 1963, [1963] 14 U.S.T. 506, T.I.A.S. No. 5349), the Republic of China (Aug. 31, 1965, [1966] 17 U.S.T. 373, T.I.A.S. No. 5986), Japan (Jan. 19, 1960, [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510), the Republic

The NATO-type agreements provide that the United States military authorities may exercise within the host state criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States.⁶⁴ The host state, however, retains the right to exercise jurisdiction over members of the forces with respect to offenses punishable by its laws and committed within its territory.⁶⁵ If a given offense violates both the military law of the United States and the local criminal law, the right to try the accused is divided as follows: The United States is granted the primary right to exercise jurisdiction over its servicemen in relation to offenses solely against the property or security of the United States, or solely against the person or property of another member of the force or civilian component or of a dependent.⁶⁶ The United States also has the primary right to exercise jurisdiction over its servicemen in relation to offenses arising out of any act or omission done in the performance of official duty.⁶⁷ The authorities of the host state have the primary right to exercise jurisdiction in relation to any other offense.⁶⁸ The state having primary jurisdiction may waive its jurisdiction upon request of the other country, allowing the latter to exercise its secondary jurisdiction.⁶⁹

The United States has no extradition treaties with four of the 18 nations with which it has NATO-type jurisdiction arrangements.⁷⁰ Moreover, there is no obligation and, on the authority of the *Valen-*

of Korea (July 9, 1966, [1967] 17 U.S.T. 1677, T.I.A.S. No. 6127), and in the amended criminal jurisdiction agreement with the Philippines (Aug. 10, 1965, [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851).

⁶⁴ See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 1(a), [1953] 4 U.S.T. 1798, T.I.A.S. No. 2846.

⁶⁵ See *id.* para. 1(b).

⁶⁶ See *id.* para. 3(a)(i).

⁶⁷ See *id.* para. 3(a)(ii).

⁶⁸ See *id.* para. 3(b).

⁶⁹ See *id.* para. 3(c).

The NATO-type criminal jurisdiction provision is discussed in greater detail in J. SNEE & A. PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION (1957); Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29 (1957). The application of the NATO-type criminal jurisdiction agreement in the Philippines is discussed in J. DODD, CRIMINAL JURISDICTION UNDER THE UNITED STATES-PHILIPPINE MILITARY BASES AGREEMENT (1968). See generally G. STAMBUK, *supra* note 61.

⁷⁰ These countries are the Republic of China, Denmark, the Republic of Korea, and the Philippines. See U.S. DEP'T OF STATE, TREATIES IN FORCE (1970).

tine case,⁷¹ no power to extradite United States citizens under the extradition treaties with nine other countries where the NATO-type agreements apply.⁷² Thus, if we assume *arguendo* that the armed forces lack the authority to return and surrender their members to a foreign country for prosecution in the absence of an agreement so requiring, with respect to 13 of the 18 countries the NATO-type status-of-forces agreements afford the only possible authorization for such extradition. It is therefore necessary to examine the status-of-forces agreements to determine whether they directly or impliedly create an obligation and the correlative authority for the United States to extradite its servicemen.

None of the NATO-type jurisdictional agreements expressly provide that the United States must return an accused serviceman to the host state's territory in order to make him available for prosecution. Therefore, if the agreements do in fact require the United States to extradite its servicemen, that requirement must be implied from the terms of the agreements. In determining whether the various status-of-forces agreements create such an obligation by implication, three different factual situations must be considered.

In the first type of case, an individual commits an offense which is subject to the primary jurisdiction of the host country, but he returns to the United States, legally or illegally, before the offense or his connection therewith is discovered. With respect to such situations it has been argued that even though the jurisdictional arrangement contains no specific provision therefor, an obligation to extradite exists by necessary implication. The crux of the argument is that since the United States has agreed that the host country shall have the primary right to exercise jurisdiction in certain cases, there is an implied obligation for the United States to effectuate that agreement by making the accused available for prosecution regardless of his whereabouts.⁷³ The argument is both logical and persuasive.

⁷¹ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). See text accompanying notes 30-31, 38-39 *supra*.

⁷² The extradition treaties with the following nine countries provide that neither party shall be bound to surrender its own citizens: Belgium [Oct. 26, 1901, 32 Stat. 1894 (1902), T.S. No. 409]; France [Jan. 9, 1909, 37 Stat. 1526 (1911), T.S. No. 561]; the Federal Republic of Germany [July 12, 1930, 47 Stat. 1862 (1931), T.S. No. 836]; Greece [May 9, 1931, 47 Stat. 2185 (1932), T.S. No. 855]; Luxembourg [Oct. 29, 1883, 23 Stat. 808 (1884), T.S. No. 196]; Netherlands [June 2, 1887, 26 Stat. 1481 (1889), T.S. No. 256]; Norway [June 7, 1893, 28 Stat. 1187 (1893), T.S. No. 262]; Portugal [May 7, 1908, 35 Stat. 2071 (1908), T.S. No. 512]; and Turkey [Aug. 6, 1923, 49 Stat. 2692 (1934), T.S. No. 872].

⁷³ See Comment, *supra* note 33, at 405; Valeros, *supra* note 33. See also Baldwin, *supra* note 88, who finds an implied obligation and authorization for the return of ser-

Any other interpretation would, in effect, vitiate the agreement in any case where the accused managed to depart from the territory of the receiving state.

A contrary argument is possible. Paragraph 5(a) of article VII of the NATO Status of Forces Agreement, the operative language of which can be found in the status-of-forces agreements with the non-NATO countries, provides as follows:

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 dependants *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.⁷⁴

The words "in the territory of the receiving State" are open to the interpretation that the obligation of the sending state to arrest and hand over members of its forces is limited to individuals who are physically within the receiving state at the time when their hand over is demanded.⁷⁵ It is difficult, however, reasonably to so read that language. The territorial phrase was not contained in the original draft of the NATO Agreement submitted by the United States,⁷⁶ although it was contained in the analogous provision in the Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers,⁷⁷ which was used as the basis for the United States draft.⁷⁸ The phrase was added in a redraft of the criminal jurisdiction provision proposed jointly by the representatives of the United States, the United Kingdom, and France,⁷⁹ and was incorporated in the first redraft of articles I to VI of the original working paper.⁸⁰ There apparently was no discussion of the amendment,⁸¹

vicemen in the fact that the obligation of the United States to give sympathetic consideration to a request for waiver of its primary jurisdiction does not depend upon the accused's presence in the receiving state. See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 3(c), [1953] 4 U.S.T. 1800, T.I.A.S. No. 2846 (discussed in text accompanying notes 62-69 *supra*) for the waiver provision in the NATO Agreement, which is repeated in the other NATO-type status-of-forces agreements.

⁷⁴ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 5(a), [1953] 4 U.S.T. 1800, T.I.A.S. No. 2846 (emphasis added).

⁷⁵ See Comment, *Criminal Jurisdiction Under the Revised Bases Agreements*, 41 PHILIPPINE L.J. 728, 748 (1966) (discussing similar language in the criminal jurisdiction agreement between the United States and the Philippines).

⁷⁶ The text of the draft submitted by the United States is reprinted in Snee, *NATO Agreement on Status: Travaux Préparatoires*, 54 INT'L L. STUDIES 1, 345 (1961).

⁷⁷ See *id.* at 334; 6 M. WHITEMAN, *supra* note 25, § 15, at 398.

⁷⁸ See Snee, *supra* note 76, at 3.

⁷⁹ See *id.* at 362.

⁸⁰ See *id.* at 370. The present article VII was originally article VI.

which was, in the context of the consideration of criminal jurisdiction in general, a relatively minor addition. It would appear that if the representatives of the other countries understood the particular language to mean that a sending state was not required to give effect to the criminal jurisdiction arrangement in any case where the accused had departed from the receiving state's territory — a large loophole indeed — the matter would have been the subject of considerable discussion, if not heated dispute.⁸²

In addition to the language of paragraph 5(a), there is other evidence which seems to support the view that, in the factual situation presently under consideration, an obligation to extradite cannot be implied from the terms of the NATO-type agreements. The preambles and general tenor of the agreements indicate that they were intended to establish a regime governing the status of the United States forces while on foreign territory. The history of negotiations of the Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany⁸³ — which is the only negotiating history of a status-of-forces agreement, other than the NATO Agreement, presently available — clearly indicates that the parties to that agreement understood it to be strictly territorial in scope and to create no obligations effective outside the territory of the Federal Republic of Germany.⁸⁴ Also, during the negotiations of the NATO Status of Forces Agreement, in a discussion of the original proposal to add what later became paragraph 8 of article VII, the Belgian representative made a

⁸¹ See *id.* at 93-94. The conclusions drawn are based on Snee's reprint of the summary records of the meetings of the Juridical Subcommittee on Status.

⁸² As used in the NATO and other status-of-forces agreements, the word "force" is a term of art, defined somewhat differently in the various agreements, but in each case limited to mean servicemen in the territory of the host state. Compare, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. I, para. 1(a), [1953] 4 U.S.T. 1794, T.I.A.S. No. 2846, with Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of Forces in Japan, Jan. 19, 1960, art. I(a), [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510. It might therefore be argued that because the obligation to cooperate under paragraph 5(a) of article VII extends only to the arrest and handing over of members of a "force," it was not intended that the agreements would require the United States to assist in the arrest and handing over of its servicemen who are no longer in the host state's territory. Like the territorial phrase discussed in the text, however, it appears that the term "forces" would have been the subject of considerable dispute if, by its adoption, the parties intended to limit the United States' obligation to the host state's territorial borders.

⁸³ Aug. 3, 1959, [1963] 14 U.S.T. 531, T.I.A.S. No. 5351.

⁸⁴ Text of Negotiating History of NATO Status of Forces Supplementary Agreement with Germany 443, 857 (1963) (computer generated text prepared by the Air Force Accounting and Finance Center).

statement which appears to indicate that, in his opinion, the NATO Agreement created no obligation to extradite.⁸⁵

Notwithstanding these contrary arguments, the mutual interests of the respective parties to the status-of-forces agreements, as well as the policies underlying the agreements, are best served if an implied obligation to extradite servicemen in order to surrender them to the host state is recognized. The repercussions of a refusal to recognize an implicit obligation to return a member of the United States armed forces for prosecution in a case where the offense has aroused public interest or outrage in the host country are obvious: The continued viability of the entire criminal jurisdiction agreement could, conceivably, be cast in doubt. Recognizing an obligation to return an accused for prosecution is in keeping with, and will give effect to, the understanding that the host country shall have the primary right to exercise jurisdiction in certain cases. It is therefore reasonable to conclude that the NATO-type criminal jurisdiction agreements obligate, and hence, authorize, the United States Government to return a serviceman for trial by the host government in cases where he has departed from the receiving state prior to the time that the offense or his connection therewith is discovered.

The second situation raising the extradition issue is that in which the host state discovers the crime and exercises primary jurisdiction over the serviceman, but the United States retains custody of him. While in the custody of United States military authorities, the individual returns to the United States either through an administrative error or by absenting himself without authority from the host territory. As discussed previously, these were the facts in the *Stone*,

⁸⁵ See Snee, *supra* note 75, at 104. As originally proposed, paragraph 8 established an unqualified rule that a man could not be tried twice for the same crime. The Belgian representative stated that the text was unacceptable and posed, as an example, a case where a Belgian "delinquent" was convicted by a French court but escaped to Belgium before he had served his sentence. Under the proposed rule, the Belgian authorities would be barred from prosecuting the individual a second time, and because the Belgian Government is not authorized to extradite its nationals, he would be immune from punishment. *Id.* Thus the Belgian representative apparently did not view the Agreement as creating an obligation for the parties to extradite their servicemen.

It is further arguable that, had the Belgian representative understood the NATO Agreement as creating such an obligation to extradite, he would have refused to be bound by that requirement due to the absence of authority for the Belgian Government to extradite its nationals. The fact that some parties to the agreement would refuse to extradite their own nationals does not, however, conclusively negate the existence of an implicit obligation to extradite servicemen under the Agreement. With respect to the United States, the Supreme Court in *Charlton v. Kelly*, 229 U.S. 447, 469-76 (1913), refused to find that the refusal of Italy to extradite its own nationals in any way affected the obligation of the United States to extradite its own citizens to Italy.

Buskers, and *Williams* cases.⁸⁶ As will appear from the following analysis, in this second type of case the status-of-forces agreements and the arrangements which implement them clearly create an obligation for the United States to return and surrender the accused for prosecution or punishment.

The custody arrangements regarding members of the United States armed forces who are subject to the host state's primary right to exercise jurisdiction vary from country to country. The NATO-type criminal jurisdiction agreements provide that if the accused is in the custody of the United States, he shall remain in that custody until he is charged by the host country.⁸⁷ If the accused was already in the host government's hands or if he has been charged, the host government has the right to retain or take custody of him. Under mutual understandings or supplementary arrangements with a number of countries, however, the United States may take and retain custody until the case is finally resolved.⁸⁸

The Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany provides:

2. (a) Where the arrest has been made by the German authorities, the arrested person shall be handed over to the authorities of the sending States concerned if such authorities so request.

(b) Where the arrest has been made by the authorities of a sending state, or where the arrested person has been handed over to them under sub-paragraph (a) of this paragraph, they

(i) may transfer custody to the German authorities at any time;

(ii) shall give sympathetic consideration to any request for the transfer of custody which may be made by the German authorities in specific cases

3. Where custody rests with the authorities of a sending State in accordance with paragraph 2 of this Article, it shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence. *The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings . . . and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice*⁸⁹

⁸⁶ See text accompanying notes 7-20 *supra*.

⁸⁷ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, para. 5(c), [1953] 4 U.S.T. 1800, T.I.A.S. No. 2846.

⁸⁸ See Stanger, *Criminal Jurisdiction Over Visiting Armed Forces*, 52 INT'L L. STUDIES 253-56 (1957-1958).

⁸⁹ Aug. 3, 1959, art. 22, [1963] 14 U.S.T. 556-57, T.I.A.S. No. 5351 (emphasis added).

A similar provision is contained in the Agreed Minutes to the Status of Forces Agreement with the Republic of China.⁹⁰

The Agreed Minutes to the Criminal Jurisdiction Agreement with the Philippines provide:

In all cases over which the Republic of the Philippines exercises jurisdiction, the custody of an accused member of the United States armed forces . . . pending investigation, trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing (a) that such accused has been delivered to him for custody pending investigation, trial and final judgment in a competent court of the Philippines and (b) *that he will be made available to the Philippine authorities for investigation upon their request* and (c) *that he will be produced before said court when required by it.*⁹¹

And the Agreed Minutes to the Status of Forces Agreement with Japan provide:

In case the Japanese authorities have arrested an offender who is a member of the United States armed forces . . . with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. *The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.*⁹²

It should be noted that while the agreements are dissimilar in certain respects, each imposes an obligation on the United States to make the accused available to the host government for trial. Each agreement provides that the right of the United States to retain custody ceases either when the host state requests custody or when a final judgment has been rendered. An obligation to surrender the individual to the local authorities is thus either expressed or implied in all forms of the agreements granting custody to the United States.

Does that obligation include returning the accused from the United States if he has departed, legally or illegally, from the territory where his trial is pending prior to the time that his transfer to

⁹⁰ Aug. 31, 1965, art. XIV, para. 5(c), [1966] 17 U.S.T. 387, T.I.A.S. No. 5986.

⁹¹ Agreement Relating to the Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 10, 1965, Agreed Official Minutes, para. 5, [1965] 16 U.S.T. 1095, T.I.A.S. No. 5851 (emphasis added).

⁹² Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of Forces in Japan, Jan. 19, 1960, Agreed Minutes, para. 1 regarding art. XVII, para. 5, [1960] 11 U.S.T. 1753, T.I.A.S. No. 4510 (emphasis added).

the local authorities is required under the applicable agreement? In the *Stone* case, the district court quite clearly took the view that the status-of-forces agreement created an obligation to return Stone to Japan:

[T]he Government of the United States is entitled to his custody for the purpose of returning him to the jurisdiction where it was bound to hold him in custody.

. . . . He had an obligation to the Government of Japan and he cannot here disclaim it, any more than can the Government of the United States repudiate its treaty obligations.⁹³

It is reasonable to conclude, as did the *Stone* court, that the obligation to keep the accused available for transfer to the host government implies an obligation for the United States to return him from its own territory. The arguments in support of this obligation are even more compelling than those supporting the same obligation in the situation discussed above, where the serviceman has left the host state prior to the discovery of the crime or his connection therewith. When the local authorities have exercised their primary jurisdiction and placed the offender in the custody of the United States military, there appears to occur a clear breach of the custody provisions of the applicable status-of-forces agreement if the United States refuses to recognize its custodial obligations where the offender has returned to the United States. The failure of the United States Government to consider itself bound to return such servicemen has caused particularly adverse reactions within one host state,⁹⁴ and unless altered, it will continue to jeopardize our relations with parties to the NATO-type agreements.

The third factual situation arises in cases where the offense either is subject to the primary jurisdiction of the United States or the host

⁹³ *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261, 1269 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970) (footnote omitted).

⁹⁴ The United States failed to recognize this obligation in a number of cases which arose in the Philippines after World War II. The refusal to return the offenders from the United States caused indignation among the people and the Government of the Philippines, who believed that the Bases Agreement created an obligation to surrender the accused even though he had returned to the United States and separated from the service. See generally J. DODD, *supra* note 69; G. TAYLOR, *THE PHILIPPINES AND THE UNITED STATES: PROBLEMS OF PARTNERSHIP* 237 (1964); Valeros, *supra* note 33; Comment, *supra* note 33. One commentator has indicated that this asserted lack of an obligation to return servicemen to the Philippines was not remedied by the 1965 amendment to the criminal jurisdiction agreement with that country. He cites a 1966 case in which the United States again refused to return one of its servicemen who, having been charged by Philippine authorities, had been reassigned to the United States. Comment, *supra* note 33, at 748-49. The commentator suggests that "[s]uch a deficiency can bring about the actual nullification of jurisdiction of Philippine courts." *Id.* at 749.

country waives its primary jurisdiction in favor of the United States. The United States military authorities either acquit the accused after a full trial, or decide not to prosecute. After the individual concerned is rotated back to the United States, the host government decides to exercise its secondary jurisdiction or to recall its waiver of primary jurisdiction. Does the NATO-type status-of-forces agreement impose an obligation to return the individual for trial in such cases?

If the individual has been tried and acquitted by the United States military authorities within the territory of the requesting state, there is no such obligation because the NATO-type agreements incorporate the rule of *non bis in idem* in such circumstances. The rule provides that where an accused has been tried by one state in accordance with the provisions of the jurisdiction agreement and has been acquitted, or has been convicted and is serving or has served his sentence, he may not later be tried for the same offense within the same territory.⁹⁵ Since the host state could not properly exercise jurisdiction for a second trial in such a case, no obligation to return the accused for trial can be implied.

The result may be different, however, if the individual has been tried outside the territory of the host state which is requesting his return or if the United States has taken no action at all against an accused over whom it has primary jurisdiction under the agreement. The *non bis in idem* provision does not bar a subsequent trial of the accused when an earlier trial was conducted outside the host state's territory.⁹⁶ And primary jurisdiction, by definition, does not mean exclusive jurisdiction. Thus, some commentators have expressed the view that where trial by the host state is not prohibited by the *non bis in idem* provision, the host government may exercise its secondary

⁹⁵ Article VII of the NATO Status of Forces Agreement provides as follows:

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 offense 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 force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, July 19, 1951, art. VII, para. 8, [1953] 4 U.S.T. 1802, T.I.A.S. No. 2846.

A similar provision appears in the NATO-type criminal jurisdiction agreements with non-NATO countries. See agreements cited note 63 *supra*.

⁹⁶ See note 95 *supra*.

right of jurisdiction.⁹⁷ Where the terms of the agreement grant the host state the secondary right to prosecute the accused, that right can be effective only if the United States, having decided not to prosecute the serviceman, recognizes an obligation to return him to the host state at the latter's request.

This third factual situation also presents two other important issues. First, the question arises whether any action short of trial will render operative the *non bis in idem* provision of the criminal jurisdiction agreements. Would a determination by the United States military authorities not to refer the case to trial after a formal investigation under article 32 of the Uniform Code of Military Justice,⁹⁸ or the imposition of nonjudicial punishment under article 15 of the Code,⁹⁹ operate to bar prosecution by the host government and thus vitiate its right to demand the return of the accused? The most prominent commentators in the field have indicated that in their opinion, prosecution by the host state would not be barred under such circumstances.¹⁰⁰ Although they conclude that the host government should in practice refrain from exercising jurisdiction where the United States has made a determination not to prosecute after a careful investigation of the facts of the case, the commentators persuasively argue that the host state's exercise of its secondary jurisdiction would not be prohibited by the *non bis in idem* provision.

Second, when the host government has waived its primary right to exercise jurisdiction, the question arises whether the host country may reassert its jurisdiction and demand the return of the individual if the United States fails to prosecute. In a case not involving a serviceman's return to the United States, the French *Cour de Cassation* held that a French waiver of its primary right was irrevocable despite the fact that the United States decided, after an informal investigation, that charges were not warranted.¹⁰¹ Other nations are, of course, in no way bound by the French decision. Nonetheless, while it might be argued that a waiver by the host state is subject

⁹⁷ See J. SNEE & A. PYE, *supra* note 69, at 63-91; G. STAMBUK, *supra* note 61, at 98; Stanger, *supra* note 88, at 194.

⁹⁸ 10 U.S.C. § 832 (1964).

⁹⁹ 10 U.S.C. § 815 (1964), *as amended*, 10 U.S.C. § 815(e) (Supp. V, 1970).

¹⁰⁰ J. SNEE & A. PYE, *supra* note 69, at 71.

¹⁰¹ *Aitchison v. Whitley*, [1958] J.C.P. II, No. LXIII. See generally J. DODD, *supra* note 69, at 121-23; G. STAMBUK, *supra* note 61, at 96-106. The case involved an attempt by a Canadian widow to initiate a criminal action in a French court — after French officials had waived primary jurisdiction over the matter — against an American serviceman whose reckless driving had caused the death of the woman's husband, a member of the Canadian NATO forces in France.

to an implied condition that the host state's jurisdiction will revert unless the United States makes a judicial ruling,¹⁰² there seems to be no persuasive reason why an otherwise unconditional waiver should be so read. If the host country wishes to make its waiver conditional, it can easily do so by incorporating terms to that effect.

Assuming from the three factual situations discussed above that the NATO-type status-of-forces agreements impose an obligation on the United States — at the international level — to extradite servicemen, it is necessary to consider whether these agreements satisfy the requirement of the United States extradition law that the extradition of a citizen must rest on a duty under a treaty or statute.¹⁰³ (This requirement has been assumed *arguendo* to be applicable to the return and surrender of members of the armed forces.) If these agreements do satisfy the above requirement, it is also necessary to consider whether the armed services are the appropriate agency to execute the obligation to extradite.

The NATO Status of Forces Agreement was ratified with the formal advice and consent of the Senate,¹⁰⁴ and it is therefore a "treaty" in the constitutional sense of the term. Thus, to the extent to which its provisions create an international obligation for the United States to extradite its servicemen, the NATO Agreement creates a duty to extradite under United States law.

The NATO-type status-of-forces agreements with non-NATO countries, however, were not ratified with the advice and consent of the Senate;¹⁰⁵ rather, these agreements are merely executive agreements authorized by the mutual defense treaties which they implement,¹⁰⁶ with the exception of the agreement with the Philippines,¹⁰⁷

¹⁰² See generally G. STAMBUK, *supra* note 61, at 96-103 (discussing the lower court's decision in the *Whitley* case).

¹⁰³ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936).

¹⁰⁴ Status of Forces Agreement with the Parties to the North Atlantic Treaty, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846 (ratified by the Senate July 15, 1953).

¹⁰⁵ The Senate considered the Administrative Agreement Under Article III of the Security Treaty with Japan [Feb. 28, 1952, [1952] 3 U.S.T. 3341, T.I.A.S. No. 2492] before it gave its consent to the Security Treaty itself [Sept. 8, 1951, [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491]. The Administrative Agreement was not, however, a treaty in the constitutional sense [see *Wilson v. Girard*, 354 U.S. 524, 526-29 (1956)], nor is its present-day counterpart, the Status of Forces Agreement with Japan [Jan. 19, 1960, [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510]. The Status of Forces Agreement with Japan is an executive agreement, authorized by the Treaty of Mutual Cooperation and Security with Japan, Jan. 19, 1960, [1960] 11 U.S.T. 1632, T.I.A.S. No. 4509.

¹⁰⁶ See, e.g., Agreement Under Article IV of the Mutual Defense Treaty with the Republic of Korea Regarding Facilities and Areas and the Status of United States Forces, July 9, 1966, [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.

which was authorized by a joint resolution of Congress.¹⁰⁸ The law of the United States is unclear as to whether an extradition obligation can be incurred only under a treaty, as opposed to an executive agreement. In *Valentine v. United States ex rel. Neidecker*,¹⁰⁹ the Supreme Court held that extradition is permissible only as required by a treaty or statute. And the federal extradition statute permits extradition only pursuant to a "treaty of extradition."¹¹⁰ The fact that the word "treaty" is used is not necessarily dispositive, however, since it is possible, though unlikely, that the term was used in the international sense of any international agreement, rather than in the constitutional sense of an international engagement made with the advice and consent of the Senate.¹¹¹

In determining whether an executive agreement could be considered to be a treaty for this purpose, it is appropriate to distinguish between the various types of executive agreements. In the case of an executive agreement made solely pursuant to the President's constitutional authority, such a construction would run counter to the spirit of the *Valentine* decision¹¹² since it would result in the exercise of the extradition power by the Executive alone, without legislative assent in the form of advice and consent to a treaty or the enactment of a statute. Moreover, the fact that apparently all of the United States extradition agreements are treaties — in the constitutional sense — and not executive agreements, seems to indicate that an obligation to extradite can be incurred only under a treaty. Thus, even though executive agreements have to a large extent replaced the treaty as the primary instrument for international engagements by the United States, extradition agreements are still submitted to the Senate for its advice and consent.¹¹³

Although an executive agreement undertaken solely under the President's constitutional authority would not support a duty to extradite under United States law, it appears that the NATO-type status-of-forces agreements, being executive agreements authorized by mutual defense treaties and in one case by a joint resolution of

¹⁰⁷ Agreement Relating to the Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 10, 1965, [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851.

¹⁰⁸ 58 Stat. 625 (1944).

¹⁰⁹ 299 U.S. 5, 9 (1936).

¹¹⁰ 18 U.S.C. § 3181 (1964).

¹¹¹ See *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912).

¹¹² 299 U.S. at 9-10.

¹¹³ A recent example is the new extradition agreement with New Zealand. See 62 DEP'T STATE BULL. 760 (June 15, 1970).

Congress, may support such a duty. Senate approval of the mutual defense treaties constitutes advance consent to the criminal jurisdiction agreements thereunder, giving these agreements the same status as extradition treaties to the extent that the agreements do in fact require extradition.¹¹⁴ The district court in the *Stone* case¹¹⁵ may have adopted this view *sub silentio* (if it indeed believed that the United States extradition law was relevant to the return and surrender of servicemen), since it made no attempt to justify its giving an obligation under an executive agreement the same weight — under United States extradition law — as a commitment created by a treaty in the constitutional sense. To support such a finding, it would be necessary to show that the mutual defense treaty with Japan authorized an implementing agreement providing for extradition. In this regard, it should be noted that in *Wilson v. Girard*¹¹⁶ the Supreme Court upheld the waiver of jurisdiction by United States military authorities under an executive agreement with Japan,¹¹⁷ the Court finding that agreements respecting the status of United States servicemen had been authorized by the mutual defense treaty in force with Japan when the agreement was signed.¹¹⁸ It could similarly be argued that the current mutual defense treaty with Japan, which also provides for agreements respecting the status of United States servicemen in Japan,¹¹⁹ authorizes executive agreements which require the extradition of servicemen when such a requirement is an integral part of the agreement respecting the servicemen's status. In the *Girard* case, however, the authority to extradite under an executive agreement was not at issue, since Girard was within the territory of Japan at the time of his surrender. A contrary argument could therefore be made that the mutual defense treaty with Japan, and those with other non-NATO countries, authorize only executive agreements governing the status of United States forces within the respective

¹¹⁴ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 142, at 440 (1965).

¹¹⁵ *United States ex rel. Stone v. Robinson*, 309 F. Supp. 1261 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970); see text accompanying notes 7-8 *supra*.

¹¹⁶ 354 U.S. 524 (1957).

¹¹⁷ Amendment of Article XVII of the Administrative Agreement Under Article III of the Security Treaty with Japan, Sept. 29, 1953, [1953] 4 U.S.T. 1846, T.I.A.S. No. 2848.

¹¹⁸ Security Treaty with Japan, Sept. 8, 1951, [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491, *superseded by*, Treaty of Mutual Cooperation and Security, Jan. 19, 1960, [1960] 11 U.S.T. 1634, T.I.A.S. No. 4509. See note 120 *infra*.

¹¹⁹ Treaty of Mutual Cooperation and Security, Jan. 19, 1960, art. VI, [1960] 11 U.S.T. 1634, T.I.A.S. No. 4509. See note 120 *infra*.

foreign territories¹²⁰ and that agreements having effect outside of such territories are not authorized by the treaties. Nothing in *Girard*, however, indicates that its rationale is so limited, and to so read *Girard* does not appear to be consistent with its thrust.

Because the NATO-type Status of Forces Agreement with the Philippines¹²¹ was authorized by a joint resolution of Congress,¹²² it would similarly appear to support a duty to extradite. Although the joint resolution authorizing agreements respecting the status of United States servicemen in the Philippines is obviously not a treaty in the constitutional sense because it was effected without a two-thirds vote of the Senate, it does meet the *Valentine* requirement that any duty to extradite must rest upon the authorization of Congress.¹²³

Even if we assume that an executive agreement authorized by treaty, such as the Status of Forces Agreement with Japan, would be sufficient as a matter of United States law to authorize extradition of military personnel, another legal hurdle might remain. The federal extradition statute appoints the Secretary of State as the United States functionary who may order a fugitive to be delivered to an agent of the requesting government.¹²⁴ He may do so only after a justice, judge, or magistrate has conducted a hearing, considered the evidence supporting the criminal charges, and found that evidence to be sufficient to sustain the charge under the provisions of the

¹²⁰ For example, the Mutual Defense Treaty with the Republic of Korea, Oct. 1, 1953, art. IV, [1954] 5 U.S.T. 2373, T.I.A.S. NO. 3097, provides:

The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces *in and about the territory of the Republic of Korea* as determined by mutual agreement. (Emphasis added.)

And the Treaty of Mutual Cooperation and Security with Japan, Jan. 19, 1960, art. VI, [1960] 11 U.S.T. 1634, T.I.A.S. NO. 4509, provides:

For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities, and areas *in Japan*.

The use of these facilities and areas as well as the status of United States armed forces *in Japan* shall be governed by a separate agreement, replacing the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, signed at Tokyo on February 28, 1952, as amended by such other arrangements as may be agreed upon. (Emphasis added.)

¹²¹ Agreement Relating to the Military Bases in the Philippines: Criminal Jurisdiction Arrangements, Aug. 10, 1965, [1965] 16 U.S.T. 1090, T.I.A.S. NO. 5851.

¹²² 58 Stat. 625 (1944).

¹²³ 299 U.S. at 9-10.

¹²⁴ 18 U.S.C. § 3185 (1964).

applicable extradition treaty.¹²⁵ And he may refuse to surrender the fugitive even though the magistrate found that the requirements for extradition had been met.¹²⁶ The statute operates in the case of all extradition agreements.¹²⁷ The *Restatement of Foreign Relations Law* indicates, however, that a self-executing executive agreement — requiring no ancillary legislation — made pursuant to a treaty supersedes inconsistent provisions of earlier acts of Congress.¹²⁸ The custody arrangements discussed in the second factual situation above appear to be self-executing, since they contemplate that the United States military authorities, without further legislative authorization, will be responsible for making the accused available to the foreign country. Thus, under the *Restatement* view, United States military authorities might have the full authority to extradite servicemen — notwithstanding the formal requirements of the extradition statute — to the extent that the custody arrangements require extradition. Similarly, because the criminal jurisdiction arrangements discussed in the first and third factual situations appear to be self-executing, those arrangements could be found to support the authority for United States military officials to extradite servicemen to the extent that the obligation to extradite can be implied therefrom.

Although United States military authorities may thus be authorized to extradite servicemen without adhering to the procedure required under the extradition statute, it seems clear that an individual may not be surrendered to a foreign country without an appropriate hearing. In *Sayne v. Shipley*¹²⁹ the Court of Appeals for the Fifth Circuit found that due process guaranteed a serviceman the right to a hearing prior to his extradition from the Canal Zone to Panama. It is therefore doubtful that membership in the armed forces makes an individual amenable to extradition merely at the order of an appropriate military commander, without a hearing. Since the armed services have the authority to convene statutory and nonstatutory boards which act as administrative tribunals¹³⁰ and military judges

¹²⁵ 18 U.S.C. § 3184 (Supp. V, 1970), *amending* 18 U.S.C. § 3184 (1964).

¹²⁶ See M. WHITEMAN, *supra* note 25, § 35, at 1026-28.

¹²⁷ See *Ex parte* Charlton, 185 F. 880 (C.C.D.N.J.), *aff'd sub nom.* Charlton v. Kelly, 229 U.S. 447 (1911).

¹²⁸ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141-42, at 432-33, 440 (1965).

¹²⁹ 418 F.2d 679, 686 (5th Cir. 1969).

¹³⁰ See generally DEP'T OF THE ARMY PAMPHLET NO. 27-187, MILITARY AFFAIRS 132-151 (1966).

who preside over courts-martial have authority recognized by statute,¹³¹ the military branch concerned should be able to provide an adequate hearing to satisfy this requirement. The extradition statute itself is satisfied by a hearing before "any magistrate authorized . . . by a court of the United States."¹³² It therefore appears that a hearing before a federal judge is not essential to satisfy the due process requirement for a hearing. Moreover, as the *Sayne* case indicates,¹³³ the hearing on a serviceman's petition for habeas corpus or for an injunction prohibiting his return could satisfy the due process requirement.

IV. EFFECT OF STATUS OF FORCES AGREEMENTS ON UNITED STATES EXTRADITION TREATIES REQUIRING THE EXTRADITION OF UNITED STATES NATIONALS

As noted above, the United States has no extradition treaty with four of 18 countries which are parties to the NATO-type status-of-forces agreements,¹³⁴ and the extradition treaties with nine of the other countries do not require the extradition of United States citizens.¹³⁵ United States nationals are extraditable under the extradition treaties with the five remaining countries.¹³⁶ Where the accused is a United States serviceman, do the criminal jurisdiction arrangements with the latter countries affect their right to demand extradition under the treaty and the obligation of the United States to comply with such a demand?

The question can arise in the third type of factual situation previously discussed, where the offense is subject to the primary juris-

¹³¹ 10 U.S.C. § 826 (1964), *as amended*, 10 U.S.C. § 826 (Supp. V, 1970).

¹³² 18 U.S.C. § 3184 (Supp. V, 1970), *amending* 18 U.S.C. § 3184 (1964).

¹³³ 418 F.2d at 686.

¹³⁴ *See* note 70 *supra*.

¹³⁵ *See* note 72 *supra*.

¹³⁶ The extradition treaties with four of these countries require the extradition of "persons": Australia and the United Kingdom [Dec. 22, 1931, 47 Stat. 2122 (1932), T.S. No. 849]; Italy [Mar. 22, 1868, T.S. No. 629 (1868), T.S. No. 174]; and Canada [Aug. 9, 1842, art. X, 8 Stat. 572 (1842), T.S. No. 119]. Under the Supreme Court's ruling in *Charlton v. Kelly*, 229 U.S. 447 (1911), the term "persons" includes citizens of the United States.

The extradition treaty with Japan [Apr. 29, 1886, art. VII, 24 Stat. 1015 (1886), T.S. No. 191] allows the extradition of United States citizens at the discretion of the President. While the Supreme Court has never specifically held that treaties which grant the Executive a discretionary power to extradite individual United States citizens are valid, it has tacitly approved of such treaties. *See* *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 12 (1936); *Charlton v. Kelly*, 229 U.S. 447, 467 (1911).

diction of the United States or the host country waives its primary jurisdiction in favor of the United States; the United States acquits the accused after a full trial or decides not to prosecute; and the host country, being dissatisfied with the result, demands extradition under the extradition treaty. If the individual has been tried and acquitted by a United States court-martial *in the territory* of the requesting state, the *non bis in idem* rule in the NATO-type status-of-forces agreement would bar the serviceman's surrender for further prosecution by the host state.¹³⁷ If the individual has been tried and acquitted *outside* the host state, or if the United States military authorities failed to take action against him, the *non bis in idem* provision of the status-of-forces agreement would not be operative, and the United States might be obligated to return him under the extradition treaty and, arguably, under the status-of-forces agreement itself.¹³⁸

There is a real danger of unfairness to the accused where he has already been tried and acquitted by a United States military court outside the territory of the requesting state. Since *non bis in idem* does not appear to be a general rule of international law, the United States would seem obliged under the extradition treaty to return the accused for trial by the requesting state. The extradition treaty with the United Kingdom, which also applies to Australia — two of the five countries with respect to which this problem would arise — specifically provides that the individual need not be surrendered if he has been tried by the United States.¹³⁹ There is no such protective provision in the extradition treaties with the other three countries, and these countries could apparently demand the extradition of a United States serviceman who had been tried and acquitted outside of the host state's territory.¹⁴⁰

¹³⁷ See note 95 *supra* & accompanying text.

¹³⁸ See text accompanying notes 96-97 *supra*.

¹³⁹ Extradition Treaty with Great Britain, Dec. 22, 1931, art. 4, 47 Stat. 2122 (1932), T.S. No. 849.

¹⁴⁰ The same threat of double jeopardy could conceivably arise under a NATO-type status-of-forces agreement itself, in the absence of an extradition treaty requiring the extradition of United States citizens. Thus, a serviceman could have been tried and acquitted in a territory outside of the host country, and the host country could then demand his return and surrender under the implied obligation created by the criminal jurisdiction arrangements. See text accompanying notes 96-97 *supra*. The courts of the United States, however, must recognize any such implied obligation before it will support a duty to extradite under United States extradition law, and it is unlikely that the courts would recognize an extradition obligation which would violate any fundamental rights of the accused. Cf. *Wilson v. Girard*, 354 U.S. 524, 530 (1956).

V. CONCLUSION

In determining whether the United States armed forces may order or compel an individual to return to a foreign country to face trial or punishment by the local authorities, it should be recalled that the Supreme Court has defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him demands the surrender."¹⁴¹ The facts in the *Stone*,¹⁴² *Buskers*,¹⁴³ and *Williams*¹⁴⁴ cases fell squarely within that definition. Nonetheless, the courts in these cases did not consider whether the United States extradition law governed the return and surrender of the respective servicemen.

Assuming that the rule in the *Valentine* case¹⁴⁵ — that a duty to extradite United States citizens can be created only by treaty or statute — is applicable to the return and surrender of United States servicemen, it appears that the NATO-type criminal jurisdiction arrangement could be construed as imposing an obligation on the United States Government to return an accused serviceman from the United States for trial by the courts of a host state. This is particularly true where the individual departed from the foreign country while he was in custody of the United States forces, awaiting prosecution under the host state's primary jurisdiction.¹⁴⁶ Similarly, where the United States military authorities have failed to fully exercise their jurisdiction over the serviceman,¹⁴⁷ the criminal jurisdiction arrangements could be construed as requiring the United States military authorities to make the serviceman available to the host state for prosecution. And where these obligations are created by executive agreements, those agreements could be found to have the

¹⁴¹ *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

¹⁴² *United States ex. rel. Stone v. Robinson*, 309 F. Supp. 1261 (W.D. Pa.), *aff'd*, 431 F.2d 548 (3d Cir. 1970). See text accompanying notes 7-11 *supra*.

¹⁴³ *Buskers v. Seamans*, Civil No. 1208-70 (D.N.J. Sept. 17, 1970), *stay denied*, No. 19,270 (3d Cir. Sept. 18, 1970), *stay denied*, Memorandum Order (U.S. Sept. 19, 1970) (Blackmun, Cir. J.). See text accompanying notes 12-15 *supra*.

¹⁴⁴ *Williams v. Rogers*, Civil No. 1027 (D.N.D. May 6, 1971), *appeal pending*, No. 71-1249 (9th Cir., filed May 10, 1971). See text accompanying notes 16-20 *supra*.

¹⁴⁵ *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5 (1936). See text accompanying notes 38-39 *supra*.

¹⁴⁶ See text accompanying notes 86-94 *supra*.

¹⁴⁷ See text accompanying notes 95-97 *supra*.

advance consent of the Senate through the mutual defense treaties which they implement.¹⁴⁸

In addition, there is support for the position that the NATO-type status-of-forces agreements, being self-executing executive agreements, can authorize military authorities to extradite servicemen, notwithstanding the requirement under the federal extradition statute¹⁴⁹ that the Secretary of State rule on the extradition.¹⁵⁰ And the due process requirement that the serviceman be afforded a hearing prior to extradition appears to be satisfied by the hearing on the serviceman's petition for habeas corpus or injunctive relief.¹⁵¹

Although the *Stone*, *Buskers*, and *Williams* cases may thus have reached justifiable results, it is clear that the courts' silence respecting the issue of extradition by the armed forces has left many crucial questions unanswered.

¹⁴⁸ See text accompanying notes 105-20 *supra*.

¹⁴⁹ 18 U.S.C. § 3184 (Supp. V, 1970), *amending* 18 U.S.C. § 3184 (1964).

¹⁵⁰ See text accompanying notes 124-28 *supra*.

¹⁵¹ See text accompanying notes 129-33 *supra*.