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Federalism and the Treaty Power: Breaking the "Bond(S)" Between Nations: The Treaty Power and Status of Forces Agreements

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FEDERALISM AND THE TREATY POWER: BREAKING THE "BOND(S)" BETWEEN NATIONS: THE TREATY POWER AND STATUS OF FORCES AGREEMENTS[1]

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The Constitution reposes the treaty power in the two political branches[3] and makes treaties the supreme law of the land.[4] What limits exist to cabin this power have been the subject of debate since the drafting of our Constitution. In addition to limits to the treaty power generally recognized as imposed by the Bill of Rights and other specific constitutional protections,[5] the question of whether the treaty power is restrained by a subject-matter limitation or the federalist structure of our government and the Tenth Amendment has been a recurring issue.

Debates over the subject matter limitations of the treaty power have existed since the nation's founding. At its inception, the treaty power was seen primarily as a means to regulate the United States' intercourse with foreign nations, with its exercise to be consistent with those external aims. Often quoted on the scope of the treaty power is James Madison's statement that the treaty power, as a distinctly federal power, was to be exercised "principally on external objects, as *war*, *peace*, negotiation, and foreign commerce."[6] This statement has been used to support both a robust treaty power, as well as arguments by proponents of federalism-based limits on that power that

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1 This article builds on my prior article, written with Prof. Geoffrey Corn, addressing the much broader reflections of treaty practice in Law of Armed Conflict treaties, to be published as *Viewing Treaties through a Military Lens: Testing the Limits*, (with Prof. Geoffrey Corn), forthcoming in 38:2 Harvard Journal of Law and Public Policy (Apr.- May 2015).

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3 U.S. CONST., art. II, §1, art. II § 2, cl.2, and art. I, § 8, cl.18. The Constitution also prohibits States from entering into treaties. U.S. CONST., art. I, §10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; . . .").

4 U.S. CONST., art. VI, cl. 2.

5 LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 185 (2d ed. 1996) ("It is now settled, however that treaties are subject to the constitutional limitations that apply to all exercise of federal power, principally the prohibitions of the Bill of Rights." For example, a treaty could not cede a State's territory without its consent (Art. IV., sec. 3, cl. 1) or modify the republican form of state government (Art. IV., sec. 4)); *see also Treaties and Other International Agreements: The Role of the United States Senate*, U.S. CONGRESSIONAL RESEARCH SERVICE, Jan. 2001, *available at* http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf [hereinafter *Senate on Treaties*] ("It seems clear from the Court's pronouncement in *Geofroy v. Riggs* that the treaty power is indeed a broad one, extending to 'any matter which is properly the subject of negotiation with a foreign country.' However, it is equally apparent that treaties, like Federal statutes, are subject to the overriding requirements of the Constitution.").

6 THE FEDERALIST NO. 45, at 289 (James Madison)(emphasis added); *see United States v. Bond* (*Bond II*), 681 F.3d 149, 159 n.11 (3d Cir. 2012).

treaties may deal only with matters of "international concern." Yet both Hamilton and Madison also emphasized that a precise definition of the power was undesirable because the treaty power was intended to be flexible in order to address future contingencies unknown to the drafters.[7] Regardless, a primary purpose of the new Constitution was to eliminate the problems of the Confederation where federal treaty obligations were frustrated by the states.[8]

It is unsurprising that treaties dealing with the Laws of Armed Conflict (LOAC) remain at the core of the treaty power. What is surprising is that that LOAC treaties have been the focal point of recent federalism challenges to its exercise. The willingness of the Supreme Court to consider federalism challenges to the treaty power in this core "national" area, specifically in the case of *Bond v. United States*,[9] may indeed indicate that its revival of federalism concerns in Commerce Clause cases may augur some additional restrictions on treaty implementation. Such restrictions would be especially significant as exercises of the treaty power that also implicate the political branches' war powers would appear to be due the upmost deference by the courts.

The failure of the Confederation to adequately constrain state interference with treaty obligations was a key motivating factor in the decision to convene the Constitutional Convention.[10] The States' failure to comply with provisions of the Treaty of Paris ending the Revolutionary War placed the early republic in existential jeopardy.[11] Rather than adopting substantive limits to the treaty power, the Constitutional Convention instead adopted a broad treaty power, relying on political and structural limits to control its abuse.[12] Despite the broad nature of the treaty power adopted by the Convention, Thomas Jefferson later construed the treaty power narrowly, contending it was limited

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7 *Bond II*, 681 F.3d, at 160; *see also* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia, in 1787, 514-15 (Jonathan Elliot 2d ed., 1859) ("The object of treaties is the regulation of intercourse within foreign nations, and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise..."); *see also* Henkin, *supra* note 5, at 186 (citing The Federalist No. 23 (Hamilton), that powers essential to the common defense, "[O]ught to exist without limitation . . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.").

8 *See* Medallin v. Texas, 552 U.S. 491, 543 (2008) (Breyer, J., dissenting) (citing The Federalist No. 42, p. 264 (James Madison) (C. Rossiter ed., 1961) (Supremacy Clause "disembarrassed" the Convention of the problem presented by the Articles of Confederation where "treaties might be substantially frustrated by regulations of the States").

9 Bond v. United States, 134 S.Ct. 2077, 2087 (2014); Bond v. United States, 131 S.Ct. 2355, 2360 (2011).

10 *See Medallin*, 552 U.S. at 543; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L Rev. 932, 934-935 (2010) [hereinafter *A Civilized Nation*].

11 Chris DeRose, Founding Rivals: Madison v. Monroe, the Bill of Rights, and an Election that Saved a Nation, 55-70 (2011).

12 Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei, Haley Nix Proctor, *The Treaty Power: Its History, Scope and Limits*, 98 Cornell L. Rev. 239, 249 (2013) [hereinafter *The Treaty Power*] (noting that the requirement for advice and consent from two-thirds of the Senate was an important political and structural constraint on the treaty making power. The Senate was the body designed to provide equal representation for all States regardless of size or population, and prior to the passage of the Seventeenth Amendment, Senators were elected by the state legislatures. The Seventeenth Amendment supersedes Article I, § 3, clauses 1 and 2 of the Constitution).

to those subjects traditionally regulated by treaties between sovereign states, excluding those rights normally reserved to the states, and further excluding those subjects normally requiring participation by the House of Representatives.[13] This narrow view, apart from rendering the treaty power a functional nullity, is not supported by the drafting history of the Constitution's treaty provisions during the 1787 Constitutional Convention,[14] nor by historical practice following its ratification.[15]

Jefferson's view of the treaty power reflected his narrower conception of the scope of federal power generally. Additionally, although Madison initially supported a strong federal government within its enumerated powers, both Madison and Jefferson altered their views on the nature of the federal compact and the ability of States to negate federal actions after the passage of the 1798 Alien and Sedition Acts early in our history.[16] Their arguments in the Virginia and Kentucky Resolutions, as well as Madison's Report of 1800, premised upon the concept of the Constitution as a compact between sovereign States, formed the basis for later State's rights arguments which ultimately led to secession and the Civil War.[17] As a result, Jefferson and Madison's later developed concept of reserved powers also served as a potential limitation on the impact of treaty obligations

13 HENKIN, *supra* note 5, at 189-90 (saying that in his later years, Thomas Jefferson construed the treaty power narrowly believing it limited to those subjects traditionally regulated by treaties between sovereign states and excluding those rights normally reserved to the states and further to exclude those subjects normally requiring participation by the House of Representatives. This narrow view, apart from rendering the treaty power a functional nullity, is not supported by the drafting history of the Constitution's treaty provisions during the 1787 Constitutional Convention, nor by historical practice following its ratification); *see Senate on Treaties*, *supra* note 5, at 27-29 (2001) (discussing the treaty provision: "By September 4 delegates had agreed that the President "by and with the advice and consent of the Senate, shall have power to make treaties," and that no treaty shall be made without the consent of two-thirds of the Senators present [t]his portion of the report was brought up for discussion on September 7. James Wilson of Pennsylvania moved to add the words 'and House of Representatives' after the word Senate because, he said, since treaties 'are to have the operation of laws, they ought to have the sanction of laws also.' As to the objection that secrecy was needed for treaty making, he said that factor was outweighed by the necessity for the sanction of both chambers. Roger Sherman of Connecticut argued that the requirement of secrecy for treaties 'forbade a reference of them to the whole Legislature.' Wilson's motion was defeated.").

14 *The Treaty Power*, *supra* note 12, at 246-47.

15 United States v. Bond (*Bond II*), 681 F.3d 149, 157-58 (3d Cir. 2012); *A Civilized Nation*, *supra* note 10; David M. Golove, *Treaty-Making and the Nation: the Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) [hereinafter *Treaty-Making and the Nation*]; Jean Galbraith, *Congress's Treaty Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275355; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 287 (4th ed. 2011); HENKIN, *supra* note 5, at 191; Brief of Amici Curiae Professors David M. Golove, Martin S. Lederman, and John Mikhail in Support of Respondent, Bond v. United States, 2013 WL 4737189, No. 12-158 (Aug. 16, 2013); *contra* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395 (1998) [hereinafter Bradley, *Treaty Power*]; Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 HARV. L.REV. 1867, 1875 (2005) [hereinafter *Executing the Treaty Power*].

16 Donald Burke, *James Madison's Dystopian Vision: The Failure of Equilibrium*, 43 AM. J. LEGAL HIST. 254, 259, 279 (1999) [hereinafter *Madison's Dystopian Vision*]; H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 690-692 (1994).

17 *See* Powell, *supra* note 16, at 692 (noting that Jefferson and Madison went on to explain and justify their narrow construction views on the basis of a full-fledged theory of the Constitution's origins, nature, and purpose. The Resolutions proclaimed that the Constitution was a compact between the sovereign states as high contracting parties; the obligation to give a narrow construction to the powers delegated to the "general government" as the states' common agent flowed directly from the constitutional fact of the states' undiminished sovereignty.").

within the states.

Despite the treaty power being entrusted solely to the federal government by the Constitution, its potentially unlimited scope made it a focus for concern over federal intrusion into matters traditionally entrusted to the states. Neither the Convention nor state ratifying conventions provided any guidance on how the national government was expected to enforce the nation's treaty obligations, primarily because treaties were envisioned to be self-executing.[18] The operation of the Supremacy Clause was seen as the primary mechanism to implement the treaty power, making treaties the supreme law of the land by binding "the Judges in every State . . . any Thing in the Constitution or Laws or any State to the Contrary notwithstanding."[19] Because of the assumption that treaties automatically became the supreme law of the land once ratified in accordance with constitutional process, the extent of Congress's ability to legislate to implement a treaty, particularly if outside of other federally enumerated powers, was not addressed at the Convention. As the doctrine of non-self-execution developed,[20] it provided proponents of a broad and a narrow treaty power another avenue to use the historical record to support their respective views. Nevertheless, no court has declared a congressional act implementing a treaty void because of its impact on states' rights.[21]

Significant scholarship in the last ten years has not only analyzed the scope and history of the treaty clause as part of the drafting and adoption of the U.S. Constitution, but also the practice of the federal government in implementing this power. Representing opposing views of this recurring debate, Daniel Golove's views supporting a broad treaty power are opposed by scholars such as Curtis Bradley and Nicolas Rosenkratz, who seek to limit the domestic effect of the treaty power to those areas already within a federally enumerated power.[22] These dueling histories place the treaty power in its historical context, and interestingly are not new to the analysis of the treaty power.[23] Early in the 20th Century, similar evaluations of the history and judicial precedent outlined

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18 *The Treaty Power*, *supra* note 12, at 250-51 ("Evidence that Founding-Era treaties were largely meant to self- execute includes the placement of treaties in the Supremacy Clause, an overt endorsement of self-execution at the North Carolina ratifying convention, and statements like Jefferson's in his Manual of Parliamentary Practice that "[t]reaties are legislative acts. A treaty is a law of the land."); *A Civilized Nation*, *supra* note 8, at 940, 994, 999-1000.

19 U.S. Const., art. VI, cl. 2.

20 *See* Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, J.) ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision . . . . But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

21 *See* Bond v. United States, 134 S.Ct. 2077, 2087 (2014) (noting that the Court has never held a statute implementing a valid treaty to exceed Congress's enumerated powers).

22 *Executing The Treaty Power*, *supra* note 15; *compare A Civilized Nation*, *supra* note 10; *Treaty-Making and the Nation*, *supra* note 15, *with* Bradley, *The Treaty Power*, *supra* note 15; *see also* Edwin S. Corwin, National Supremacy, Treaty Power VS. State Power at 73 (Forgotten Books ed., 2012) (1913) [hereinafter Corwin, National Supremacy].

23 *See, e.g.*, Charles Henry Butler, 1 The Treaty Making Power of the United States (1902) [hereinafter Butler, The Treaty Making Power], *available at* http://books.google.com/books?oe=UTF- 8&id=L6AMAAAAYAAJ&q=

hauntingly familiar arguments based on U.S. practice and historical analysis.[24] Although both Corwin and Butler, two leading scholars at the turn of the 20th Century, concluded that the Civil War had resolved the outstanding questions on the treaty power in favor of its broad scope unhindered by any reserved power of the states,[25] the Supreme Court had not explicitly determined if Congress's ability to legislate to implement treaties was limited to its otherwise enumerated powers.[26]

In the view of many, this uncertainty was resolved by *Missouri v. Holland*.[27] The decision seemed to foreclose any federalism argument limiting Congressional implementation of a valid treaty. In that case the Supreme Court rejected a Tenth Amendment challenge to legislation implementing

john+randolph+tucker#v=onepage&q=john%20randolph%20tucker&f=false; *see* CORWIN, *National Supremacy*, *supra* note 22 (arguing for broad treaty power, and creation of one sovereignty of all people of United States); *see also* John Randolph Tucker, 1 THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION, 294-301 (Henry St. George Tucker, ed.) (1899) (as basis of states' reserved rights, Tucker expounds on full sovereignty of founding states and arguing that the "people" referred to in the preamble were the people of the various sovereign states, not of one sovereignty of the United States), *available at* http://books.google.com/books?id=Xsy0vyHmFM0C&pg=PA11&source=gbs_toc_r&cad=4#v=onepage&q&f=false [hereinafter Tucker, CONSTITUTION].

24 *See Treaty-Making and the Nation*, *supra* note 15, at 1265-66 (arguing that Holmes' central theory about the nature of the Tenth Amendment was based on his adoption of Corwin's thesis that the people of the United States formed a single sovereignty and as such the United States was fully sovereign within its enumerated powers. In rejecting the reserved powers implications of the states' rights advocates, premised upon Madison and Jefferson's Virginia and Kentucky Resolutions, he saw the Civil War as having resolved the central notion of one nation, which rejected the right of a state to secede); *see also* Butler, THE TREATY MAKING POWER, *supra* note 23, at §§ 15-16, 142 (describing proponents of the States' rights view pre-bellum as John C. Calhoun and Chief Justice Taney and John Phillip Butler in the ante-bellum period, contrasted with broad constructionists Chief Justice Marshall and Justice Story pre-bellum, and Justices Field, Gray and Miller after the war); *see also* Tucker, CONSTITUTION, *supra* note 23, at 294-301 (expounding on full sovereignty of founding states and arguing, as a basis of states' reserved rights, that the "people" referred to in the preamble were the people of the various sovereign states, not of one sovereignty of the United States).

25 *See* CORWIN, *supra* note 22, at 301-02 ("More rigorous exponents of this [state's rights] doctrine would confine the treaty-power to the field of powers which, exclusive of the treaty-power, are delegated to the United States, but the difficulties attaching to this view were admitted by Jefferson himself, who took if from Nicholas, and it has been hopelessly discredited by the history of negotiation, and adjudication thereon. But there are more far-reaching objects to the State-rights view of the treaty-power upon the score of history. Not only was this view sustained during the period of its greatest prominence by immediate concern for a great sectional interest which no long exists, but it rests upon a view of the fundamental character of the Constitution that is without historical warrant: the view, namely, that the Constitution was a compact among the State sovereignties; from which view was deduced quite logically, but to the utter defiance of the history of the matter, the proposition that the States in the exercise of their reserved powers are capable of confronting the National Government in the exercise of its delegated powers, when the two jurisdictions clash, as equal sovereigns."); Butler, THE TREATY MAKING POWER, *supra* note 23, at § 3 ("That the treaty-making power of the United States as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis for negotiation and contract between any of the sovereign powers of the world . . . [t]hat the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations, which in the absence of treaty stipulations, would be unconstitutional as infringing on the powers reserved to the States, are constitutional, and can be enforced, even though they conflict with State laws or provisions of State constitutions.")

26 When faced with such a question in 1920, Justice Holmes relied extensively on Corwin's treatise, NATIONAL SUPREMACY, to structure his opinion and inform his conclusions; *Treaty-making and the Nation*, *supra* note 15, at 1257-58.

27 *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (tellingly, Congress itself sees *Missouri v. Holland* as dispositive of the issue of whether they have authority to legislate in support of a ratified treaty); *see Senate on Treaties, supra* note 5, at 66-67.

the 1916 U.S./Canadian Migratory Bird Treaty. Absent the treaty, Congress had been held to lack authority to legislate to protect migratory birds.[28] In a concise opinion, Justice Holmes writing for the Court rejected the position that the Treaty and its implementing legislation were void as "an interference with the rights reserved to the states."[29] Echoing back to Madison's prescient description of the necessity of flexibility in the treaty power, Justice Holmes stated, "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." Evaluating the treaty power, the Court held, "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."[30] Recognizing that qualifications to the treaty-making power "must be ascertained in a different way,"[31] the Court determined first that the provision did not contravene any prohibitory language in the Constitution. The Court then queried further, "[t]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."[32] For Justice Holmes, that question could only be answered by considering what "this country has become in deciding what that amendment has reserved."[33] In upholding the Act, Holmes concluded, "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[34] Although the 1920 *Missouri v. Holland* decision settled the issue of the scope of both the treaty power and Congress's authority to legislate to implement treaties, what "invisible radiations" exist to circumscribe the federal treaty power remains an open question. Thirty years later, *Missouri v. Holland* would once again be subject to national debate as states' rights advocates attempted to amend the Constitution to alter its conclusions. The context for this renewed debate was about as far removed from migratory birds as imaginable, and instead dealt with a core national security interest of the nation: U.S. involvement in the most important mutual defense relationship in our nation's history.

A. The NATO Status of Forces Agreement (SOFA) Treaty: Bricker Strikes Again.

The late 1940s and early 1950s required the United States to reevaluate its place and role in the world in the aftermath of World War II. In the immediate aftermath of World War II, the United States supported the creation of the United Nations as a replacement for the ineffective League of Nations. Participating in the negotiation of the 1949 Geneva Conventions during this critical period, the United States sought to incorporate the lessons drawn from its experience in the recent devastating total warfare of World War II and establish a world-wide standard of humanity in warfare.[35] The commencement of both the Cold War and the Korean War resulted in the creation

28 *Holland*, 252 U.S. at 432.
29 *Id.*
30 *Id.* at 433.
31 *Id.*
32 *Id.* at 433-34.
33 *Id.* at 434; *see* discussion at note 24.
34 *Id.*
35 *See* Olivier Barsalou, *Making Humanitarian Law in the Cold: The Cold War, The United States and the Genesis of the*

of new multi-lateral alliances designed to meet the challenge of global communism, as well as the first utilization of the United Nations in a response to a threat to international peace. Following the commencement of the Korean War in June 1950 and its stalemate beginning in June, 1951, the Senate held consideration of the 1949 Geneva Conventions in abeyance at the request of the State Department from 1952 to its approval in 1955.[36] During this period in June 1953, the Senate also considered giving advice and consent for the ratification of the North Atlantic Treaty Organization's Status of Forces Agreement. The NATO Treaty itself had been ratified by the United States with Senate consent within a three month period in 1949,[37] and the NATO SOFA was intended to resolve the legal status of military forces stationed in other NATO-partner countries as this multilateral defense treaty came into effect.[38]

Consideration of the NATO SOFA Treaty occurred at a time of increasing domestic controversy over the proper roles of treaties in domestic U.S. law, particularly in light of the ratification of the United Nations Treaty in July 1945, and the newly proposed UN International Covenant on Human Rights.[39] Following World War II, the United States saw both an expansion

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Geneva Conventions of 1949 38 (IILJ Emerging Scholars Paper 11, 2008), *available at* http://www.iilj.org/publications/documents/Barsalou.ESP11-08.pdf.

36 *See Geneva Conventions on the Protection of War Victims: Senate Report on Hearings Before Senate Foreign Relations Committee*, 84th Cong. 4 (1955) [hereinafter Senate GC Hearings Rpt.], *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl104-192/hear-060355-1955.pdf (noting that although the 1949 Geneva Conventions had been negotiated and signed in 1949, they had not yet been considered by the Senate by the time of outbreak of the Korean War in 1950. The State Department asked the Senate to defer consideration of the Conventions to allow the battlefield experience of the Korean War to be incorporated into the United States' decision to ratify the Conventions. The ongoing war under the auspices of the United Nations raised significant issues on the viability of the Geneva Conventions in a war with non-parties to the Conventions, particularly with the significant prisoner of war issues that extended from World War II and continued into the Korean War. The Senate took up consideration of the 1949 Geneva Conventions in 1955, allowing it to incorporate the lessons learned from the Korean War into its evaluation of the wisdom of the treaty).

37 *NATO Chronology of Events*, HARRY S. TRUMAN PRESIDENTIAL LIBRARY, *available at* http://www.trumanlibrary.org/nato/natocron.htm.

38 SOFAs, address the legal status of military forces present in a foreign country with the consent of the receiving state, and in particular, "how the domestic laws of the foreign jurisdiction apply to U.S. personnel. *See* R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, U.S. CONGRESSIONAL RESEARCH SERVICE (RL34531; Mar. 15, 2012), 1 n.2, *available at* http://www.fas.org/sgp/crs/natsec/RL34531.pdf. [hereinafter CRS SOFA Report] (depending on the terms of each SOFA agreement, "U.S. personnel may include U.S. armed forces personnel, Department of Defense civilian employees, and/or contractors working for the Department of Defense. The scope of applicability is specifically defined in each agreement.") Although specific SOFAs define these terms in the context of each particular agreement, they are generally useful to describe the relationship existing between states when friendly military personnel are sent to another nation at the invitation of the host state. Military Personnel sent "on official business may be sent as part of a force or individually. *See* Major Manuel E. F. Superveille, *The Legal Status of Foreign Military Personnel in the United States*, 1994-MAY THE ARMY LAWYER 3 (1994) [hereinafter Superveille] (discussing international law principles of territory, nationality, passive personality, and protection as a basis for differing views on allocation of criminal jurisdiction over visiting foreign military forces).

39 *Treaty-Making and the Nation*, *supra* note 15; *see* Arthur H. Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 FOREIGN AFF. 1, 3-5 (1953) ("The primary function of the Federal Government in the conduct of our foreign relations has always been- but is much more consciously so today- that of providing a policy that will ensure national survival . . . . We have chosen a combination of national strength and active diplomacy, achieving a compromise between the theory- perhaps exploded by scientific assaults on time, space, and the atom- of an isolated continental fortress and

of federal power at the expense of the states and the strengthening of the executive power at the federal level. Conservatives, concerned over these developments, "feared that these trends would be accelerated by America's increasingly active role in world affairs, especially its participation in the United Nations . . . . and sought to limit the domestic effects of the nation's growing international involvement."[40] Although differing from the traditional pre-World War II isolationists, conservatives in the early 1950s equated the expansion of federal executive power (often at the expense of the states) with increased involvement by the United States in world affairs.[41] This, and heightened concern over the potential impact of new human rights treaties on U.S. domestic law, seen as posing a danger to racial segregation and state sovereignty,[42] sparked renewed opposition in Congress over the scope of the Treaty power. Leading the effort to restrict treaty powers was Senator John Bricker, who in 1951 embarked on a battle to overturn *Missouri v. Holland*[43] and limit the Treaty power through constitutional amendment.[44] Senator Bricker's various attempts to amend the U.S. Constitution included prohibitions on the domestic operation of any U.S. treaty absent specific enabling legislation passed by Congress making its provisions operative domestically, and limits on the subject-matter of such legislation to that already authorized Congress in Article I.[45]

In the early 1950s, both parties in Congress "fundamentally viewed the world situation in the same way," with President Eisenhower "inherit[ing] his basic national security structure from the Democratic Truman, and adopt[ing]the broad outlines of his policies."[46] During this critical juncture in our nation's struggle against an increasingly dangerous Soviet threat, the United States was engaged in the Korean War, had over 3.6 million men in uniform, was allocating billions of dollars to defense, and was involved in a policy of "active diplomacy . . . to coordinate the military

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the theory of some supranational polity. This compromise has appeared in an age of global military problems in which the free nations of the world must jointly meet the threat of a monolithic totalitarian dictatorship ruling one-third of the peoples and natural resources of the world . . . the policy of the past decade has been that of an active diplomacy backed by military preparedness. This course has required active Congressional support."); *see also* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY, A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 103-07 (Cornell Univ. Press, 1988).

40 TANANBAUM, *supra* note 39, at ix.

41 TANANBAUM, *supra* note 39, at 1.

42 *Treaty-Making and the Nation*, *supra* note 15, at 1274; *see also* TANANBAUM, *supra* note 39, at ix.

43 *Missouri v. Holland*, 252 U.S. 416 (1920).

44 *Treaty-Making and the Nation*, *supra* note 15, at 1274-75.

45 From 1951 to 1954, when it was ultimately defeated, Senator Bricker proposed various Constitutional amendments. The tests and focus of these various proposed amendments changed, at times focusing on substantially limiting the federal treaty power, and at others, on paring it or requiring implementing legislation by Congress in order to make it the law of the land. *See generally* TANANBAUM, supra note 39 (providing an excellent discussion of the Bricker Amendment controversy). At its most basic, these efforts to amend the Constitution included the fundamental provision of the various proposed amendments that: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." *See also* HENKIN, *supra* note 5, at 192.

46 *The Senate and a Bipartisan Foreign Policy: 1953-1960*, 132 Cong. Rec. S4960-03, at 2 (1986) [hereinafter *The Senate and a Bipartisan Foreign Policy*]; *see also* Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67-AUT LAW & CONTEMP. PROBS. 169, 179 (2004) ("[A] certain 'brand of anti-internationalism runs deep in the American political tradition.' However much this tradition ebbed and flowed beforehand, it seems clear that it receded for a sustained period in light of World War II, the Cold War, and the consensus for U.S. international engagement that the two conflicts fostered. It should therefore have come as no surprise that the end of the Cold War would have eroded that consensus and the dominant legal vision that sprang from it.")(citation omitted).

and economic strength of the free world in meeting the threat of Soviet power."[47] Necessary to this policy was the creation of an extensive network of treaties and executive agreements.

"An expression of isolationism of a very powerful kind,"[48] Bricker's attempt to amend the Constitution reflected discomfort with the increasing number of treaties and executive agreements entered into by the United States to meet the threat of Soviet power and ensure U.S. national security interests after World War II,[49] and the related desire to limit their domestic effect. Although ultimately defeated in 1954, Senator Bricker's proposed Constitutional amendment caused significant concern in the Truman and Eisenhower Administrations because the proposed alteration of the treaty power would seriously disrupt the exercise of U.S. foreign policy.[50] Conducted simultaneously with its deliberation over the Bricker Amendment, the Senate considered the NATO SOFA Treaty. The debate over this treaty, and the reservation proposed by Senator Bricker, intended to alter one of the treaty's fundamental articles detailing criminal jurisdiction, reflected the underlying domestic political dispute over U.S. foreign policy and the role of treaties in U.S. law generally present in the early 1950s.

During the Senate's 1953 deliberations on the treaty, Senator Bricker seized on the treaty's allocation of criminal jurisdiction over visiting military forces as the focal point of his sovereignty- and federalism-based opposition. In an effort to nullify the concurrent jurisdictional arrangement of the treaty – whereby 'receiving' nations shared concurrent criminal jurisdiction over foreign military forces stationed in their national territory – Bricker offered a reservation to retain sole criminal jurisdiction over U.S. military personnel overseas in exchange for granting the same status to foreign soldiers in the United States. His opposition to the criminal jurisdiction provisions of the NATO SOFA, discussed in greater detail below,[51] reflected both a narrow understanding of jurisdiction over military forces generally, and a resistance to the increasing role of the United States as a global power with binding international commitments.[52] The Senate's ultimate rejection of Senator Bricker's reservation and its discussion and comprehension of the effect of these provisions on domestic U.S. law, reflect its perception of the ultimate benefit gained from the integrated NATO

47 Dean, *supra* note 39, at 4-5; *see also The Senate and a Bipartisan Foreign Policy*, *supra* note 46, at 2.

48 Burt J. Abrams, *Bricker Measure is Called Isolationist by Prof. Corwin*, 77 DAILY PRINCETONIAN 141 (Jan. 6,1954), *available at* http://theprince.princeton.edu/princetonperiodicals/cgi-bin/princetonperiodicals?a=d&d=Princetonian19540106-01.2.10&srpos=1&e=-------en-20--1--txt-IN-corwin+bricker; *see generally* Cathal J. Nolan, *The Last Hurrah of Conservative Isolationism: Eisenhower, Congress, and the Bricker Amendment*, 22 PRESIDENTIAL STUDIES QUARTERLY 337-49 (1992); Srini Sitaraman, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES, 171 (Ashgate 2013).

49 *See* Dean, *supra* note 39, at 4-5 ("Secretary of State Dulles . . . estimated that over 10,000 executive agreements had been entered into in relation to the NATO Treaty alone.").

50 *See* Dean, *supra* note 39, at 2; TANANBAUM, *supra* note 39, at 71-72 (noting that although the 1954 vote was seen as the defeat of the Bricker Amendment, Senator Bricker made numerous attempts from 1951 to 1958 to amend the Constitution to overrule *Missouri v. Holland* and limit the domestic effect of the treaty power).

51 *Infra*, pages 19-23.

52 Senator Bricker's view that the law of the flag governed criminal jurisdiction over troops present in foreign nations, resulted in his conclusion that the NATO SOFA impermissibly expanded foreign jurisdiction over U.S. servicemen. His proposed reservation offered to preserve law of the flag jurisdiction for U.S. servicemembers (a view not accepted universally in international law), but also for foreign NATO servicemembers present on United States soil. His amendment would have completely removed criminal jurisdiction from U.S. states, an ironic outcome when considered against his attempts to amend the U.S. Constitution to limit the domestic effect of treaties.

defense effort—an exercise of national foreign policy--particularly when considered with the 1955 ratification of the 1949 Geneva Conventions and the 1949 ratification of the NATO Treaty itself.

Understanding the Unique Challenge of Visiting Forces and the Genesis of the NATO Status of Forces Agreement

Prior to the twentieth century there were few instances of the peacetime presence of military forces within a foreign country outside the context of belligerent occupation or allied wartime cooperation.[53] While it was generally understood that a friendly military force conducting consensual transit through the territory of another sovereign retained jurisdiction over its transiting soldiers,[54] this limited understanding did not create a norm of customary international law regarding the allocation of jurisdiction more generally, and in particular for the longer term consensual basing of forces in another state. Instead, two competing views existed on the issue of criminal jurisdiction over visiting military forces; yet neither emerged as the prevailing view prior to the advent of World War I. The most 'force-protective' theory was a view advanced by early American scholars, that of the "Law of the Flag." According to this view, the sending state's law[55] applied exclusively to its military forces at all times absent an international agreement to the contrary, providing visiting friendly military forces absolute immunity from a receiving state's criminal jurisdiction. In contrast, British and other commentators focused on the territorial jurisdiction of the receiving state, recognizing at best concurrent jurisdiction between the territorial receiving state and the sending state's disciplinary authority over its own armed forces.[56] Because of the uncertainty of international law governing visiting friendly military forces, nations entered into specific international agreements to delineate criminal jurisdiction over their forces during World War I, and again in World War II.[57]

The specific arrangements adopted by these wartime agreements usually reflected the need and bargaining positions of the nations involved. For example, France granted exclusive criminal jurisdiction to visiting Allied armed forces in World War I, a manifestation of France's urgent need for allied intervention and recognition that her Allies were in effective control of their respective

53 A discussion of colonial military presence in various nations is beyond the scope of this article.

54 *See* Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army, JA 422, Operational Law Handbook 120 (Major Andrew Gillman et al. eds., 2012) [hereinafter 2012 Operational Law Handbook], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf; *see The Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty: Supplementary Hearing before the Senate Foreign Relations Committee*, 83d Cong. 47-51 (1953) [hereinafter *Senate NATO SOFA Supp. Hearing*] (discussing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) (1812)).

55 When discussing SOFAs, the terminology, "sending state" and "receiving state" are important, delineating the nation whose troops are sent to the foreign nation, and the foreign nation receiving those troops. These terms are used in the NATO SOFA because its reciprocal nature results in a nation being both a sending and receiving state depending on the specifics of the locations of the nation's military forces in the territory of other nations.

56 S*ee Senate NATO SOFA Supp. Hearing*, *supra* note 54, at 47-51 (discussing the two countervailing international views and practice on these two theories, and United States historical cases rejecting the asserted theory of absolute immunity); Superveille, *supra* note 38; *see also* Murray L. Schwartz, *International Law and the NATO SOFA Agreement*, 53 Colum. L. Rev. 1091, 1094-99 (1953).

57 *See* Schwartz, *supra* note 56, at 1094-99.

areas of responsibility.[58] In contrast, only the United States successfully negotiated exclusive jurisdiction with Britain over U.S. forces present in the United Kingdom during World War II.[59] As to other Allies, Britain authorized the exercise of jurisdiction by friendly forces only for discipline and internal administration, and it retained exclusive British jurisdiction over murder, manslaughter, and rape- offenses that could be tried solely by British civil courts. In an ostensible move to reciprocate the British grant of exclusive jurisdiction to visiting American forces in World War II, Congress enacted the U.S. Service Courts of Friendly Foreign Forces Act of 1944. However, Congress rejected a proposed provision in this statute divesting U.S. courts of jurisdiction over visiting British forces, instead acting to "implement whatever jurisdiction the foreign service courts brought with them to this country."[60] Thus the passage of this statute was at best a recognition of concurrent jurisdiction.[61]

In 1948, Belgium, France, Luxembourg, the Netherlands, and Great Britain established a multilateral defense alliance in response to the perceived Soviet bloc threat after World War II. This Brussels Treaty "contemplated the stationing of allied troops in each other's countries for an indefinite period of time," and therefore, it included a SOFA which explicitly recognized not only the existence of the receiving state's jurisdiction but which also allocated criminal jurisdiction between the sending and receiving states based on the degree of harm caused by the offense to each State.[62] Although never coming into effect, this arrangement became the basis of the NATO SOFA's criminal jurisdiction allocation provisions. In 1952, Britain passed the Visiting Forces Act. This Act paralleled the provisions of the NATO SOFA, and "vitiate[ed] the 1942 grant of exclusive jurisdiction" to the United States.[63]

THE NATO SOFA

It was against this backdrop that the United States Senate considered the NATO SOFA Treaty, which provided for shared jurisdiction between sending and receiving states. The international law territoriality principle of jurisdiction recognizes the legitimate authority of nations to assert criminal jurisdiction of all persons found within their borders, an incident of sovereignty exercised by all nations today, including the United States.[64] However, all states may also consent to limit this

58 *Id.* at 1095.

59 *Id.* at 1096 (explaining that nevertheless, the 1942 U.K. Act granting exclusive jurisdiction to the U.S. over its forces was seen as "a "very considerable departure ... from the traditional system and practice of the United Kingdom").

60 The Senate Committee Report on this legislation stated that Senators Murdock and McFarland, who were in charge of the bill, had rejected the position that United States' courts be divested of jurisdiction and indeed doubted whether Congress had the authority to prohibit jurisdiction on the part of the State courts over criminal matters. *See Senate NATO SOFA Supp. Hearings*, *supra* note 54, at 46 (statement of Senator Murdock); *see also* Superveille, *supra* note 38, at 7-9.

61 *See Senate NATO SOFA Supp. Hearing, supra* note 54, at 46 (indicating a belief that international law already restricted jurisdiction to the sending State).

62 Superveille, *supra* note 38, at 9-10.

63 Schwartz, *supra* note 56, at 1096-97.

64 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1) (1987).

sovereign authority, which is the key function of a SOFA.[65]

In 1953, however, not all members of the U.S. Senate- most notably, Senator John W. Bricker- were willing to acknowledge the applicability of territorial jurisdiction over visiting forces. Based largely on Justice Marshall's dicta in *The Schooner Exchange* case,[66] there was substantial scholarship at the time supporting the view that exclusive criminal jurisdiction over friendly visiting military forces lay solely in the sending state under the Law of the Flag doctrine.[67] Therefore, because he contended that the foundational premise upon which the NATO SOFA was based was fundamentally flawed,[68] Senator Bricker proposed a reservation to the Resolution of Ratification "giving American military authorities exclusive jurisdiction over American forces committing crimes in Europe and giving NATO allies the same authority over their troops in the United States."[69] Senator Bricker's willingness to waive U.S. territorial jurisdiction appeared to rest on at least two (mistaken) assumptions: first, that the SOFA would only apply to military forces entering the United States as an organized unit, not as individuals; and second, that the absolute number of foreign military members in that status in the United States would be small.[70] For Bricker, the law of the flag was a core norm of both international and U.S. law, and he therefore considered the shared jurisdiction framework of the NATO SOFA to be an impermissible expansion of the jurisdiction of receiving states over visiting U.S. forces.[71] Senator Bricker's reservation to the NATO SOFA

65 *The Schooner Exchange v. M'Faddon*, 11 U.S. 136 (7 Cranch) (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."); *Munaf v. Geren*, 553 U.S. 674, 694-700 (2008); *Wilson v. Girard*, 354 U.S. 524, 529 (1957); *Holmes v. Laird*, 459 F.2d 1211, 1217 (D.C. Cir. 1972) ("We think it now fully established that the plenary criminal authority of a friendly host nation during peacetime is undiminished by the bare fact that the accused is a member of a military force stationed there."); *Smallwood v. Clifford*, 286 F. Supp. 97, 100 (D.D.C. 1968).

66 *The Schooner Exchange v. M'Faddon*, 11 U.S. 136 (7 Cranch) (1812).

67 Justice Marshall's discussion in *The Schooner Exchange* of the exclusive jurisdiction of the foreign nation when a friendly foreign force is allowed to pass through the territory of another nation is often cited as a basis for the Law of the Flag doctrine assertion of exclusive criminal jurisdiction in the visiting sovereign. *See* Schwartz, *supra* note 56, at 47-50; *see* Superveille, *supra* note 38, at 7-8; *see also Senate NATO SOFA Supp. Hearing*, *supra* note 54, at 9-37 (incorporating article by Archibald King, *Jurisdiction Over Friendly Foreign Armed Forces*).

68 *Senate NATO SOFA Supp. Hearing, supra* note 54, at 3.

69 *See* Dwight D. Eisenhower, *To William Fife Knowland, July 14, 1953*, The Papers of Dwight David Eisenhower 386 (Louis Galambos ed., 1970) [hereinafter Eisenhower *Letter to Knowland*]; *see also Senate NATO SOFA Supp. Hearing, supra* note 54, at 1 (quoting the text of the Bricker Amendment to the NATO SOFA, "The Senate advises and consents to the ratification of Executive T, Eighty-second Congress, second session, regarding status of forces of parties to the North Atlantic Treaty, signed at London on June 19, 1951, subject to the reservation, which is hereby made a part and condition of the resolution of ratification, that the military authorities of the United States as a sending State shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with response to all offenses committed within the territory of the receiving State, and the United States as a receiving State shall, at the request of a sending State, waive any jurisdiction which it might possess over the members of a force or civilian component of a sending State and their dependents with respect to all offenses committed within the territory of the United States."); *see also* Tananbaum, *supra* note 39 (discussing how Senator Bricker's proposed amendment to the NATO SOFA treaty was at issue contemporaneously with his more famous attempt to amend the U.S. Constitution by severely limiting the federal government's treaty power.

70 *Senate NATO SOFA Supp. Hearing*, supra note 54, at 4 (estimating that the total number of NATO Troops in the United States at any one time at 3000).

71 Substantial debate also centered on the fundamental rights accorded to accused soldiers under European civil law

Treaty, however, seemed to contravene the principles he advocated in his proposed constitutional amendment—if adopted, the NATO SOFA treaty would totally deprive the states of "their normal jurisdiction over crimes committed in their territory."[72] For the Eisenhower Administration, passage of the NATO SOFA was inextricably intertwined with the battle over the Bricker Amendment, and it "waged an all-out fight to win approval of the Status of Forces Agreement without any reservations,"[73] arguing that the NATO SOFA was necessary to "carry forward the vital program for the integrated defense forces of the North Atlantic Treaty Organization."[74]

On July 14, 1953 President Eisenhower sent a public letter to Senator William F. Knowland, the Acting Senate Majority Leader, emphasizing the critical importance of ratification of the NATO SOFA, concluding that failure to ratify these agreements without reservations "could result in undermining the entire United States military position in Europe . . . [and that r]atification would be a great forward step cementing the mutual security effort among the Nations of the Free World."[75] Senator Knowland read the President's letter to his Senate colleagues that same day. Later that day the Senate defeated Senator Bricker's proposed reservation, and on July 15, 1953, approved the NATO SOFA by a vote of 72-15.[76]

By giving advice and consent for ratification of the NATO SOFA without Bricker's proposed reservation, the Senate ultimately rejected his narrow view of criminal jurisdiction, but also affirmed the American commitment to leading the defense of the free world. Although the Senate Foreign Relations Committee was concerned about the exercise of criminal jurisdiction over 'our boys' by foreign nations due to fundamental differences in legal systems and basic rights,[77] its advice and

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systems, focusing on the lack of rights to appeal right to a jury trial, rights to a public trial and to be tried publically before a jury, as well as the lack of bail provisions and a provision preventing cruel and unusual punishment. *See Senate NATO SOFA Supp. Hearing*, *supra* note 54, at 57-60, 81 (explaining that Senator Bricker also referred back to the Senate hearings on the Service Courts of Friendly Foreign Forces Act in which some Senators felt that Act was a nullity because it sought to grant what some Senators believed was already U.S. law on criminal jurisdiction- that jurisdiction lay solely in the sending State); *see also Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty: Hearings before the Senate Foreign Relations Committee*, 83d Cong. 30-31, 57-60 (1953) (hereinafter *Senate NATO SOFA Hearing*).

72 *See* TANANBAUM, *supra* note 39, at 105 (quoting Herman Phleger, State Department Legal Advisor).

73 *Id.*; *see also* CRS SOFA Report, *supra* note 38, at 2 (listing four reservations included by the Senate in its resolution of ratification for the NATO SOFA, "(1) [T]he criminal jurisdiction provisions contained in Article VII of the agreement do not constitute a precedent for future agreements; (2) when a service member is to be tried by authorities in a receiving state, the commanding officer of the U.S. armed force in that state shall review the laws of the receiving state with regard to the procedural safeguards of the U.S. Constitution; (3) if the commanding officer believes there is danger that the servicemember will not be protected because of the absence or denial of constitutional rights the accused would receive in the United States, the commanding officer shall request that the receiving state waive its jurisdiction; and (4) a representative of the United States be appointed to attend the trial of any servicemember being tried by the receiving state and act to protect the constitutional rights of the servicemember.").

74 *Id.*

75 *See* Eisenhower *Letter to Knowland*, *supra* note 69; *see also* TANANBAUM, *supra* note 39, at 106.

76 TANANBAUM, *supra* note 39, at 106.

77 The Senate focused on the list of procedural rights accorded by Article VII(9) of the NATO SOFA, and the absence of other rights familiar to Americans, specifically, the lack of a guarantee to a jury trial, the presumption of innocence, a public trial, and to a ban on cruel and unusual punishment. Recognizing that this SOFA would inevitably serve as a baseline for future SOFA agreements, with agreements with Japan under consideration at the time of ratification, the Senate understood the importance of the due process rights enunciated by the Treaty, and those not

consent to ratification indicated acceptance of the trade-off inherent in the reciprocal nature of NATO SOFA criminal jurisdiction provisions and the balance it reflected between the needs of the sending and receiving States in the integrated defense effort supporting U.S. foreign policy. The State Department, and ultimately the required two-thirds of the Senate,[78] concluded that the NATO SOFA provided more protection to U.S. soldiers overseas, albeit at the cost of jurisdictional concessions within the United States.[79] The Senate understood both the necessity of a continued U.S. military presence in Europe to counter the growing Soviet threat, and the concomitant necessity of treaty arrangements to deal with long-term peacetime stationing of large numbers of soldiers in other countries. The Senate's approval also marked a significant foreign policy victory for the Eisenhower Administration, and had "important implications for the fight over the Bricker Amendment,"[80] with thirteen Senators who had previously supported Bricker's constitutional amendment, voting for ratification of the NATO SOFA.[81] Significantly, the debate over the NATO SOFA "illustrated some of the debilitating effects the Bricker Amendment would have, such as preventing the United States from entering into the Status of Forces Agreement."[82] Rejecting claims by proponents of the Bricker Amendment that the NATO SOFA "provided further proof that a constitutional amendment was needed to protect the rights of the American people,"[83] the votes by the thirteen Senators who had supported Bricker's constitutional amendment were essential to its approval.

The Senate, accepting both the NATO Treaty itself and the NATO SOFA, understood both the necessity of mutual defense arrangements and the concomitant restriction on U.S. unilateral action.[84] Ratification indicates that both the President and the Senate accepted the necessity of binding international ties in the U.S. policy of "active diplomacy," even when those agreements affected both the rights of U.S. soldiers overseas, and the jurisdiction of domestic U.S. courts. Such a consensus in the midst of the ongoing controversy over Senator Bricker's multi-year attempt to amend the Constitution and reverse the conclusions of *Missouri v. Holland*, had broader significance: an endorsement and recognition of the importance of federal control of the treaty power, even in the face of significant effects on what were traditional areas of state control, such as criminal justice. It similarly reflected rejection of the view of inherent subject matter limitations on the treaty power as Bricker's various defeated constitutional amendment proposals included purported attempts to limit legislation in support of treaties to those areas already within federal enumerated powers.

Since that time, treaties have become an even more significant mechanism for the regulation of armed conflict, and therefore even more vital to the national security interests of the United States.

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included as well. *See Senate NATO SOFA Supp. Hearing*, *supra* note 54, at 70, 80-82; *see also* Tananbaum, *supra* note 39, at 103-107.

78 Bricker's reservation was defeated by a vote of 53-27, with the NATO SOFA approved by a vote of 72-15, providing the Administration a comfortable margin. *See* Tananbaum, *supra* note 39, at 106.

79 *See Senate NATO SOFA Supp. Hearing*, *supra* note 54 at 68-69, 72-75, 84-87 (citing Department of Justice testimony and Senate discussions of effect of jurisdictional provisions).

80 Tananbaum, *supra* note 39 at 107

81 *Id.* at 106, n. 30.

82 *Id.* at 107.

83 *Id.* at 106.

84 *See Senate NATO SOFA Hearing*, *supra* note 71, at 68-75.

Indeed, multi-lateral treaties have evolved as the predominant means of controlling the development of the laws of war. Nonetheless, the controversy over the nature of the relationship between the nation's treaty powers and federalism limitations once again arose in the context of a treaty regulating the conduct of war: the 1992 Chemical Weapons Convention (CWC). Once again the legacy and meaning of *Missouri v. Holland* would become the focal point of controversy in the early 21st Century.

A. THE CURIOUS CASE OF MS. BOND AND THE CHEMICAL WEAPONS CONVENTION (CWC)

In the decades that followed the Court's enunciation of the treaty power in Missouri v. Holland, there was no serious challenge to the Congressional ability to legislate in support of treaties– until 2009. Congress has long considered Missouri v. Holland as dispositive of the issue of whether it has authority to legislate in support of a ratified treaty.[85] However in 2009, a case appealing a federal conviction based on punitive legislation implementing the Chemical Weapons Convention opened the lid on what so many assumed was a conclusively sealed jar.

In *United States v. Bond*,[86] Carol-Anne Bond contested her prosecution in federal district court for use and possession of a chemical weapon in violation of the Chemical Weapons Convention Implementation Act of 1998 and its associated criminal provisions. The permissible reach of this statute, enacted to implement a critical LOAC treaty was central to her challenge, and highlights the issues with which courts must grapple when faced with a federalism challenge to the Constitution's Treaty powers.

The Senate provided advice and consent to ratify the CWC in 1997 after extensive negotiations and discussions with the White House. Apart from significant political brokering between the two political branches to accomplish this end, the Senate held extensive hearings on the constitutional issues it perceived as potentially problematic in the CWC and its proposed Implementation Act. Foremost among them were Fourth and Fifth Amendment concerns related to the verification regime proposed under the Convention. However, there was no indication of any concern related to the constitutionality of legislation to implement the ratified Convention, particularly as the terms of the Convention had been drafted to be consistent with the requirements of search and seizure law and the constraints imposed by the U.S. Constitution.[87]

Accordingly, following the 1997 ratification of the CWC, Congress passed the Chemical Weapons Convention Implementation Act of 1998 along with its associated penal provisions.[88] These penal provisions included 18 U.S.C. § 229, which implemented the U.S. obligation to

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85 *Senate on Treaties*, *supra* note 5, at 66-67.

86 *United States v. Bond* (*Bond I*), 581 F.3d 128, 132 (3d Cir. 2009).

87 *See Examining the Constitutionality of the Convention on the Prohibition of Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction Opened for Signature and Signed by the United States at Paris on January 13, 1993: Hearings Before Subcomm. on Constitution, Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 104th Cong. 106, S. Hrg. 104-859 (1996) [hereinafter *Senate CWC Constitutional Implications Hearing*] (discussing how the Convention was drafted "to specifically allow the U.S. Government, in granting access to facilities identified for challenge inspections, 'to tak[e] into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures').

88 *Bond I*, 581 F.3d, at 133.

criminally sanction individuals who violated provisions of the convention, in particular, use or possession of a chemical weapon.

Closely tracking the language of the CWC, the relevant portions of the statute under which Bond was charged prohibit:

> (a) Unlawful conduct--Except as provided in subsection (b), it shall be unlawful for any person knowingly--
>
> (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or
>
> (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).[89]

When Carol-Anne Bond discovered that her best friend Myrlinda Haynes had been impregnated by Carol-Anne's husband, she began a campaign of harassment against her former friend. Focused on revenge, Bond obtained two potent toxic chemicals, 10-chloro10H-phenoxarsine and potassium dichromate, either of which can prove deadly at doses of less than one-half a teaspoon, and which can cause toxic harm to humans after minimal topical contact. On at least twenty-four separate occasions Bond spread these chemicals on her friend's mailbox, car door handles, and home doorknob. Although Ms. Haynes normally noticed the chemicals and avoided them, on at least one occasion, she "sustained a chemical burn to her thumb." After the local police proved less than responsive, Ms. Haynes complained to her local post office. Postal inspectors investigated and ultimately arrested Bond. She was charged in federal district court with two counts of possessing and using a chemical weapon in violation of 18 U.S.C. § 229(a)(1), and two counts of mail theft.[90] Among other motions, Bond moved to dismiss the chemical weapons charges claiming that § 229 was unconstitutional because "it violates principles of federalism embodied in our Constitution."[91] The district court denied her motions ruling that § 229 did not violate the principles of federalism because it was properly enacted by Congress and signed by the President under the necessary and proper clause of the Constitution to comply with the terms of a treaty.[92] Subsequently, Bond

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89 *See* 18 U.S.C. § 229(a); *see* § 229F(1)(A) (defining "chemical weapon" as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose"); § 299F(8)(A) (defining "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals"); § 299F(7)(A) (noting that permitted purposes include "any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity").

90 *See* 18 U.S.C. § 1708; *see Bond I*, 581 F.3d, at 132.

91 *See Bond I*, 581 F.3d, at 132-33 (Bond also claimed § 229 violated the fair notice requirements of the Due Process clause. The district court rejected this argument as well, ruling that "the statute is not vague, [because] it is clear that if anybody uses a toxic chemical for other than peaceful purposes, th[at] person can be prosecuted").

92 *Id.* at 133.

entered a conditional guilty plea reserving her right to appeal.[93]

The facts of Ms. Bond's case[94] certainly exemplify the concern over the federal criminalization of conduct which would otherwise have been considered local and left to the ministration of the State of Pennsylvania. On appeal, Bond argued that § 229 was unconstitutional because it permitted a massive expansion of federal law enforcement into areas traditionally reserved to the states "without regard to the federalism boundaries enshrined in the Constitution, [and] violates "the unique system of federalism protected by the Tenth Amendment." She argued that permitting federal prosecution of "localized offenses" was a "massive and unjustifiable expansion of federal law enforcement into the state regulated[] domain."[95] Unsurprisingly, the government, relying on *Missouri v. Holland*, responded that the Tenth Amendment did not bar Bond's prosecution because Congress had the authority to enact the statute "under the Necessary and Proper Clause of the Constitution as a law enforcing its Treaty Power." Rather than addressing the Tenth Amendment argument on its merits, the Third Circuit, joining five other Circuit Courts of Appeal, held instead that Bond did not have standing to raise the Tenth Amendment argument absent involvement of a state or state official.[96] Bond appealed this ruling.

In resolving this circuit split on "the question whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States,"[97] the Supreme Court explained:

> The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. [Because] federalism secures to citizens the liberties that derive from the diffusion of sovereign power, . . . [f]ederalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . Federalism secures the freedom of the individual." [98]

Thus, after the Supreme Court's first *Bond* decision, persons injured by the application of treaty provisions or treaty-implementing legislation would have standing "to challenge a law as enacted in

93 *See id.* at 132-33 (noting that Bond also appealed the denial of her motion to suppress evidence of the chemicals found pursuant to a search warrant of her home and car, contending that there was no probable cause to support the issuance of the search warrant, and additionally appealed a sentencing enhancement for use of a special skill in the commission of a crime).

94 *Bond I*, 581 F.3d, at 131-33.

95 *Id.* at 134.

96 *See id.* at 137-41 (rejecting Bond's vagueness claim, holding that § 229 was neither vague nor overly broad, and additionally that the search warrants which Bond contested were supported by probable cause, and that use of the sentencing enhancement for use of a special skill in the commission of a crime was appropriate).

97 *Bond v. United States*, 131 S.Ct. 2355, 2360 (2011).

98 *Id.* at 2364.

contravention of constitutional principles of federalism."[99] Recognizing that Bond had standing to contest her conviction on the basis that the statute upon which it was based violated the principles of federalism embodied in the Tenth Amendment, the Court reversed and remanded the case to the Third Circuit to determine if the statute was a valid exercise of Congressional power, because it can be "deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power."[100]

Unsurprisingly, the Third Circuit returned to *Missouri v. Holland,* as its touchstone to resolve the Tenth Amendment challenge.[101] At its core, the Court stated, *Missouri v. Holland* teaches that, "when there is a valid treaty, Congress has authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question."[102] In order to qualify as necessary and proper, the legislation and the treaty must be rationally related to each other.[103]

In evaluating the validity of the criminal statute challenged by Bond, the court utilized a three-part analysis, providing a useful template for future cases involving federalism challenges to treaty-implementing legislation. First, despite Bond's concession that the CWC was a proper subject for international negotiations, the court evaluated whether the CWC "falls within the Treaty power's appropriate scope."[104] On this question, the court concluded it did. Next, the court evaluated whether the implementing legislation was within the Necessary and Proper Clause as sufficiently related to the CWC.[105] It was. Finally, and intertwined with the first two considerations, the court evaluated whether the provision in some way violated the balance between the federal and state powers embodied in the Tenth Amendment.[106] However, even after applying this three-part assessment, the Third Circuit expressed frustration at the lack of guidance provided by *Holland* on these three inextricably related considerations, particularly in light of global changes since 1920. The court posited that the *Holland* Court may have provided more guidance on the impact of federalism to "assess the validity of a treaty, and hence of coextensive treaty-implementing legislation,"[107] had it been faced with a less clear exercise of the Treaty power.[108]

Evaluation of the treaty power's proper subject matter led the court to examine the drafting history and contemporaneous discussion of the Constitution's treaty provisions. As the Third

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99 *Id.*

100 *Id.* at 2367.

101 *United States v. Bond* (*Bond II*), 681 F.3d 149, 156-57 (3d Cir. 2012) (rejecting amici positions that the power under the Necessary and Proper clause regarding the Treaty Power was limited solely to the power to make treaties, not to implement treaties once they were agreed upon, determining the argument was foreclosed by *Missouri v. Holland*).

102 *Id.* at 157.

103 *Id.* It may be that this aspect of current doctrine is most susceptible to modification as the federalism jurisprudence of the last two decades comes to be extended into the area of treaty execution, since mere rationality review comes close to rendering Congress the authoritative interpreter of the scope of the additional powers that it derives from a treaty.

104 *Id.* at 159.

105 *Id.* at 162.

106 *Id.* at 165.

107 *Id.* at 163.

108 *Id.* at 163, n. 16.

Circuit concluded, these provisions indicated almost conclusively that the founders viewed the purpose of treaties as limited to the regulation of intercourse with foreign nations, and that they expected the exercise of the treaty power was expected to be consistent with those external ends.[109] At its core, the treaty power encompassed war, peace, negotiation and foreign commerce. Additionally, treaties that encroached on matters that ordinarily were left to the states were historically within the treaty power's ambit: "so long as the [international] subject matter limitation was satisfied . . . it was accepted that treaties could affect domestic issues."[110]

The Third Circuit evaluated cases and scholarship that contrasted the post-*Holland* view that the Treaty Power was unlimited—that anything two nations chose to negotiate about was by definition international in character[111]—with recent scholarship suggesting that the Treaty Power was, as originally contemplated by the Framers, more limited, requiring some minimal international subject matter.[112] The Third Circuit expressed frustration with the absence of further clarification by the Supreme Court after the *Holland* decision. The court recognized that such additional guidance might help to evaluate modern multi-lateral treaties, which deal with matters beyond the traditional sphere of the treaty power the framers would have recognized, or to explain the Tenth Amendment's impact as the treaty power expanded beyond those traditional limits and encroached further into areas of traditional state sovereignty.[113] Nevertheless, the Third Circuit concluded that the CWC was at the core of the treaty power, addressing "war, peace, and perhaps commerce."[114] Thus, even if that power were to be defined restrictively, the CWC fell within its legitimate scope.

Because of its conclusion (and Bond's concession) that the CWC fell within the scope of the historically and traditionally recognized treaty power, the court concluded that its implementing legislation was valid unless it "somehow goes beyond the Convention."[115] Bond contended that the Act covered a wide range of activity not banned by the Convention, and therefore violated this limitation.[116] Having already evaluated this claim in its first review of Bond's case, the Third Circuit restated that "Section 229 . . . closely adheres to the language of the . . . Convention,"[117] and that

109 *Id.* at 159.

110 *Id.* at 160.

111 *See United States v. Bond* (*Bond II*), 681 F.3d 149, 161 (3d Cir. 2012) (noting that earlier Supreme Court decisions underscored the view that the Treaty Power, although broad and flexible to address future contingencies extending to all proper subjects for international negotiation, was limited by explicit Constitutional prohibitions and had to be "consistent with . . . the distribution of powers between the general and state governments." The Third Circuit contrasted this "traditional view" with that reflected in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), "flatly rejecting the requirement that treaties involve "only matters of international concern." It also discussed recent scholarship positing the abandonment of the view that the Treaty Power is limited to international matters).

112 *See Bond II*, 681 F.3d, at 160-61 (discussing Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395 (1998), and taking exception to *Holland* to the extent it can be read to say that "the treaty power is immune from federalism restrictions because that power has been exclusively delegated to the federal government.").

113 *Bond II*, 681 F.3d, at 162.

114 *Id.*

115 *Id.* at 165.

116 *Id.*

117 *Id.* (citing *United States v. Bond* (*Bond I*), 581 F.3d 128, 138 (3d Cir. 2009)).

identical language between the treaty and the statute is not required.[118] Applying the test under the Necessary and Proper Clause to determine, "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power,"[119] the Third Circuit concluded the CWC was "implemented by sufficiently related legislation."[120]

Finally, the court evaluated Bond's claim that federalism, as well as affirmative restrictions on government power like the First Amendment, imposed limits on the Treaty power.[121] Applying the clear unequivocal language of *Holland*, "that there can be no dispute about the validity of a statute implementing a valid treaty," the Third Circuit rejected Bond's Tenth Amendment claim.[122] Evaluating *Holland*, the court recognized that it had been decided at a time when an implied subject matter limitation on the Treaty power existed -- specifically, that the Treaty power must have some minimal international focus and was designed to be consistent with the division of powers between the federal and state governments. Thus, the Third Circuit determined that the Supreme Court's conclusion that the Tenth Amendment "only reserves those powers that are not delegated and that the power to make treaties is delegated" was entirely sensible in *Holland*, because it involved a treaty of recognizably national interest and co-extensive legislation.[123]

Though it acknowledged the significance of the Supreme Court's emphasis on the important role that federalism plays in preserving individual rights, the Third Circuit nevertheless felt itself bound by the clear holding of *Holland*. However, the court also highlighted two intertwined ways in which additional Supreme Court guidance could elucidate the meaning of *Holland* in future cases implicating the Treaty Power. First, the Third Circuit recognized, as a proper subject for judicial resolution, the question of whether a negotiated Treaty falling outside the "traditionally understood bounds of the Treaty Power" had reached a constitutional boundary.[124] For the Third Circuit, *Holland* provided no guidance for a court to apply in resolving such a question. The court was reduced to concluding that, "The deliberately vague boundaries of the Treaty Power would probably relegate that court to the unenviable position of saying it knew a violation when it saw one."[125]

Second, referring back to the "evolving" view of the Treaty Power in which anything negotiated between sovereigns was within the proper subject matter of the Treaty power, the Third Circuit queried:

> Before the outer limits of the treaty power are reached, however, it may be that federalism does have some effect on a treaty's constitutionality. While it is not our prerogative to ignore Holland 's rejection of federalism limitations upon the Treaty Power, the Supreme Court could clarify whether principles of federalism have

118 *Bond II*, 681 F.3d, at 165.
119 *Id.* (quoting *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010)).
120 *Bond II*, 681 F.3d, at 165.
121 *Id.* at 162.
122 *Id.* at 163-65.
123 *Id.* at 163 (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920)).
124 *Bond II*, 681 F.3d, at 164, n.18.
125 *Id.*

> any role in assessing an exercise of the Treaty Power that goes beyond the traditionally understood subject matter for treaties." Holland itself indicates that "invisible radiation[s] from the general terms of the Tenth Amendment" may be pertinent in deciding whether there is any space between obviously valid treaties and obviously ultra vires treaties and whether, in that space, some judicial review of treaties and their implementing legislation may be undertaken to preserve the federal structure of our government. The "invisible radiation[s]" imagery is unusual but, in light of current conceptions about the breadth of the Treaty Power, it may well be worth taking seriously. [126]

Addressing this question would also provide lower courts vital insight into the limits of implementing legislation.

In *Holland*, Justice Holmes reaffirmed the nationalist view of the Treaty power, seeing it as an independent power delegated to the federal government, rather than a means to exercise powers otherwise delegated in Article I.[127] For Holmes, because the treaty power was an exclusively delegated Constitutional power given solely to the federal government, its exercise was necessarily supreme over contrary State law. Additionally for Holmes, a Civil War veteran, the contention that States had reserved specified matters from the Treaty power had been largely resolved by the Civil War.[128] Rather than referring to the states' rights theory of the Tenth Amendment which had been discredited by the outcome of the Civil War,[129] Holmes' 'invisible radiation' language instead refers to more basic structural limitation on federal power vis-à-vis the States. As explained by Prof. David Golove:

> [I]n combination with other provisions and general structural considerations, . . . the Tenth Amendment provides the states with certain special immunities from federal regulation--such as the prohibition on Congress to "commandeer" state legislative or executive processes or subject states to suit in federal or state court. These more nebulous "Tenth Amendment" dignitary limitations arise from, or are

126 *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 921–22 (1997) (stating that the concept of dual sovereignty was "one of the Constitution's structural protections of liberty") (internal citations omitted)).

127 *Treaty-Making and the Nation*, *supra* note 15, at 1257-67.

128 *See Missouri v. Holland*, 252 U.S. 416, 433-34 (1920) ([W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago . . . . The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.").

129 *See Treaty-Making and the Nation*, *supra* note 15, at 1087-88 (stating that under the states' rights theory, the Treaty Power was not a separate power delegated to the federal government, but instead merely one avenue to exercise the other powers delegated to the federal government).

> closely related to, principles of sovereign immunity, and they apply to exercises of authority that are admittedly within the subject matter scope of congressional powers.[130]

As Holmes states in *Holland*, "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."[131] Thus, to determine whether the "invisible radiations" of the Tenth Amendment prohibit any particular exercise of the Treaty power, one must determine if its implementation transgresses either an express prohibition of the Constitution,[132] or otherwise violates "state sovereign immunity or dignitary interests."[133]

For the Third Circuit, *Holland*'s categorical rejection of federalism limits on the Treaty power left unanswered the question of whether the Tenth Amendment could limit the way in which a valid treaty was implemented, perhaps, by incorporating federalism limits into judicial evaluation of an implementing legislation's nexus to the treaty, or judicial interpretation of the permissible effects of the domestic operation of self-executing treaties. For example, a self- executing treaty or implementing congressional legislation could not commandeer state governmental processes. While both Congress and the Courts take explicit Constitutional limits into account in implementing or interpreting treaties, it is unclear, after *Holland*, whether more nebulous federalism concerns impose additional constraints that should be addressed through judicial interpretation. Shared criminal jurisdiction is not unique to the CWC, the federal government routinely prosecutes as civil rights violations, offenses which would otherwise fall under the criminal jurisdiction of the states.[134] As *Holland* made clear, "If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the treaty powers of the Government."[135]

The Third Circuit, however, did not have the final say in Bond's case. Following the Third

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130 *See id.* at 1281, n.704 ("There was no question in any of these cases--nor any doubt--but that Congress's legislative powers extended to the subject matter regulated. The only question was whether the particular fashion in which Congress chose to regulate was justified, or whether by the manner in which the regulation applied to the states as states, it unconstitutionally trenched upon their sovereign immunity or dignitary interests.").

131 *Holland*, 252 U.S. at 433.

132 *See Treaty-Making and the Nation*, *supra* note 15, at 1277, n.693 (citing *Reid v. Covert*, 354 U.S. 1, 17-18 (1957).

133 *Treaty-Making and the Nation*, *supra* note 15, at 1281 n.704.

134 *See, e.g.*, *Cleveland v. United States*, 329 U.S. 14, 16 (1946) (noting that the Mann Act's criminalization of interstate transportation for "purpose of prostitution or debauchery, or for any other immoral purpose" was not unconstitutional invasion of traditional area of state regulation); *see Bond II*, 681 F.3d, at 168 (Rendell J., concurring) ("We have a system of dual sovereignty. Instances of overlapping federal and state criminalization of similar conduct abound."); *see United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) ("Federal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement *per se* of states' sovereignty in the administration of their criminal laws").

135 *Holland*, 252 U.S. at 432; *see also Neely v. Henkel*, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in § 8 of article I. of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.").

Circuit's decision upholding her conviction, the Supreme Court again granted *certiorari* to determine the merits of Ms. Bond's federalism challenge to the statute. Many anticipated that the Court would use the case to finally address the substance of Justice Holmes' "invisible radiations" from the Tenth Amendment, or to provide guidance on any subject matter limitations to the Treaty Power, or address the scope of Congress's ability to legislate to implement a treaty. No such outcome materialized. Instead the Court reversed Bond's convictions, not on a constitutional basis, but instead on a statutory grounds--its analysis of § 229 of the CWC Implementation Act.[136] Exercising the constitutional avoidance doctrine, the Court split the implementing legislation from its authorizing Treaty. As the Court explained: "[W]e have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229—and the statute, *unlike the Convention*—must be read consistent with the principles of federalism inherent in our constitutional structure."[137]

Analyzing the statute, the Court discovered an ambiguity in § 229 that arose from its context, an ambiguity created by the broad reach of § 229's definition of a "chemical weapon." This ambiguity arose solely because of § 229's potential broad impact on the traditional allocation of law enforcement authority between the Federal government and the States. This ambiguity led the Court to adopt a "clear indication" rule, requiring Congress to clearly indicate its intent to drastically alter the traditional balance between State and Federal prerogatives when legislating to implement a treaty. Absent such a clear indication, purely local crimes were not reachable, at least in "this curious case"[138] where there was no need for such drastic alterations with a Treaty that was instead focused on chemical warfare and terrorism. Thus, because Congress had not clearly stated its intent to reach these "purely local crimes" in the CWC Implementation Act, the statute's criminal proscription did not reach Ms. Bond's purely local assault.[139]

A. CONSEQUENCES OF *BOND*

While Ms. Bond may have been spared a federal conviction, it is more noteworthy what the *Bond* Court did not do. First, it avoided the traditional tools of treaty interpretation, and made no attempt to analyze either the object and purpose of the CWC, its negotiating history, or its implementing legislation. Instead, discerning a statutory ambiguity from the effect of the legislation on the traditional division of state and federal authority, it subjected the implementing legislation to a clear statement rule, separating the scope of the implementing legislation from the unanalyzed object and

136 *Bond v. United States*, 131 S.Ct. 2355, 2387-90 (2011).

137 *Id.*

138 *Id.*

139 *Id.* at 2089-90 (Scalia J. concurring) (Justices Scalia, Thomas, and Alito disagreed that there was any ambiguity in the statute, concluding that the language of § 229 was clear, and unambiguously reached Ms. Bond's local conduct. All three justices, therefore, wrote of their views of the Treaty power, with Justice Scalia adopting the most restrictive view. For Justice Scalia, Congress only had power under the Necessary and Proper clause to act to assist the President in "*making*" the Treaty. Accordingly, Congress had to rely on a separate Article I power in order to legislate to implement a treaty. In effect, Justice Scalia was advocating a constitutional view that had been defeated in the Bricker amendment controversies of the 1950s) and one which is advocated by Nicholas Rosenkrantz in *Executing The Treaty Power*, *supra* note 15.

purpose of the treaty it implemented.[140] This approach seemed to be inconsistent with the drafting history of the implementing legislation. When Congress drafted the statute and created federal crimes for its violation, it never considered a Tenth Amendment restriction on that jurisdiction, instead focusing on other constitutional concerns such as the Fourth Amendment restrictions on searches.

Given the Senate's understanding at the time it adopted the CWC and its implementing legislation that, "it seems well settled since *Missouri v. Holland* that the powers reserved to the States under the Tenth Amendment constitute no bar to the exercise of the treaty power,"[141] this is unsurprising, and logically explains why the CWC Implementation Act contained no clear statement on the impact of the legislation on state powers. While the rule adopted by the *Bond* Court prospectively may enable Congress to signal when it really means to fully exercise its treaty implementing power, it leaves legislation implementing past treaties subject to this new federalism impediment. In fact, on the basis of *Bond*, district courts are now engaged in evaluating federalism-based attacks on other statutes affecting state's traditional areas, with defendants claiming that *Bond* requires, as a general principle, a clear statement of Congress's intent to disturb traditional federal-state relations, even when Congress was not legislating to implement the treaty power.[142]

Further, in requiring Congress to make such a clear statement in treaty-implementing legislation, the Court did not discuss how such a remedy would apply when a self-executing treaty affected the traditional balance between the Federal and State powers. While it did imply that a different

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140 *Id.* at 2090-91 ("These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term- "chemical weapon"- being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose- a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States . . . it is fully appropriate to apply the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.' That assumption is grounded in the very structure of the Constitution."); *see Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014) ("Clarity is demanded whenever Congress legislates through the spending power, whether related to waivers of sovereign immunity or not."); *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987)); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating that one of the distinguishing features of the spending power is that it allows Congress to exceed its otherwise limited and enumerated powers by regulating in areas that the vertical structural protections of the Constitution would not otherwise permit).

141 *See Senate on Treaties*, *supra* note 5, at 66-70 (listing other theoretical possible challenges to the treaty power than that posed by the reserved powers of the States under the Tenth Amendment, such as: rights conferred upon the States by other provisions of the Constitution; areas requiring participation by the House of Representatives, such as appropriations; those international agreements implicating the judicial power of the United States, typically seen in treaties subjecting the United States to the jurisdiction of international tribunals; requiring treaties to relate to "proper subjects of negotiation" with a foreign nation; and those affecting rights protected by the Bill of Rights).

142 *See, e.g.*, *United States v. Hale*, 762 F.3d 1214 (10th Cir. 2014) (*Bond*'s clear statement rule used to contest prosecution for false or misleading information of biological attack); *United States v. Toviave*, 761 F.3d 623 (6th Cir. 2014)(rejecting household/local act of forced labor of children by parent as federal crime of forced labor absent clear showing that legislation is intended to override the usual constitutional balance of federal and state powers); *Wheeler v. Cross*, No. 14-CV-659-DRH, 2014 WL 3057560 (S.D. Ill. July 7, 2014) (rejecting *Bond*-based attack on federal prosecution for using destructive devise instead of state arson charge).

rule might apply,[143] the Court did not address self-executing treaties at all. This concern is far from illusory. A much more direct and potentially disruptive effect on the balance between federal and state authorities in our constitutional structure is produced by a different category of treaty related to military affairs, the history of which was discussed above: status of forces agreements (SOFAs).

B. VISITING FORCES, STATUS AGREEMENTS, AND THE USURPATION OF STATE CRIMINAL JURISDICTION?

The *Bond* case raises potentially significant federalism concerns in relation to treaties regulating the means of warfare. However, a much more direct and potentially disruptive effect on the balance between federal and state authorities in our Constitutional structure is produced by a different category of treaty related to military affairs: status of forces agreements (SOFAs). Because the numbers of foreign soldiers present in the United States are relatively few in comparison to the numbers of U.S. soldiers overseas, the effect of these agreements on the federal-state division of power has been infrequent Nonetheless, SOFAs offer an important illustration of the intersection of treaty power and federalism concerns, and how *Bond*'s clear statement rule could genuinely frustrate the nation's ability to advance its national security interests by reciprocally protecting allied forces from assertions of a state's criminal power.

The United States hosts over 7000 military students from over 136 nations at 150 schools or installations nationwide under its International Military Education and Training (IMET) program.[144] Additionally, at least two German units are permanently stationed in the United States at Fort Bliss in Texas and at Holloman Air Force Base in New Mexico.[145] Thus, there are significant numbers of foreign NATO forces and family members as well as significant numbers of non-NATO military personnel engaged in international exchanges present in the United States present at any given time. Although relatively small in number compared with the number of U.S. forces and associated personnel residing overseas, these foreign forces and their families are involved in the same proportion of crimes and accidents as any other inhabitant of the United States.[146]

With a far-flung military presence in dozens of foreign nations, the United States currently has over 100 international SOFA type agreements that address the status of military forces.[147] These

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143 *See Bond v. United States*, 131 S.Ct. 2355, 2088 (2011) ("[W]e have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229- and the statute, *unlike the Convention*, must be read consistent with the principles of federalism inherent in our constitutional structure.") (emphasis added); *see also id.* at 2102 (Scalia, J., dissenting) (stating that it makes sense not to extend the arguable proposition that self-executing treaties are not limited by the subject matter of Article I, §8 to non-self-executing treaties).

144 U.S. Dep't of Def. & U.S. Dep't of State Joint Report to Cong., Foreign Military Training In Fiscal Years 2010 and 2011, Vol. I & II (Country Training Activities), at II-2, http://www.state.gov/documents/organization/171500.pdf.

145 Both are exclusive federal jurisdictions, although a small portion of a housing area at Holloman is under the concurrent jurisdiction of the federal government and New Mexico. *See generally* 2012 Operational Law Handbook, *supra* note 54, at 125.

146 *See* Martha Stamsell-Liming, *Foreign Criminal Jurisdiction Inside the United States: The Other Side of the Coin*, 28 A.F. L. REV. 133 (1988) (describing the types of offenses that foreign forces and their families can be involved in and is equally illustrative of situations today).

147 *See* CRS SOFA Report, *supra* note 38, at 1; *see also* The Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 [hereinafter NATO

agreements can be bi-lateral, multi-lateral, reciprocal or non-reciprocal. With the exception of the multi-lateral North Atlantic Treaty Organization (NATO) SOFA- the only SOFA that is a treaty[148]- most SOFAs take the form of executive agreements, some of which are concluded on the basis of authority contained in a treaty, while others are based on other congressional authority, and still others, more loosely associated with other defense agreements or based on exclusive executive authority.[149] Because the domestic legal effect of the alternatives to formal Article II, section 2 treaties is far from settled, the form of the SOFA can be critical is assessing its federalism impact. Although treaties clearly operate as the supreme law of the land under the Constitution's Supremacy Clause, the effect of a SOFA concluded by executive agreement would not necessarily have the same domestic force and effect. Accordingly, any interference with a state criminal prosecution arising from operation of a SOFA, particularly the typical executive agreement type SOFA, could very easily trigger federalism concerns and state initiated challenge to the effect of the agreement. Because the NATO SOFA jurisdictional framework is considered a benchmark and model for all other SOFA type agreements, examination of its criminal jurisdiction provisions is critical to understanding the potential impact of SOFAs on federalism.[150]

Article VII of the NATO SOFA[151] grants exclusive criminal jurisdiction where only the laws of

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SOFA Treaty], *available at* http://www.nato.int/cps/en/natolive/official_texts_17265.htm.

148 CRS SOFA Report, *supra* note 38, at 1.

149 Congress authorizes these executive agreements either before or after the executive agreement, or under the President's independent foreign affairs powers. The majority of U.S. SOFAs have mutual defense or security treaties as their underlying basis. Many of our mutual defense treaties, either include specific authorization for SOFAs, or are relied upon as authority for a SOFA. *See e.g.*, CRS SOFA Report, *supra* note 38, at 6, 11-14, 17 (stating that Japan has specific provision in treaty authorizing SOFA; Korea has a specific provision in treaty authorizing SOFA; the Philippines has no specific SOFA authorization provision in treaty; Australia has no specific SOFA authorization provision in treaty).

150 Other potential allocations of criminal jurisdiction in SOFA include: exclusive jurisdiction in the sending state; shared jurisdiction along the NATO SOFA model- according a member of the force a status equivalent to the technical and administrative staff of the U.S. Embassy in that country, a status that under the Vienna Convention on Diplomatic Relations of April 18, 1961 amounts to immunity from prosecution by the receiving state; or a SOFA can provide no special status leaving U.S. military personnel fully subject to the jurisdiction of the receiving state. *See* 2012 Operational Law Handbook, *supra* note 54, at 120.

151 NATO SOFA Treaty, art. VII:

1. Subject to the provisions of this Article,

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

(b)) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State. 2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

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

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

(i) treason against the State;

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

one state are broken;[152] in all other cases the NATO SOFA grants concurrent jurisdiction to both the sending and receiving state. In other words, if a service-member covered by the SOFA commits an act that violates the law of only one state, that state has exclusive jurisdiction. But in the much more common situation where the conduct violates the laws of both the sending and receiving state, jurisdiction is concurrent.

Within this category of concurrent jurisdiction, the SOFA allocates the primary right to exercise jurisdiction to the sending state for acts or omissions arising from the performance of official duties or for inter se cases where "both the accused and the victim are members of the sending state."[153] The receiving state is granted primary jurisdiction in all other cases. In cases of concurrent jurisdiction, either state may cede their right of primary jurisdiction to the other.

This jurisdictional allocation creates the potential for interference with U.S. state criminal proceedings in the two situations of concurrent jurisdiction: - cases arising from official duty and *inter se* cases.[154] In both these situations, the foreign sending State would have the primary

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defense of that State.

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

(i) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

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

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

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

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

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

4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67.

152 For example purely military offenses, such as sleeping on guard duty or dereliction of duty, or more generally espionage or sabotage against the home country.

153 *See* Superveille, *supra* note 38, at 6; *see also* NATO SOFA Treaty, *supra* note 147, at art. VII (3)(a)(i).

154 U.S. states have criminal jurisdiction over all offenses that occur within their sovereign territory, which includes any offenses committed by U.S. or visiting allied service members off the military installation where they are stationed, and in many cases even offenses committed on the installation (where the federal government has concurrent jurisdiction with or leases the land from the state). The exercise of executive, legislative, and judicial authority on federal military installations can either be held exclusively by the federal government (exclusive federal jurisdiction) or by both the federal and state governments (concurrent jurisdiction). Exclusive federal jurisdiction is obtained either through cession from a state when the military installation is created or through a reservation by the U.S. concerning the installation when a state is admitted to the Union. Therefore, in addition to its off-post jurisdiction the state will have jurisdiction for on-post offenses if the installation is subject to concurrent state and federal legislative jurisdiction. Under exclusive federal jurisdiction, the federal government then exercises sole authority over the installation. Under concurrent jurisdiction, the federal government has the power to exercise its full authority over the installation, but the state in which the installation is located retains the right to simultaneously exercise its authority along with the federal government. The federal government may also own property in a proprietary status but enjoys no special jurisdictional power over the property

right to exercise jurisdiction, a right granted by an international agreement with the United States. This means the United States would be obligated to allow the sending state to assert jurisdiction and would preclude the assertion of U.S. jurisdiction absent a waiver by the sending state. But what exactly is U.S. jurisdiction in such a context? Does such a SOFA foreclose the assertion of jurisdiction by only the federal government? Or does the agreement prohibit the state from asserting jurisdiction for a crime that occurs in its territory whenever the sending state chooses to assert its primacy under the SOFA? Considering that most criminal law in the United States is administered primarily by the states, this is a profoundly significant question, and for the NATO SOFA treaty was one explicitly considered by the Senate.

Examples of cases where the sending state has the primary right of jurisdiction highlight the tensions that can emerge between state and federal authorities when compliance with an international treaty or international agreement is at stake. Two hypothetical examples involving the German forces stationed in Texas and New Mexico illustrate the potential for federalism concerns produced by the NATO SOFA.[155] First, recall that the SOFA grants the sending state primary jurisdiction for official duty offenses. If an on-duty German military member kills an American citizen as the result of an automobile accident while driving an official German military vehicle off-post,[156] the State of New Mexico or Texas would ordinarily have jurisdiction to charge the German driver with vehicular homicide or other applicable criminal offense. However, because the alleged criminal act occurred while the soldier was in an official-duty status, the German government (as the sending State) would have a treaty-based right to assert primary jurisdiction for this offense.[157]

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and is therefore fully subject to state laws with some restrictions on state laws that may interfere with performance of the federal function. Under the Assimilative Crimes Act, 18 U.S.C. section 3, acts or omissions that would constitute crimes under the state law in which the installation is located will constitute similar federal crimes if the act occurs in an area under federal jurisdiction (either concurrent or exclusive). *See* U.S. Dep't of Army Field Manual 19-10, Military Police Law and Order Operations, 47-49 (1987); *see also Senate NATO SOFA Hearing*, *supra* note 71, at 31 (explaining that because many federal military installations have been formed over the years, it is possible that some portions of an installation may be subject to concurrent state jurisdiction and some to exclusive federal jurisdiction. So the location of the offense will determine whether the federal government alone or the state and federal government will have jurisdiction over the offense. Some installations can be subject to federal jurisdiction and the concurrent jurisdiction of more than one state. For example, Fort Campbell straddles the boundary between Tennessee and Kentucky, and is a concurrent jurisdiction installation subject to the laws of either Kentucky or Tennessee depending on where on the installation a criminal act occurs. Other installations formed over a lengthy period of time will have some areas of exclusive federal jurisdiction and others of concurrent jurisdiction).

155 Use of German forces as examples is solely because their presence in the U.S. is long-standing. It involves the stationing of German units in the U.S. and does not imply any proclivity or tendency by the German forces to violate the law. This permanent stationing encompasses the presence of the friendly foreign force and their families and is a closer analog for the reciprocal treatment given by Germany to the many hundreds of thousands of U.S. forces stationed in Germany under the NATO SOFA since 1955.

156 *See Senate NATO SOFA Hearing*, *supra* note 71, at 70 (The ratifying Senate considered this exact scenario in its considerations of the NATO SOFA Treaty and its potential domestic consequences for State criminal jurisdiction.)

157 The German military disciplinary system authorizes disciplinary courts-martial by its commanders, but these proceedings have no power to impose real criminal penalties. Their authority is similar to the U.S. non-judicial punishment authority under Article 15 of the U.C.M.J. For actual criminal proceedings the German military or family member is returned to Germany and is prosecuted by the State Prosecutor for the German State from which he comes. In a recent case involving a German service member accused of child abuse off base in Alamogordo, New Mexico, the

In the second type of case, a foreign military member might commit spouse or child abuse in the family's off-post residence. Assuming both the victim and the accused in this hypothetical are German citizens present in the United States under the provisions of the SOFA, this is an "*inter se*" case, and again, under Article VII Germany would have primary jurisdiction.[158]

It is easy to comprehend the sensitivities of local prosecutors and courts in cases involving these and other types of criminal misconduct committed in their jurisdictions.[159] Nevertheless, a local court would be expected to analyze the provisions of the SOFA to determine the treaty-imposed limitations on the exercise of its own jurisdiction, and in these cases, forego prosecution or dismiss[160] charges absent a German waiver of the right to exercise primary jurisdiction. If, however, the local court refused to defer to the German assertion of primary jurisdiction - the outcome mandated by Article VII of the NATO SOFA - the state through the decision of the local prosecutor or state judge, would effectively force the United States to breach its international obligations.

Interestingly, the Senate appears to have contemplated these type of conflicts when it considered the NATO SOFA during ratification hearings. In order to illustrate the potential interference with

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local elected District Attorney (DA) brought charges in New Mexico state court against the German service member. The local DA refused to dismiss the charges when the German government requested she do so in accordance with Article VII of the NATO SOFA as they had primary jurisdiction over this *inter se* case. Her refusal resulted in significant diplomatic discussions between the German government and the U.S. Department of State and Defense. Resort to the State of New Mexico Attorney General was unsuccessful as the local DA was an independent elected state official not subject to their oversight. Ultimately, the DA agreed to dismiss the charges and the German government returned their serviceman to Germany to face charges in German criminal court. The German government was also concerned that the case be returned to Germany so that appropriate child welfare agencies could become involved with the family. The local state judge had not been informed of the NATO SOFA issue. Telephone interview with Mr. Emil Brupbacher, Jr., Attorney-Advisor (Int'l), Office of the Staff J. Advocate, Holloman Air Force Base, N.M. (Oct. 26, 2012); *see* Martha Stamsell-Liming, *Foreign Criminal Jurisdiction Inside the United States: The Other Side of the Coin*, *supra* note 146, at 149 (explaining that in addition to *inter se* cases, other on-duty accidents could easily generate strong state interest in prosecuting a foreign service member; for example one can envision the local interest in prosecuting negligence in an aircraft crash, a shooting by a German sentry, or a shooting accident during weapons training that injured local civilians. To understand the degree of state interest, significant tensions exist between state governments and the federal government concerning the application of state law to U.S. service members for on-duty criminal offenses under state law); see Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel From Going to Jail for Doing the Right Thing: Jurisdiction, ROE and the Rules of Deadly Force*, 2000-NOV. ARMY LAW. 1 (2000) (discussing criminal law issues in context of SOFAs and state-federal criminal law issues, particularly of differing self-defense justifications in various U.S. state courts).

158 These two examples are equally present and sensitive when U.S. forces are present in Germany and commit offenses, and because of the numbers of U.S. forces present in Germany in the past 60 years, are more prevalent.

159 The interests of the U.S. state are easy to comprehend but similar cases have occurred in Germany since the NATO SOFA took effect over 60 years ago, and the German authorities, taking seriously their obligation to give sympathetic consideration to requests to waive primary jurisdiction, have frequently waived their primary right to prosecute American soldiers for equally serious injuries to German citizens. A refusal by a local state court to recognize a German right of primary jurisdiction under the SOFA could have serious ramifications to this on-going relationship to the detriment of overseas U.S. soldiers. These cases do occur, and they are usually handled by coordination between the local military base, the local prosecutor, and on occasion, the Department of Defense, the Foreign Government, and the local U.S. Attorney.

160 Or abate the case pending a German decision on ceding its primary jurisdiction.

state's rights, the Senate explicitly discussed the impact of the NATO SOFA jurisdictional sharing provisions on a hypothetical foreign soldier in the United States involved in an automobile accident while on official duty resulting in injury or fatality to a U.S. citizen. The Senate fully understood that if ratified, Article VII[161] would alter state criminal law under the Supremacy Clause, and further, it would regularly fall to the state courts to implement NATO SOFA obligations. Thus, the Senate envisioned a local court determining its own jurisdiction under the SOFA and the Supremacy Clause and dismissing any case in which the SOFA granted the primary right of prosecution to the foreign sending state. It is therefore clear the Senate understood the seriousness of this potential interference with U.S. state criminal jurisdiction. However, it also understood that permitting this interference was necessary to protect U.S. forces abroad from the plenary territorial sovereignty of allied receiving states, a trade-off certainly influenced by the expectation that U.S. forces would be affected by the SOFA far more frequently than allied forces in the United States.[162]

In its hearings on the NATO SOFA the Senate expressed the understanding that state courts would comply with the Constitution's Supremacy Clause and properly limit their own jurisdiction to try the foreign military member in accordance with the SOFA's provisions. Furthermore, because the Senate considered the provisions of the NATO SOFA to be self-executing, Congress never passed explicit implementing laws that would allow the federal government to compel dismissal of the state criminal proceeding if it believed the state court did not properly interpret the SOFA provisions.[163] Indeed, in its hearings the Senate recognized that there was no real federal remedy if the local state criminal court improperly determined that it had jurisdiction over a visiting force member when the foreign sending state disagreed. Instead, such disparate interpretations of the SOFAs concurrent jurisdiction provision would be left to "the realm of international negotiation."[164] Such an unresolved breach could easily lead to retaliatory action by our NATO allies, affecting U.S. military members and their families overseas, but also the integrity of the defense alliance itself. This is especially true in our modern era, when unlike the height of the Cold War, foreign hosts of U.S. forces often perceive the U.S. military presence to be of less interest to their own security than to that of the U.S.

Accordingly, enforcement of the NATO SOFA, and other analogous status agreements, is functionally dependent on a state court recognition and application of the SOFA's allocation of concurrent jurisdiction- recognition ostensibly mandated by the Supremacy Clause for treaties, and from the federal government perspective, hopefully for executive agreements as well. This enforcement is well within a state court's capabilities. However, should a court prove obdurate

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161 *See* NATO SOFA Treaty, *supra* note 147, at art. VII; *see generally Senate NATO SOFA Hearing*, *supra* note 71, at 70-74.

162 *Senate NATO SOFA Hearing*, *supra* note 71, at 75.

163 The NATO SOFA is considered by the Department of Justice to be a self-executing treaty. *See* Stamsell-Liming, *supra* note 146, at n.27 (quoting Department of Justice legal opinion to that effect).

164 *See Senate NATO SOFA Hearing*, *supra* note 71, at 71 (explaining that although this type of statement has been used to distinguish self-executing from non-self-executing treaty provisions in some court cases, the complete context of the Senate hearings establishes that the Senators understood that the treaty provisions would be directly applicable and become "the supreme law of the land" such that state court judges would be expected to apply Article VII of the NATO SOFA).

or a local prosecutor unconvinced of the importance of these SOFA provisions when weighed against local sovereignty and the interests of the local community, it would prove difficult to enforce compliance with these treaty provisions. Ironically, this was a problem the Founders certainly appreciated, as compliance with Treaty obligations was a driving reason for the failure of the Confederation.[165]

Nonetheless, because they remove state criminal jurisdiction where the sending state has primary jurisdiction, SOFAs affect a traditional and core area of state sovereignty in the most fundamental way. Still, given that the Senate consented to the NATO SOFA Treaty as it was rejecting Senator Bricker's proposed constitutional amendment to overturn *Missouri v. Holland*, which explicitly permitted interference with traditional state prerogatives under the treaty power, any state failure to comply with the NATO SOFA's jurisdictional provisions would be particularly ironic. *Bond*, as resolved by the Supreme Court, only defers resolution of the extent of the 'invisible radiations' arising from the Tenth Amendment on treaty-implementing legislation, and does not address what limitations, if any, exist when, as directly contemplated by the Founders, the treaty is self-executing.[166]

OTHER SOFAS: EXECUTIVE & CONGRESSIONAL-EXECUTIVE AGREEMENTS

While the NATO SOFA is the sole SOFA concluded as a treaty, the United States "is currently party to over 100 agreements that may be considered SOFAs."[167] These agreements can be bi-lateral, multi-lateral, reciprocal or non-reciprocal, and most SOFAs take the form of executive agreements.[168] The form of the SOFA agreement can arguably impact its domestic legal

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165 *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19, 47, 164, 225, 245, 323 (Max Farrand ed., 1911). These cases become even more complex when the SOFA at issue in a particular case was entered into as a congressional-executive agreement, such as the Partnership for Peace (PfP) SOFA, the various agreements under which were executed as Congressional-Executive agreements).

166 As for the NATO SOFA, the complete removal of a State's criminal jurisdiction is a "dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. *See Bond v. United States*, 134 S.Ct. 2077, 2093 (2014). For a self-executing treaty such as the NATO SOFA, the Senate's consideration and understanding of this effect, after explicit discussion about its effects in its deliberations on ratification, should amount to the "clear indication" of the Senate's intent to affect such a dramatic departure).

167 CRS SOFA Report, *supra* note 38, at 1.

168 These are authorized or approved by Congress either before or after the executive agreement, or under the President's independent foreign affairs powers. The majority of U.S. SOFAs have mutual defense or security treaties as their underlying basis. Many of our mutual defense treaties, either include specific authorization for SOFAs, or are relied upon as authority for a SOFA. *See, e.g.*, CRS SOFA Report, *supra* note 38, at 6, 11; *see also* Michael John Garcia & R. Chuck Mason, *Congressional Oversight and Related Issues Concerning International Security Agreements Concluded by the United States*, U.S. CONGRESSIONAL RESEARCH SERVICE, Jun. 2009, at 2 (R40614; Jun. 7, 2012) ("[T]here are three types of *prima facie* legal executive agreements: (1) *congressional-executive agreements*, in which Congress has previously or retroactively authorized an executive agreement entered into by the executive; (2) *executive agreements made pursuant to an earlier treaty*, in which agreement is authorized by a ratified treaty; and (3) *sole executive agreements*, in which the agreement is made pursuant to the President's constitutional authority without further congressional authorization."), *available at* http://fas.org/sgp/crs/misc/R40614.pdf http://fas.org/sgp/crs/misc/R40614.pdf (last visited on Jul. 29, 2014).

consequences. If the President is authorized by Congress to negotiate and conclude international agreements on particular subjects, or if the agreement is approved by a joint resolution of Congress, these "Congressional-Executive" agreements have been considered the equivalent of a treaty.[169] Although treaties clearly operate as the supreme law of the land under the Constitution's Supremacy Clause, the domestic effect of a SOFA concluded by congressional-executive agreement could arguably be subject to *Bond*'s clear indication rule before it could affect the traditional division of law enforcement authority between federal and state governments. Although most SOFA agreements have been entered into as part of an overall mutual or bi-lateral defense or security agreements, only the NATO SOFA and the Partnership for Peace (PfP) SOFA are reciprocal, posing federalism concerns in their enforcement.

As part of post-Cold War diplomacy, the PfP Agreement authorized the establishment of bilateral agreements between NATO and individual Euro-Atlantic partner countries, usually former Warsaw pact countries, to encourage their democratization and integration with Europe and NATO.[170] The PfP applies most of the provisions of the NATO SOFA bilaterally between signatory states of the PfP and NATO member nations.[171] In 1994, Congress authorized the President to apply the provisions of the reciprocal NATO SOFA to PfP nations by entering into executive agreements to that effect.[172] As of 2012, an additional 24 counties are subject to the

169 *See* Henkin, *supra* note 5, at 217 ("[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws, as well as inconsistent provisions in earlier treaties, in other international agreements, or in acts of Congress."); *see also* Restatement (Third) of Foreign Relations Law of the United States § 303 & comment (e) (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); *Senate on Treaties*, *supra* note 5, at 5 ("The constitutionality of this type of agreement seems well established and Congress has authorized or approved them frequently."); Michael Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133 (1998) (stating that the domestic legal effect of sole executive agreements are subject to considerable more controversy; however, because none of the SOFAs concluded as a sole executive agreement are reciprocal, this article will not discuss the domestic effect of these agreements).

170 *See* Press Release, U.S. Dep't of State, The 20th Anniversary of the Partnership for Peace (Jan. 11, 2014) (stating that PfP brings together 22 nations with NATO, 12 of which have become full NATO members), *available at* http://www.state.gov/r/pa/prs/ps/2014/01/219560.htm; *The Senate Resolution on NATO Expansion*, Arms Control Association (Apr. 30, 1998) https://www.armscontrol.org/act/1998_04/srap98; *see generally*, *Partnership for Peace Programme*, North Atlantic Treaty Organization (Mar. 13, 2014), http://www.nato.int/cps/en/natolive/topics_50349.htm.

171 S*ee Partnership for Peace Status of Forces Agreement*, North Atlantic Treaty Organization (Apr. 29, 2014), http://www.nato.int/cps/en/natolive/topics_50086.htm.

172 Foreign Relations Authorization Act, Fiscal Year 1994 and 1995, Pub. L. No. 103-236, § 514(b), 108 Stat. 382 (1994) ("Authority of the President-The President is authorized to confer, pursuant to agreement with any country eligible to participate in the Partnership for Peace, rights in respect of the military and related civilian personnel (including dependents of any such personnel) and activities of that country in the United States comparable to the rights conferred by that country in respect of the military and related civilian personnel (including dependents of any such personnel) and activities of the United States in that country"); *Partnership for Peace Status of Forces Agreement*, *supra* note 167 ("All states that are party to the [PfP] agreement grant the same legal status to forces of the other parties when these are present on their territory . . . . A common status and an important degree of equal treatment will be reached, which will contribute to the equality between partners.").

NATO SOFA through implementation of the PfP Agreement through executive agreement, with the NATO SOFA implemented by a treaty, and the PfP SOFA by a congressional-executive agreement. Between the NATO SOFA and the PfP SOFA, the U.S. has common reciprocal SOFA arrangements with approximately 58 countries, amounting to over half the SOFA arrangements currently in place.[173]

Just as the Supreme Court did not discuss the effects of its requirement for a clear indication that Congress sought to change the traditional balance of criminal authority, it also did not discuss whether and how such a clear indication would be shown when the source of the change was a congressional-executive agreement, such as the PfP SOFA agreements. The Senate in considering the NATO SOFA did understand, and accept, the effect of the SOFA's criminal jurisdiction provisions on traditional state criminal jurisdiction. While Congress clearly authorized the President to enter into these reciprocal PfP SOFA arrangements, and because the underlying PfP agreement requires direct application of the NATO SOFA provisions to these new countries,[174] they should have equal domestic effect. Nevertheless, just as the effect of the *Bond* decision on self-executing treaties is unknown, so too will be its effect on a reciprocal SOFA entered into as a congressional-executive agreement. Here, it is clear that reciprocity was authorized by Congress in the context of extending the NATO SOFA protections to PfP nations. Presumably, Congress in extending these provisions did so with the knowledge that the NATO SOFA itself was a self-executing treaty, and applied directly to affect state criminal jurisdiction. Such common sense evaluation of the statutory effect, however, may not be the sort of clear indication mandated by the Supreme Court in *Bond*.

CONCLUSION

Limitations imposed on federal power pursuant to the U.S. federalist system of government are central to our democracy. However the exercise of the national treaty power, and the implementation of these agreements, have historically been immune from these limitations. This may no longer be the case as federalism concerns are now impacting the nation's implementation of core LOAC treaty obligations. The *Bond* case demonstrates that individual citizens will have standing to contest the validity of implementing legislation or perhaps self-executing treaties in circumscribing their behavior in areas traditionally reserved to the states.

Although not resolving Justice Holmes' 'invisible radiations' from the Tenth Amendment, *Bond* establishes that implementing legislation will not be interpreted to interfere with the traditional division of law enforcement authority between Federal and State governments absent a clear indication from Congress of that intent. Lurking in the background are SOFA treaties, treaties that reflect fundamental foreign policy, war powers, and national security decisions of the nation, but that similarly implicate the core of traditional states' areas of responsibility in our federal system. Given the central concern of the Founders during the drafting of the Constitution over the States'

173 CRS SOFA Report, *supra* note 368, at 2.

174 *See Partnership for Peace Status of Forces Agreement*, *supra* note 171 (explaining that the PfP SOFA applies- with the necessary changes having been made- most of the provisions of an agreement between NATO member states, which was formed in London on 19 June 1951; some provisions of this so-called NATO SOFA cannot be applied to partner countries for technical reasons).

interference with the fulfillment of national treaty obligations, it is particularly ironic that federalism may still have an impact on such an important function of the federal government in the 21st Century.

Awareness of the periodic ebbs and flows of the relationship between the nation's treaty powers and federalism, against the backdrop of our nation's history, indicate that Congress and the President should directly address the federalism concerns extant in relation to adoption of treaties and other international agreements. The current position of the Supreme Court reflects these historic divides. Just as our Founders wrestled with the creation of unified nation capable of acting on the world stage as a legitimate member of the family of nations, the Court should carefully consider rulings, which in the name of federalism, emasculate the nation as a responsible international actor and compromise its vital national security interests. In spite of Justice Holmes resolution of questions related to the scope of the treaty power framed by the outcome of the Civil War, and President Eisenhower by the rejection of Senator Bricker's proposed constitutional amendments, *Bond* seems to have only exacerbated federalism uncertainty. The political branches must take up the mantle and provide much clearer statements of their expectation that treaties and international agreements, especially those related to status of visiting forces, trump states' rights.