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THE UNITED STATES AS A RECEIVING STATE

BY ROBERT B. ELLERT *

IN THE five years since the President ratified the NATO SOF Agreement [1] on 24 July 1953 almost no legislation has been enacted by Congress to implement this treaty within the United States.[2] Conversely, France, Great Britain, Italy and the other signatories have found ways to overcome their constitutional barriers and have initiated procedures designed to guarantee the success of this all important defense measure.

In considering this present laches on the part of the United States in implementing the provisions of the Agreement, it is interesting to note that historically this country has been reluctant to enact domestic legislation providing absolute immunity to foreign troops stationed in the United States. This has been true, even though the United States had agreed to such arrangements with various foreign countries during World War II, in return for like concessions for American troops by the countries concerned.[3]

The only legislation dealing with foreign friendly forces during World War II was the Friendly Foreign Forces Service Courts Act, enacted in 1944.[4]

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[1] *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces,* June 19, 1951, T.I.A.S. No. 2846, henceforth referred to as Agreement. The following NATO countries have ratified the Agreement: France, Norway and Belgium—Aug. 23, 1953; Canada—Sept. 27, 1953; The Netherlands—Dec. 18, 1953; Luxenbourg—April 18, 1954; United Kingdom—June 12, 1954; Turkey—June 17, 1954; Denmark—June 27, 1954; Greece—Aug. 25, 1954; Portugal—Dec. 22, 1955; Italy—Jan. 21, 1956.

[2] Only the claims provisions of Article VIII of the Agreement have been implemented by the Act of August 31, 1954, 68 Stat. 1006, C. 1152, 31 U.S.C. § 224i. The Claims Division, Office of The Judge Advocate General of the Army, Fort Holabird, Md. has been designated as the Receiving State Office for claims cognizable under the Agreement. Such claims should be filed with the nearest United States Armed Forces installation to the place where the accident or incident occurred.

[3] In 23 Brit. Y.B. Int. L. 338 (1946), M.F. Bathhurst in an article entitled *Jurisdiction over Friendly Foreign Armed Forces—The American Law* asserts that the reason the U.S. failed to make similar arrangements as to exemptions from criminal jurisdiction for British troops in the U.S. during World War II as was granted U.S. troops in the United Kingdom was because the U.S. believed that such immunity already existed in the U.S. and that accordingly legislation was not needed to confer this jurisdiction. (But see Cong. Record, Senate, 22 June 1944, pg. 6569, pg. 6572 Senator Murdoch, and pg. 6577, Senator Connolly, for the contrary view that such exclusive jurisdiction on the part of foreign troops did not exist and that it was not considered advisable or possible for Congress to make such a concession to members of friendly foreign forces in the U.S.)

[4] 58 Stat. 643, 22 U.S.C. 701 (1944). This Act became operative with respect to the military, naval or air forces of any foreign State only after a finding and declaration by the President that the powers and privileges provided by the Act were necessary for the maintenance of discipline. By Proc. No. 2626, Oct. 12, 1944 it was declared operative for the forces of the United Kingdom and Canada. This Proclamation was revoked by Proc. No. 3107, Aug. 9, 1955. The restrictive application of the provisions of this Act also tends to refurbish the criticism of the contentions of M.E. Bathhurst, *supra.*

This act, while recognizing the right of a service court of a friendly nation to function under certain circumstances in the United States, cannot be construed as according the friendly foreign force in the United States absolute immunity from the criminal jurisdiction of the Federal and State courts.

An eminent British writer in commenting on this anomaly stated:

> "It has not been difficult to detect in the attitude of the United States of America towards the subject of the exercise of jurisdiction over visiting forces a dualism of approach, which justified it in denying at home a right that it claimed for itself abroad. Until the conclusion of the Status of Forces Agreement, the evidence of the practice of the United States of America was apparently equivocal." [5]

The NATO SOF Agreement is a multi-lateral treaty which defines the immunities, rights, privileges, benefits, and responsibilities of the forces [6] of one party when serving in the territory of another party. It may therefore be expected that the Agreement will be an international obligation of this country for some time to come. In claiming rights and privileges under the Agreement for American troops stationed abroad, it would be a shrewd bargaining point if the United States had already made such rights and privileges available to NATO forces who are serving in the United States.[7]

The provisions of Article VII of the Agreement which authorize other NATO countries to exercise criminal jurisdiction over American servicemen stationed therein have received nationwide publicity and have been the subject of intensive Congressional hearings.[8]

In criticizing these provisions relating to criminal jurisdiction, Congressman Frank T. Bow of Ohio stated, "These provisions abrogate the basic constitutional rights of our American soldiers serving on foreign soil." [9]

On the other hand, Congressman Charles S. Gubser of California in vigorously supporting the Agreement said, "The material fact is that the rights of American soldiers have been increased as a result of the Status of Forces Treaty." [10]

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[5] Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity,* 31 Brit. Y.B. Int. L. 364 (1954).

[6] "Forces" is used in this thesis to include members of the forces and civilian component of a sending State. Dependents are not included in this usage.

[7] A recent listing of Department of the Army directives on the Agreement reveals that none have been issued as to its operation in the U.S. (JAGW 1957/8493, 29 Oct. 1957).

[8] Hearings Before the Committee on Foreign Affairs, House of Representatives, 84th Cong., 1st and 2d Sess. on H.J. Res. 309, Status of Forces Agreements (1955-1956) Pts. 1 and 2.

[9] *Ibid.*

[10] *Id.* at 137.

While there has been marked controversy concerning the execution and the wisdom, of the provisions of the Agreement relating to the trial, the sentencing and the imprisonment of American Servicemen in foreign courts, there appears to have been little thought to the fulfillment of the duties and obligations imposed upon the United States in respect to the personnel of NATO countries stationed in the United States.[11]

The experience of the United States with the actual operation of the Agreement among its forces abroad has indicated many problem areas. Accordingly, it may be expected that the United States with the necessity of implementing the Agreement between the 48 States and the Federal Government, as well as with the sending State, will face even more complications.

The commission of a serious offense by a member of a NATO force could develop into a cause celebre as a result of awkward handling by the authorities of an unprepared Federal Government, or the equally unprepared authorities of the several States. Such incidents might generate international ill feeling and provoke hasty decisions, which upon subsequent analysis would prove to be against the interests of the United States.

Article VII of the Agreement, dealing with criminal jurisdiction, Article IV, relative to motor vehicle driving licenses, and Article X, pertaining to taxation, are likely to prove most troublesome and will affect substantially all NATO personnel stationed in the United States. Accordingly, careful consideration of the problems likely to arise under these Articles of the Agreement is warranted.

While the NATO SOF Agreement represents another example of the curtailment of States Rights necessitated by the stepped up tempo of modern international living, the full impact of these articles has not yet been felt by the States. When the States become aware of this impairment of their sovereign rights, it may be expected that the constitutionality of the Agreement will be questioned.

In speculating as to the constitutionality of these Articles of the Agreement, consider the following hypothetical situation which might arise under the provisions of Article VII in one of the 48 States:

A Turkish soldier, while in the performance of official duty in the United States, commits an offense against State law and is apprehended by State authorities. The offense committed is also a violation of Turkish military law.

[11] See *Ibid,* 271-72, where it is stated that although there are about 12,000 NATO troops stationed in the U.S. during the course of a year, no procedure has been established for reporting to any central U.S. authority the trials of such personnel by State and Federal courts. This information had to be obtained from the various Embassies in the U.S.

The State concerned is preparing to try the soldier and refuses to recognize as binding the provisions of Article VII [12] of the Agreement, which provides that in cases where there is concurrent jurisdiction and the offense arose out of an act done in the performance of official duty, the military authorities of Turkey have the primary right to exercise jurisdiction. In justifying this action the State asserts that the provisions of the Agreement, allowing Turkey the primary right to exercise jurisdiction over the soldier, are unconstitutional when applied to one of the 48 States, arguing that the power of a State to punish offenders of its criminal law is an attribute of Government and a necessary incident of sovereignty. If a State can try a United States soldier, why can't it try a Turkish soldier? While the Federal Government may curtail the exercise of its own criminal jurisdiction by treaty, it has no constitutional right to make a treaty which limits a power reserved to the States by the 10th Amendment.

The Supreme Court has not as yet considered the constitutionality of any of the provisions of the NATO SOF Agreement. In the *Girard* case,[13] however, the Supreme Court construed the provisions of the Executive Agreement with Japan,[14] which is substantially similar to the NATO SOF Agreement. The court held there was no constitutional barrier to carrying out the provisions of the Agreement with Japan, which authorized the United States Government to give up the qualified jurisdiction granted it by Japan over certain offenses committed in Japan by members of the United States Armed Forces. The *Girard* case was therefore limited to the exercise of criminal jurisdiction by foreign courts over American forces stationed abroad. A similar limitation in scope is found in the decisions of the lower federal courts [15] which have considered both the NATO SOF Agreement and the Executive Agreement with Japan. In view of these limitations it will be necessary to go farther afield to resolve the constitutional issue presented in the hypothetical stiuation.

As early as 1887, the Supreme Court in *Wildenhus's Case* [16] considered such a treaty which limited the exercise of criminal jurisdiction by the several States. This treaty was between the United States and Belgium and gave exclusive jurisdiction to the Belgian consul over certain minor disorders committed on a Belgian vessel by the crew thereof, even though such vessel was in the territory of one of the States. Apparently unaware of any constitutional prob-

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[12] See Appendix.

[13] Girard v. Wilson, 354 U.S. 524 (1957).

[14] Amendment of Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States and Japan, T.I.A.S. 2848.

[15] Cozart v. Wilson, 236 F.2d 732 (D.C. Cir. 1956), vacated as moot, 352 U.S. 884 (1956); Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954); cert. denied. 348 U.S. 952 (1955).

[16] 120 U.S. 1 (1887).

lem, other than the supremacy of the treaty, Chief Justice Waite stated for the court,

> "The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." [17]

Although New Jersey was held to have jurisdiction in the particular case, it was because the offense committed was outside the scope of the treaty.

In 1920 in *Missouri v. Holland* [18] the sweeping language of the supremacy clause of the Constitution was challenged on the grounds that it did not sanction the invasion by the treaty-making power of certain reserved powers of the States. The State of Missouri asserted that a treaty between the United States and Great Britain for the protection of migratory birds, and an Act of Congress passed pursuant thereto, which authorized the Secretary of Agriculture to draw up regulations to govern the hunting of such birds, were an unconstitutional invasion of the police power of a State to protect the game within its boundaries. On the basis of the supremacy of the treaty-making power, the Supreme Court neatly disposed of the States Rights argument of Missouri. Both the treaty and the statute were held to be constitutional.

New impetus was given to the supremacy of the Federal Government in international affairs by the decision in *United States v. Curtiss-Wright Export Corporation.*[19] In this case Justice Sutherland forcefully stated:

> "The broad statement that the federal government can exercise no powers except those enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." [20] And again, "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution would have been vested in the federal government as necessary concomitants of nationality." [21]

This opinion left little room for any contention that the powers reserved to the states under Article X could not be restricted by a treaty.

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[17] *Id.* at 17.
[18] 252 U.S. 416 (1920).
[19] 299 U.S. 304 (1936).
[20] *Id.* at 315.
[21] *Id.* at 318.

The unfettered status of the United States in foreign affairs was further emphasized in *United States v. Belmont* [22] and *United States v. Pink*.[23] In these cases the Supreme Court reiterated the doctrine that in the field of international affairs the national government cannot be subjected to any encroachment or interference on the part of the several States.

Finally, in a case not even involving a treaty or other international agreement, the Supreme Court in *Ullman v. United States* [24] sustained, as constitutional, federal legislation which prohibited the States from prosecuting certain offenses. In this case the court, in construing the Federal Immunity Act of 1954 as providing immunity from State as well as from federal prosecution, held Congress has power to grant immunity from prosecution in a State court to a witness compelled to testify in a case involving interference with the security or defense of the United States by treason, espionage or other forms of subversion. This restraint of prosecutions by a State was upheld as "necessary and proper" for safeguarding national security.

An examination of the preceding cases compels the conclusion that the police powers of a State are neither sacred nor untouchable when weighed against the supremacy of the treaty-making power or against the security of the nation. In either case the individual State must yield, and there is little doubt that the provisions of Article VII of the Agreement are a constitutional exercise of the treaty power. Turkey, in the hypothetical situation, would therefore have the primary right to exercise jurisdiction over the soldier. In the event the State refused to surrender the soldier to Turkish military authorities, the federal courts have jurisdiction to issue a writ of habeas corpus as to all persons restrained by State authority in violation of a treaty of the United States.[25]

The Role of the Several States

Although the NATO SOF Agreement under the pattern of past Supreme Court decisions would be constitutional, the peculiar wording of paragraph 2 of Article I [26] may prove troublesome in determining the role of the several States in any implementation of the Agreement by the United States. This paragraph applies the Agreement to the authorities of the political sub-divisions of the Contracting Parties as it applies to the central authorities of the Contracting Parties.

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[22] 301 U.S. 324 (1937).
[23] 315 U.S. 203 (1942).
[24] 350 U.S. 422 (1956).
[25] 28 U.S.C. 2241 c (3).
[26] See Appendix.

The following hypothetical situation indicates how this language of paragraph 2 might be utilized by one of the 48 States:

A British soldier while off duty steals clothing from a department store. Under the provisions of Article VII the State concerned has the primary right to exercise jurisdiction over the soldier. Because of disciplinary reasons the military authorities of Great Britain feel this is a case of particular importance and want to try the soldier by court-martial. Pursuant to paragraph 3 (c) of Article VII they request the United States to waive its right to exercise primary jurisdiction. Under the provisions of Article VII the United States is bound to give sympathetic consideration to the request. The Federal authorities who receive this request, advise the State that, in furtherance of national policy to secure waivers from British authorities of their primary right to exercise jurisdiction over similar offenses committed by American servicemen in Great Britain, they have granted the British request for a waiver in this case. The State, however, refuses to recognize the waiver by Federal authorities and prepares to try the British soldier. In support of this action, the State claims that paragraph 2 of Article I applies the Agreement to the State as it applies to the Federal Government. The State asserts that by virtue of this provision it possesses complete autonomy under the Agreement. Any request for waiver by the British should have been made directly to the State. As long as the State complied with the Agreement and gave the request sympathetic consideration, the Federal Government could not intervene if the State denied it. Further, the State feels that as any such request for waiver is within its discretion, it is not bound to follow the policy considerations of the Federal Government.

The hypothetical situation presents the provocative question of the validity of the State's contention that under the Agreement it possesses complete autonomy. An inquiry into the Federal Constitution, its historical background and its interpretation, as well as of the provisions of the Agreement, is necessary to resolve this apparent impasse.

The Articles of Confederation, which preceded the Constitution, required the approval of Congress for any "treaty, confederation or alliance" to which a State should be a party.[27] The Constitution, however, went further. It not only laid down an unqualified prohibition against a State entering into any "treaty, alliance or confederation", but additionally required the consent of Congress for any "agreement or compact" by a State with a foreign power.[28]

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[27] Art. VI.

[28] Art. I, § 10, cl. 3.

In *Holmes v. Jennison,*[29] Chief Justice Taney pointed out the significance of the addition of these words. He stated as follows:

> "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word 'agreement' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement'. And the use of all of these terms, 'treaty', 'agreement', 'compact', show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms: and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." [30]

There is no doubt that these provisions of the Constitution are a clear expression of the original concept of its framers, that although the States were several, their people in respect to foreign affairs were one. Rufus King at the Framers' Convention, in respect to the entire absence of State power to deal with foreign affairs, stated as follows:

> "The States were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign." [31]

At an early date in our history John Marshall viewed the Union as but one entity in foreign affairs. On 7 March 1800 in the House of Representatives he stated, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." [32]

Perhaps, the most trenchant expression by the Supreme Court as to the absence of international powers from the aggregate of State powers was contained in *United States v. Curtiss-Wright Export Corporation.*[33] In a learned opinion, Justice Sutherland, reached the conclusion that, based on the inherent

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[29] 14 Pet. 540 (1840).
[30] *Id.* at 570, 571, 572.
[31] 5 *Elliot's Debates* 212.
[32] Annals, 6th Cong., col. 613.
[33] 299 U.S. 304 (1936).

power of the federal government to control foreign affairs, only the President can speak or listen in such field as a representative of the nation.

The need for unity in international affairs was acknowledged by President Eisenhower when on 27 April 1955 he stated, "The Constitution had as one of its principal reasons for coming into being the conduct of the foreign affairs of the United States as a single unit, not as 48 States." [34]

The effect of the provisions of the Constitution has been, as between the States and the Federal Government, to vest only in the Federal Government the attributes of an International Person capable of responsible action in international affairs. In the eyes of other nations these constitutional limitations have characterized the several States as political sub-divisions of the Federal Government. The individual States have no standing in the community of nations.

The position of the State in the hypothetical situation is therefore untenable. Paragraph 2 of Article I cannot be interpolated to dub autonomy on the States in international affairs. They could not be either a sending or receiving State under the Agreement. As always, the interests of the several States in foreign affairs are represented by the Federal Government.

The hypothetical situation is an example of the internecine conflict between State and Federal Government that the framers of the Constitution sought to avoid. The granting of the waiver is within the sole discretion of the Federal Government and the State is therefore precluded from trying the British soldier. Should the State refuse to release the soldier, federal courts by statute have jurisdiction to issue a writ of habeas corpus as to all persons restrained by State authorities in violation of a treaty of the United States.[35]

It is emphasized that in view of the broad language used by Chief Justice Taney in *Holmes v. Jennison,*[36] as to what constitutes an agreement under clause 3, section 10, Article I of the Constitution, the Federal Government should first secure the consent of Congress before delegating to the States any authority to make waiver agreements with foreign powers under Article VII of the Agreement. State action would otherwise constitute an agreement with a foreign power requiring the consent of Congress.

It is not believed that the dicta in *Virginia v. Tennessee,*[37] that certain interstate compacts do not need the consent of Congress if they have no tendency

[34] 32 Dep't State Bull. 820 (1955).
[35] 28 U.S.C. § 2241 c (3) (1952).
[36] 14 Pet. 540 (1840).
[37] 148 U. S. 503 (1893).

to increase the political powers of the contractant States or to encroach upon the just supremacy of the United States, can validly be applied to State agreements with foreign powers.[38] Such reasoning barefacedly contradicts the express language of the Constitution which prescribes the approval of Congress to such agreements.[39]

IMPLEMENTATION OF ARTICLE VII

In the United States it has been critically stated that the provisions of Article VII are contrary to the principles of international law.[40] There has been strong reproach that the State Department has unnecessarily subjected American servicemen to the jurisdiction of foreign courts.[41] It has been argued that under international law friendly foreign troops are immune from the jurisdiction of another nation wherein they are stationed with the consent of the host country.[42] In a carefully written memorandum the Department of Justice has rebutted these contentions with a penetrating examination of the position under international law of friendly foreign troops in a host country.[43] The conclusions of this memorandum were twofold: one, that when there is no express agreement among nations, claims of immunity for friendly foreign troops for criminal acts in the host State have generally been strongly rejected; and two, that the United States by the Agreement acquired more jurisdiction over its forces abroad than it had without it. Regardless of this controversy, the NATO SOF Agreement is an expression of positive international law. Whether it represents poor bargaining or practical statesmanship on the part of the United States, its obligations must be accepted.

Article VII is the heart of the Agreement. Its jurisdictional provisions are an integral segment of the give and take scheme of national defense which is the keystone of the United States foreign policy. In order for it to operate effectively when the United States is a receiving State there must be amplification on the municipal level. This amplification must be authoritative in source,

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[38] But see Dunbar, *Interstate Compacts and Congressional Consent,* 36 Va. L. Rev. 753 (1950), and Bruce, *The Compacts and Agreements of States,* 2 Minn. L. Rev. 500 (1918), who have resolved this dicta by stating that although local matters can be settled by interstate agreements without recourse to Congress, such agreements are avoidable at the option of Congress.

[39] See Frankfurter and Landis, *The Compact Clause of the Constitution—A study in Interstate Adjustments,* 34 Yale L. J. 685, 694 (1924), as to the purpose of the compact clause.

[40] See statement of Congressman Frank T. Bow of Ohio, *op. cit., supra* note 8, Pt. 1, 2, 3.

[41] *Ibid.*

[42] See King, *Jurisdiction Over Friendly Armed Forces,* 36 Am. J. Int'l. L. 539 (1942) and King, *Further Developments Concerning Jurisdiction Over Friendly Foreign Armed Forces,* 40 Am. J. Int'l. L. 257 (1944).

[43] *Op. cit. supra* note 8, Pt. 1, 139. See also Barton, *Foreign Armed Forces; Immunity from Supervisory Jurisdiction,* 26 Brit. Y.B. Int'l L. 380 (1949); Barton, *Foreign Armed Forces; Immunity from Criminal Jurisdiction,* 27 Brit. Y.B. Int'l. L. 186 (1950); Schwartz, *International Law and the NATO Status of Forces Agreement,* 53 Colum. L. Rev. 1091 (1953).

unequivocal as to meaning and far reaching in effect. It must state decisively the responsibilities of the Federal Government under Article VII and the subordinate position of the 48 States. It should further furnish a framework for machinery which will provide for the day to day operation of Article VII in the United States and provide for the functioning of the service courts of a sending State and for investigative and other assistance to the sending State.

The form of implementation which will best satisfy these requirements is Congressional legislation. It would be far reaching, authoritative, and a forceful means of delimiting Federal and State relationships in the operation of the Agreement in the United States.

In speaking of legislation which implemented a treaty provision of the United States, the Supreme Court in *Neely v. Henkel* [44] stated:

> "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article 1 of the Constitution, as all other 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 stipulation 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." [45]

In short, if Congress enacts legislation to carry the provisions of Article VII into operation, the only question that could be raised as to the constitutionality of such measures would be whether they are "necessary and proper" measures for this purpose.

It is submitted that the type of implementing legislation suggested is not only appropriate, but necessary and proper to give efficacy to the provisions of Article VII in the United States and would therefore be constitutional.

In considering the provisions of such legislation it is not reasonable to expect that Congress itself would have both the time and technique necessary to prescribe all of the details necessary for the routine operation of Article VII in the United States. Congress could however, formulate the general policies to be followed and delegate to an administrative agency the task of promulgating the detailed rules and regulations necessary to effectuate the legislative norms. The flexibility of this method is desirable, as the precise rule of action to be followed in the United States may only be apparent after careful experimentation.

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[44] 180 U.S. 109 (1901).

[45] *Id.* at 121.

The federal agency most concerned with the operation of the criminal provisions of Article VII in the United States is the Department of Justice, which already has liaison with its counterpart among the States and would therefore be capable of supervising the administration of the provisions of Article VII in consonance with the lines established by Congress. In this respect Congress should provide that such regulations as may be adopted by The Attorney-General should not become effective until approved by the President.

It should be noted that the implementation of Article VII in the United States will encompass both State and Federal offenses and in those cases where the offense is solely a violation of State law, the States should have the widest possible discretion consistent with the furtherance of the foreign policy of the United States.

For the purpose of determining a solution to some of the troublesome problems that might be encountered in formulating implementing legislation Article VII should be divided as follows: 1. Exclusive Jurisdiction. 2. Concurrent Jurisdiction. 3. State and Federal Jurisdiction over the Same Act. 4. Service Courts of the Sending State, and 5. Other Assistance to the Sending State.

1. *Exclusive Jurisdiction*

The second paragraph of Article VII [46] concisely sets forth the right of the sending and receiving States to exercise exclusive jurisdiction. It grants the military authorities of the sending State the right to exercise jurisdiction in the United States over persons subject to its military law as to offenses, including security offenses, punishable by the law of the sending State, but not by the law of the receiving State. It permits the United States the right to exercise jurisdiction over members of a force or civilian component of a sending State and their dependents with respect to offenses, including security offenses, punishable by the law of the United States, but not by the law of the sending State.

In determining whether the United States has exclusive jurisdiction over a particular offense committed by a member of a force of a sending State a knowledge of the military code of the sending State is an essential working tool.

Consider the following hypothetical situation which might arise in the United States under this provision:

A French soldier commits an offense in violation of United States law over which the United States has exclusive jurisdiction. The soldier is in the custody of the United States authorities. As part of his duties with the French

[46] See Appendix.

Army the soldier handles classified information vital to the security of France. The French authorities fear that if the soldier is confined in a civil jail the security information possessed by the soldier might be compromised. In order to regain full control over the soldier and with knowledge that they cannot try him for the offense committed, the French authorities request the United States to waive its right to exercise jurisdiction. The authorities of the United States do not realize that the offense is not an offense under French law. In the belief that the French military authorities have jurisdiction and will try the soldier, the United States authorities on this condition waive the right of the United States to exercise jurisdiction. After delivering the soldier to the French authorities, the United States realizes that the French authorities cannot try the soldier. Can the United States now regain jurisdiction?

The type of waiver in the hypothetical situation must not be confused with the waiver of the right to exercise primary jurisdiction set out in paragraph 3 (c) of Article VII.[47] In the hypothetical situation the French authorities are asking the United States not to exercise its exclusive jurisdiction. The misunderstanding arose when the United States thought the French authorities were going to try the soldier.

The United States could probably regain jurisdiction, although the administrative difficulties might make such action infeasible. In the hypothetical situation the United States conditioned its waiver upon the event that the French authorities try the soldier. Since France could not try the soldier because it lacked any jurisdiction over the offense, the waiver of the United States never reached maturity. Conversely, if the United States had made the waiver, fully realizing that the French authorities could not exercise jurisdiction over the soldier for the offense committed, it would patently be an act of bad faith for the United States to attempt to regain jurisdiction.

Recently, the French Court of Cassation on an appeal, which considered whether a previous waiver of criminal jurisdiction by French authorities was a bar to the combined civil-criminal action brought on behalf of the widow of a Canadian officer killed while riding in the car of an American Air Force officer, held that the waiver was binding on all agencies of France, including the courts.[48]

This case involved an unconditional waiver and must be distinguished from the conditional waiver in the hypothetical case. It should be noted that Article VII has no requirement that a request for a waiver of exclusive jurisdiction be

[47] See Appendix.

[48] Whitley Case.

even considered. Such action would be strictly a matter of comity between the nations concerned.

Seemingly, a knowledge of the law of the sending State will eliminate any difficulty in implementing this provision in the United States. It would suffice if legislation were enacted setting forth the substance of Article VII dealing with this provision and authorizing The Attorney-General to formulate necessary administrative procedures. Except for the foregoing, the several States should have full rein in those cases where they exercise exclusive jurisdiction.

2. *Concurrent Jurisdiction*

In those cases where concurrent jurisdiction exists between the sending and the receiving States, paragraph 3 of Article VII provides which party shall have the primary right to exercise jurisdiction. It also establishes a procedure for the other party to request a waiver of such primary right to exercise jurisdiction.

When concurrent jurisdiction exists under Article VII the military authorities of a sending State in the United States would have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to:

(1) Offenses solely against the property or security of the sending State.

(2) Offenses solely against the person or property of another member of the force or civilian component of the sending State or a dependent of such member.

(3) Offenses arising out of an act or omission done in the performance of official duty.

The United States would have the primary right to exercise jurisdiction in the case of all other offenses. It would always have the primary right to exercise jurisdiction over dependents as they are not included in this provision.

The offenses set out in (1) and (2), offenses against the sending State, are so clearly defined that there should be little difficulty in deciding when the sending State has the primary right to exercise jurisdiction.

But the antithesis of this is found in relation to (3), offenses arising out of any act or omission done in the performance of official duty. What constitutes such an offense? Consider the following hypothetical situation which might arise in the United States in regard to this determination:

A soldier from a sending State while on guard duty at a cantonment in New York State gets drunk and carelessly discharges his firearm, killing an American. The sending State asserts that it has the primary right to exercise

jurisdiction over the soldier as the offense arose from an act done during the performance of official duty. The United States takes the position that the circumstances of drunkenness and careless discharge of a firearm negate any conclusion that the offense arose out of an act or omission done in the performance of official duty. Therefore, the United States claims that it has the primary right to exercise jurisdiction over the soldier and that he may be tried by the State of New York.

In an attempt to secure jurisdiction over its forces in as many cases as possible, sending States have a tendency to maintain that any offense committed during the period of performance of official duty, regardless of its relationship to the duty, entitles it to the primary right to exercise jurisdiction. In several cases the United States as a sending State was successful in urging that an offense arising out of the driving of a motor vehicle from home to place of duty was an offense arising out of an act done in the performance of official duty.[49]

At any rate, a sending State in support of this liberal view could argue that it is merely interpreting Article VII in accordance with the opinion expressed by Oppenheim [50] that if an accused member of a visiting force was on duty at that time when he transgressed local law, he was entitled to immunity from prosecution for the offense by the host State. But this argument must yield to the express language of paragraph 3 (a) (ii) of Article VII, which limits such offenses to those committed in the course of the *performance of official duty.* It clearly requires something more than that the offense was committed during the period while the accused was *on* official duty. This additional ingredient is a casual connection between the offense committed and an act or ommission done in the performance of official duty.

Returning to the hypothetical situation, as there is no casual relationship between the offense and any act or omission in the performance of official duty, the sending State would not have the primary right to exercise jurisdiction. But, there is no doubt that there will be substantial dispute as to whether an offense falls within the official duty provision. The situation will be further aggravated when the factual basis of an offense is in doubt; one view of the facts supporting an offense committed in the course of official duty, the other view establishing the absence of a casual relationship between the offense and an act done in the course of official duty.[51] These factual conflicts are not susceptible to cure by

[49] Snee and Pye, *A Report on the Actual Operation of Article VII of the Status of Forces Agreement,* p. 44, Georgetown University Law Center (1956).

[50] 1 Oppenheim, International Law 759 (7th Ed., Lauterpacht, 1947).

[51] Such a controverted factual dispute was revealed in Girard v. Wilson, 354 U.S. 524 (1957). One version of the facts indicated Girard fired at the deceased as an incident to his duties as a guard; the other version indicated that he was on a frolic of his own and there was no connection between the unlawful act and his duties.

any general rule. Concurrent and cooperative investigation by the authorities of the sending and receiving States in ascertaining the facts would, however, reduce such incidents to a minimum.

The countries of France, Italy, the United Kingdom, and Turkey[52] have in general recognized that the sending State has the right to make the initial determination as to whether it has the right to exercise primary jurisdiction. It further appears that this view was advanced in the working papers of the Agreement by the American Representative,[53] accepted by the Working Group,[54] and has also been the position of the United States as a sending State.[55] Accordingly the United States *as a receiving State* should follow this trend.

In France an administrative procedure has been developed to expedite the recognition of this primary right of the sending State in appropriate cases.[56] Under this procedure the sending State informs the French procureur of the nature of the incident in which the member of the force is involved and over which concurrent jurisdiction exists, the sending State then asserts that under the circumstances it has the primary right to exercise jurisdiction under paragraph 3 of Article VII, and states that unless a reply is received in ten days it will proceed to dispose of the case. If the French disagree with the determination of the sending State and lodge an objection, the matter is negotiated.

A similar procedure would work effectively in the United States and should be included in the administrative regulations promulgated by The Attorney-General. It should be applied to all offenses, State and Federal, where concurrent jurisdiction with the sending State exists.

Article VII does not provide for the impasse which results when the sending State and the United States cannot agree as to who possesses the primary right to proceed. One workable solution would be for the United States and the sending State to agree that all such cases would be submitted to an arbitrator whose adjudication would be binding and conclusive on both parties.

Although the sending State has no right under the Agreement to claim primary jurisdiction over dependents, the practice has been otherwise. In France, Italy, the United Kingdom and Turkey foreign authorities have not claimed, nor have American authorities on behalf of the United States as a sending State admitted, any distinction between dependents and a member of

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[52] Snee and Pye, *supra* note 49, at 22, 23, 24.
[53] Summary Record, Doc. MS-R (51) 14, 26 April 1951.
[54] Summary Record, Doc. MS (J) R (51) 5, 21 Feb. 1951.
[55] Snee and Pye, *supra* note 49, at 22, 23, 24.
[56] *Id.* at 22.

a force in this regard.[57] Accordingly, as a matter of comity, if not of law, implementing legislation in the United States should include dependents among those over whom the sending State could claim the primary right to exercise jurisdiction. In fact, it would not be amiss to extend the definition of dependents as set out in paragraph 1 of Article I to include any other person wholly or mainly maintained by the member of a force or civilian component of a sending State. This has already been done in the United Kingdom.[58] Such liberalizing action on the part of the United States would be worthwhile in prompting similar action by the other NATO countries and thus benefiting United States dependents abroad.

Under Article VII it is possible that one act could constitute an offense over which the sending State would have the primary right to exercise jurisdiction and also an offense over which the United States would have a similar right. Such a situation could arise where a member of a force through reckless driving kills another member of the force. The sending State would have the primary right to exercise jurisdiction over the homicide since the victim was a member of the force of the sending State. Conversely, the United States would have the primary right to exercise jurisdiction over the reckless driving offense. This type of situation will ordinarily be resolved through negotiation. Usually the State having the primary jurisdiction over the more serious offense should be allowed to proceed by the other State. The Attorney-General under the implementing legislation should have sufficient authority to resolve such problems. As no general standard can be set forth for the exercise of this authority, each case would have to be decided with a view to the best interest of the United States.

In those cases where the several States would have the right to exercise primary jurisdiction over a member of a force and the country concerned has not requested a waiver of the State's right to proceed, the State should be afforded full discretion in disposing of the case unfettered by Federal legislation. Where the primary right to exercise jurisdiction is in the sending State, the implementing legislation should clearly set forth that neither State nor Federal courts may exercise jurisdiction until the sending State has waived its right to exercise its primary jurisdiction. The Attorney-General should have authority to draft regulations carrying out these provisions.

When concurrent jurisdiction exists, paragraph 3 (c) of Article VII provides that the State having the primary right to proceed must give sympathetic consideration to a request from the authorities of the other State for a waiver

[57] Snee and Pye, *supra* note 49, at 43.
[58] Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, (c. 67), s. 12 (4).

of its primary right to exercise jurisdiction. This request would be made by the other State in cases it considers to be of particular importance. While there is no obligation on the part of the State receiving such a request to grant it, there does appear to be a duty to refrain from trying any case until its authorities have completed action on the request for waiver. Otherwise, the right of the State requesting the waiver would be meaningless.

The sole substantitive problem facing the United States as a receiving State under this provision will be the formulation of the policy it will follow in granting and denying such requests for waiver of State and Federal primary jurisdiction from the sending State. Inevitably, the policy adopted will have an impact on the operation of the United States as a sending State in securing similar waivers from foreign jurisdictions in behalf of American servicemen abroad. Therefore, in order to gauge the action of the United States as a receiving State on such requests, its objectives as a sending State should be examined.

As a sending State the United States has taken full advantage of this provision of Article VII. Whenever possible United States commanders in the field have sought waivers of the primary right of a foreign country to exercise jurisdiction over American servicemen.[59] The fecundity of this policy was revealed by the fact that during the period from 1 December 1954 through 31 May 1955 foreign countries waived their primary right to exercise jurisdiction in 2,952 out of 4,458 cases involving persons subject to United States military law, or in 66.2% of the cases.[60] A further consideration is that the number of American troops abroad is disproportionately larger than the approximately 12,000 foreign troops stationed in the United States during the course of a year.[61]

It is therefore evident that a liberal policy by the United States as a receiving State in granting requests for waiver of its primary right to exercise jurisdiction would best encourage like waivers from foreign countries for American servicemen who transgress foreign law. As a means of attaining this objective, the policy of the United States might well consist in granting all requests by a sending State for a waiver of the primary right of the United States to exercise jurisdiction, except in unusual cases. The citing of this procedure for foreign troops in the United States would be a potent lever in obtaining similar treatment for American forces abroad.

Legislation carrying out this policy should provide The Attorney-General with authority to grant the requests of a sending State for a waiver of the

[59] Hearings Before the Committee on Foreign Affairs, House of Representatives, *op. cit. supra* note 8, Pt. 1, 172, 173.
[60] *Id.* at 176.
[61] *Id.* at 271.

primary right of the United States to exercise jurisdiction over offenses in violation of either State or Federal law. It is essential that this legislation clearly provide that the several States may not take action on any requests for waiver from a sending State, and that they may not take action on such a case until action on the waiver request has been completed by proper Federal authorities. This limitation on the sovereignty of the several States is necessary as a means of carrying out the overall foreign policy of the nation in regard to obtaining similar waivers for United States forces abroad. In forwarding such requests by the sending State to The Attorney-General for action, the States should attach their recommendations as to whether or not the waiver should be granted.

To avoid administrative ensnarlment The Attorney-General should establish the channels by which Federal and State authorities should forward these requests and should also provide a means by which the Commanding Officer of the accused member of a force may be immediately notified of his apprehension by State or Federal authorities. The importance of this notification cannot be overemphasized. It is a duty imposed on the receiving State by paragraph 5 (b) of Article VII. Failure to notify the military superiors of the accused may in some cases deprive the sending State of its right to request a waiver, and may cause much resentment and ill-will. In establishing a prompt reporting system it will be necessary to study the command structure of the various NATO forces in the United States. In some cases it may be necessary to go through diplomatic channels or through United States forces to give such notice. Again, action on the case should be delayed until appropriate notice has been given.

3. *State and Federal Jurisdiction Over the Same Act*

In the United States there exists a limited number of situations where the same act is an offense against both State and Federal law. Unless otherwise agreed, the customary procedure in these cases is for the jurisdiction first taking cognizance of the matter to retain it to a conclusion, to the exclusion of the other.[62] The legislation implementing Article VII should provide for this contingency. It would suffice if it simply provided that unless otherwise agreed between the State and Federal Government the general rule as set forth above would apply. While this general rule would entitle either the State or Federal Government to proceed in a case of concurrent jurisdiction over a member of the force of a sending State, what would be the result if the *other* jurisdiction attempted to try the member for the same offense after the completion of the first trial? This aspect is explored in the following hypothetical situation:

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[62] Mail v. Maxwell, 107 Ill. 554 (1883).

In a Federal court a soldier of a sending State is tried and acquitted of an offense against Federal law. The Judge in the case publicly called the verdict of the jury disgraceful. Since the act for which the soldier was tried is also an offense against State law, federal authorities bring the evidence in the case to State prosecutors. The soldier is indicted, tried and convicted in the State court. The authorities of the sending State protest that this is double jeopardy and a violation of paragraph 8 of Article VII.

The procedure is apparently correct.[63] It is not prohibited by the Federal Constitution nor by any provision of the Agreement. Paragraph 8 of Article VII only provides that where an accused has been tried by the authorities of one contracting party under the Agreement and has been acquitted by that contracting party or has been convicted and is serving or has served his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of *another* Contracting Party. Since the State authorities in the hypothetical situation are not another Contracting Party, but part of the United States, the Agreement does not preclude the second trial.

As a practical matter the United States should include in the legislation implementing Article VII a prohibition against duplicate trial by State and Federal courts for the same offense, particularly since it has been argued that the procedure in civil law countries, such as France and Italy, where the prosecutor has a right to appeal from an acquittal, is a violation of an American serviceman's Constitutional rights. Under its law the United States can go one step more. If it loses out in the Federal court, it can, if jurisdiction is concurrent, try again in a State court. Even the much libeled civil law countries prohibit this procedure.

4. *Service Courts of a Sending State*

The provisions of paragraph 1 (a) of Article VII establishes the right of the military authorities of the sending State to convene service courts of appropriate jurisdiction within the United States. This would include the right of the sending State to convene any military, naval or air force court or other similar tribunal of the sending State to exercise in the United States the criminal and disciplinary jurisdiction of the sending State.

Although Article VII provides that a service court of a sending State may function in the United States, such courts may need certain assistance from the

[63] See Bartkus v. Illinois, 355 U.S. 281 (1958) where under a similar factual situation the judgment of the State court was affirmed by an equally divided court. This involved due process under the 14th Amendment. See also United States v. Lanza, 260 U.S. 377 (1922) re the constitutionality of a second trial by Federal court after a former trial by State court for the same act.

United States to effectively exercise their jurisdiction, as when American witnesses are required by a foreign service court.

At present there is no authority under which the United States could compel the recalcitrant witnesses to testify, even though paragraph 6 (a) of Article VII requires the United States to assist the sending State "in the collection and production of evidence". The Working Papers of the Agreement indicate that the words "and production" were inserted for the purpose of making the attendance of civilian witnesses of the receiving State compulsory.[64] Be this as it may, in practice this interpretation has not been adopted. The only NATO countries who have provided compulsory process for such witnesses before a service court of a sending State have been the United Kingdom [65] and Canada.[66] Notwithstanding that there may be disunity among the NATO countries on this matter, the intent reflected in the Working Papers of the Agreement and the practical consideration, that in certain cases the lack of this power would emasculate the service courts of a sending State, are compelling reasons for providing the sending State with a means of obtaining the attendance of American witnesses. Such a step by the United States would aid it as a sending State in securing similar privileges abroad.

The most effective way to provide this assistance in the United States would be by legislation, providing appropriate Federal courts with jurisdiction to issue orders to persons within their jurisdiction to appear before the service courts of the sending State, with fees and mileage to be paid by the sending State. It should provide for contempt and perjury proceedings against these witnesses. It is essential that this legislation entitle these witnesses before the service courts of the sending State to the same immunities and privileges enjoyed by witnesses before a United States federal court. This would insure that American nationals would have such Constitutional safeguards as the protection against self-incrimination.

The Friendly Services Courts Act of 1944, which is presently inoperative, provides a format which would be a useful guide in drafting this legislation.[67]

5. *Other Assistance to the Sending State*

The provisions of paragraph 5 (a), 6 (a) and 7 (b) of Article VII respectively bind the United States to assist the sending State in making arrests, to assist the sending State in carrying out investigations, to assist the sending State

[64] Summary Record, Doc. MS-R (51) 15, 28 April 1951.
[65] Visiting Forces Act, 1952, *op. cit.* s. 8.
[66] Visiting Forces (North Atlantic Treaty) Act, 1951, 2nd Session, c. 28, s. 14.
[67] 22 U.S.C. §§ 703, 704 (1952).

in the collection and production of evidence and to give sympathetic consideration to any request from the sending State for assistance in carrying out a sentence of imprisonment.

This provision that the United States will assist the sending State in the arrest of a member of its force or their dependents should apply to State as well as Federal authorities. This construction is based on paragraph 2 of Article I, which applies the Agreement to State authorities, and on the Working Papers of the Agreement, which in relation to this provision of the Agreement state that the term "authorities" applies not only to the authorities of the central government, but also to local and military authorities.[68]

In applying the arrest provision of the Agreement to the United States, the situation where a member of the force of a sending State commits an offense in violation of Federal or State law, and that where such a member commits an offense over which the sending State has exclusive jurisdiction, must be distinguished. In the first situation, Federal or State police authorities need no additional powers to arrest; their normal police powers would be sufficient. In the second situation, special authority to arrest would be necessary, since there is no violation of State or Federal law.

Accordingly, legislation implementing this provision of the Agreement must confer jurisdiction on United States arresting authorities to make arrests for those offenses over which the sending State has exclusive jurisdiction. For example, such legislation could provide that upon request of an officer commanding any force of a sending State, any person (in the civil, military or naval establishments of the United States, or in the civil establishment of a State) having authority to arrest, could summarily arrest any member of a force or civilian component of the sending State (or dependent thereof) so designated in the request and deliver him to the custody of an officer of the sending State. It is not considered advisable that any special provision be made to protect such arresting officers against suits for damages as the result of the arrest of a foreign serviceman pursuant to this legislation. Such a provision would be repugnant to public policy in exculpating their excesses.

Similar legislation should provide authority for State and Federal law enforcement agencies to assist the sending State in carrying out investigations and in the collection and production of evidence. The Attorney-General should be empowered to adopt appropriate implementing regulations for these provisions. Additionally, Congress should provide that persons sentenced to imprisonment by a service court of a sending State in the United States may be

[68] Summary Record, MS-R (51) 15, 28 April 1951.

confined in a disciplinary barracks, guardhouse or other place of detention of the United States armed forces or in other confinement facilities of the United States at the expense of the sending State. Such legislation would aid a sending State in carrying out sentences imposed by its service court.

It is concluded that the implementation of the provisions of Article VII within the United States by a combination of Federal legislation and federal administrative regulations is the only effective method for this country to discharge its obligations and duties as a receiving State under the NATO SOF Agreement. The procedures outlined restrict the exercise of criminal jurisdiction by one of the 49 States only in those cases where the sending State has requested a waiver of the right of the United States to exercise jurisdiction. In these cases the Federal Government would have the authority to grant the waiver even though the offense concerned was solely a violation of State law. It is not considered that this minimum control on the exercise of criminal jurisdiction by a State is an unwarranted invasion of the sovereignty of the several States. It is justified on the basis of advancing the overall foreign policy of the United States and thus securing the maximum benefits for American forces and their dependents stationed in the other NATO countries.

These procedures are aimed at securing uniformity in the day to day operation of the Agreement throughout the United States. Should they not be followed or should the Supreme Court for some unforseen reason find them to be in violation of the Constitution, no other acceptable substitute is available. In fact, if the Federal Government does not unequivocally control the implementation of Article VII in the United States, it will become a multiple source of tripartite conflict among the sending State, the Federal Government and the several States.

IMPLEMENTATION OF ARTICLES IV AND X

Article IV, dealing with motor vehicle driving licenses, and Article X, dealing with taxation, concern what may be termed non-competing aspects of sovereignty, since they contain no provision that the sending State must forego the exercise of its own sovereignty in regard to driving licenses and taxation because of any act by the receiving State under such Articles. The sovereignties involved are therefore non-competing. In cases where concurrent jurisdiction exists the sending and receiving States vie with each other for the primary right to exercise jurisdiction. In practice the loser is usually precluded from exercising jurisdiction over the individual concerned for the offenses committed.

The absence of this competing aspect of sovereignty in Articles IV and X simplifies their implementation. Further, since the receiving State is exercising

territorial sovereignty, which is not in conflict with the personal sovereignty of the sending State, and the Articles themselves require no notification to the sending State, the receiving State in practice will be able to deal directly with the member of the sending State.

Article IV

Article IV provides that the United States as a receiving State is obligated either (1) to accept as valid the driving permit or license or military driving permit of the sending State or (2) to issue its own license without a driving test to a member of the force or civilian component of the sending State who holds a valid driver's license or permit or military driving permit issued by the sending State. Dependents are not included in the provisions of this Article. No difficulty has been encountered in securing this privilege for American servicemen stationed in the other NATO countries.

The provisions of this Article apply only to driving licenses for motor vehicles operated by the force of the sending State in a private capacity. It is therefore inapplicable to assigned operators of the service vehicles of the sending State while being used on official business.

In the United States the issuance of civilian driving licenses, except for the District of Columbia, is solely a function of the several States. As Article IV applies to the States, they are bound to comply with its provisions. In view of this, consider the following hypothetical situation:

A French soldier on duty in the State of North Carolina is apprehended by the North Carolina State Police for the offense of driving his civilian motor vehicle without having a North Carolina driving license. In his defense the French soldier maintains that under the provisions of Article IV of the Agreement, North Carolina must either accept his French driving license as valid or issue him a driving license without a test. Further, since North Carolina has not made any provision for issuing driver's licenses to members of a NATO force, the soldier asserts that North Carolina must now recognize his French driving license.

The position taken by the soldier is consistent with Article IV. In order for North Carolina to prosecute the soldier for lack of a North Carolina license it must first establish a requirement for such a license pursuant to Article IV. Then if the soldier does not comply, even though he has a valid French license, he may be tried in the North Carolina courts.

The hypothetical situation demonstrates that implementation of Article IV in the United States requires a means whereby the Federal Government, which

is responsible to the sending State for discharging the obligations imposed by this Article, can insure compliance by the States. How may this be accomplished without unduly infringing upon the sovereignty of the several States?

The provisions of this Article are so simple that little in the way of implementation is needed. The major difficulty will be in bringing it to the attention of State authorities so that they will recognize its application to NATO forces in the United States. This could easily be accomplished by Federal legislation which provided that in the absence of a State established procedure for the issuance of State driving licenses to a member of a NATO force or civilian component under the circumstances specified in Article IV, the driving permit or license or military driving permit of the sending State will be valid in such State. The several States could then either issue their own licenses or be forced to recognize that of the sending State. Such legislation would be constitutional on the basis of being necessary and proper to carry into operation the provisions pertaining to Article IV. Actually, although this legislation paraphrases the Article, it has the virtue of promulgating its provisions throughout the nation in a form having force and authority and readily available to State officials.

As an alternative to such legislation, a less effective procedure would be for the Secretary of State to request the assistance of the Council of State Governments. This organization could endeavor to insure that each State either recognized the driving license of the sending State or issued its own without requiring a driver's test as provided in Article IV.

Article X

It has been argued that in practice there should be no taxation by a host nation of friendly foreign troops stationed in the host country with its permission.[69] This view is predicated on the theory that the consent of the host country to the entry of the friendly foreign troops implies a waiver of its sovereignty over such forces. Taxation of such troops is an exercise of sovereignty by the host country and should therefore be precluded.

Regardless of the soundness of this argument, practical reasons dictate the exemption of friendly foreign forces from certain forms of taxation by the host country. Traditionally it has been recognized that the power to tax inherently includes the power to destroy by excessive taxation. Collection of income tax, for example, from friendly foreign forces might well prevent such troops from performing the duties for which they were permitted to enter the host

[69] Fairman and King, *Taxation of Friendly Armed Forces*, 38 Am. J. Int'l. L. 258 (1944).

country. It is also repugnant that one ally should seek to enrich itself by the taxation of another ally's forces.

At any rate Article X adequately protects the members of a force or civilian component of a sending State from this type of tyranny by taxation. It provides that where the legal incidence of any form of taxation in the receiving State depends upon residence or domicile, periods during which a member of a force or civilian component of a sending State is in the territory of that State by reason solely of his being a member of such force or civilian component shall not be considered as periods of residence or domicile for the purpose of such taxation. Further, it states that such members when stationed in the receiving State are exempt from income tax by the receiving State on salary and emoluments paid to them as members of the sending State. Such members are also exempted from taxation on any tangible moveable property the presence of which is in the receiving State due solely to the temporary presence of the members. On the debit side, Article X provides those forms of taxation of members of the sending State which are authorized by the receiving State. Thus such members may be taxed by the receiving State with respect to any profitable enterprise other than their employment as a member of the sending State. Dependents are not included in this Article.

The basic concept behind Article X as stated in the Working Papers of the Agreement was to devise a system of taxation that would insure, first, that a member of a foreign force would not suffer a financial loss on account of service in a receiving State and, second, that such a member would not profit by undue advantages which would give the impression of enjoying fiscal privileges.[70]

In the United States the implementation of Article X into the tax structure of both the Federal and State Governments is necessary.

In the sphere of federal taxation little difficulty is foreseen. Section 894 of the 1954 Internal Revenue Code already provides that income exempted by any treaty obligation of the United States is exempt from taxation under that subtitle.[71] Thus as to the federal system of taxation, no additional legislation is needed.

Each State, however, must take action to include the provisions of Article X in their tax structure. While it is not expected that the States would fail to become acquainted with these tax provisions, it would not be amiss for the Federal Government to enact legislation applying the provisions of Article X to the States. Such legislation would simply restrict the States from taxing

[70] Summary Record, MS-D (51) 12, 19 Feb. 1951.
[71] 26 U.S.C. 894 (1954).

members of a force of a sending State as set out in the Article. This legislation would be tangible authority for any member of a NATO force protesting a State tax in contravention of Article X. In practice, once the States are acquainted with Article X, there should be no problems in this area.

CONCLUSIONS

It has been demonstrated that the Federal Government has failed to discharge the obligations imposed on the United States as a receiving State by Articles IV, VII and X of the NATO SOF Agreement. By demanding abroad certain rights under the Agreement for American servicemen, while neglecting these same rights for foreign NATO forces in the United States, this country has become a target for the unpleasant charge of discrimination. Further, other NATO nations may justifiably be reluctant to grant concessions to American servicemen in matters relating to the Agreement because they would be unilateral in nature in view of the negative position taken by the United States as a receiving State.

In juxtaposition with the need to fulfill our international obligations under the Agreement, is the equally important requirement that authorities of the Federal Government, the several States and the sending State have guidance as to how the provisions of Article IV, VII and X will operate in the United States. In view of these international and domestic considerations, the fact that to-date few cases have arisen in the United States under the Agreement is not a valid reason for rejecting its implementation in the United States.

Federal legislation is necessary and proper to carry into operation the provisions of the Agreement in the United States. Coupled with administrative regulation, this approach would insure that the obligations of the United States set out in Article VII would be uniformly fulfilled throughout the country, and would afford the United States sufficient scope to advance its foreign policy under the Agreement by paralleling its domestic implementation of the Agreement to such policy, thus benefiting American servicemen abroad.

Appendix

AGREEMENT BETWEEN THE PARTIES TO THE NORTH ATLANTIC TREATY REGARDING THE STATUS OF THEIR FORCES

The Parties to the North Atlantic Treaty signed in Washington on 4th April, 1949,

Considering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party:

Bearing in mind that the decision to send them and the conditions under which they will be sent, in so far as such conditions are not laid down by the present Agreement, they will continue to be the subject of separate Agreements between the parties concerned;

Desiring, however, to define the status of such forces while in the territory of another Party;

Have agreed as follows:

ARTICLE I

1. In this Agreement the expression—

(a) "force" means the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a "force" for the purpose of the present Agreement;

(b) "civilian component" means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located;

(c) "dependent" means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support;

(d) "sending State" means the Contracting Party to which the force belongs;

(e) "receiving State" means the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit;

(f) "military authorities of the sending State" means those authorities of a sending State who are empowered by its law to enforce the military law of that State with respect to members of its forces or civilian components;

(g) "North Atlantic Council" means the council established by Article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorized to act on its behalf.

2. This Agreement shall apply to the authorities of political sub-divisions of the Contracting Parties, within their territories to which the Agreement applied or extends in accordance with Article XX, as it applies to the central authorities of those Contracting Parties, provided, however, that property owned by political sub-divisions shall not be considered to be property owned by a Contracting Party within the meaning of Article VIII.

ARTICLE IV

The receiving State shall either

(a) accept as valid, without a driving test or fee, the driving permit or license or military driving permit issued by the sending State or sub-division thereof to a member of a force or of a civilian component; or

(b) issue its own driving permit or license to any member of a force or civilian component who holds a driving permit or license or military driving permit issued by the sending State or a sub-division thereof, provided that no driving test shall be required.

. . .

ARTICLE 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 component 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 purpose 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 defense of that State.

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

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

(i) 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;

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) to a prompt and speedy trial;

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

(c) to be confronted with witnesses against him;

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

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

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

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

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

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

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

. . .

ARTICLE X

1. Where the legal incidence of any form of taxation in the receiving State depends upon residence or domicile, periods during which a member of a force or civilian component is in the territory of the State by reason solely of his being a member of such force or civilian component shall not be considered as periods of residence therein, or as creating a change of residence or domicile, for the purposes of such taxation. Members of a force or civilian component shall be exempt from taxation in the receiving State on the salary and emoluments paid to them as such members by the sending State or on any tangible movable property the presence of which in the receiving State is due solely to their temporary presence there.

2. Nothing in this Article shall prevent taxation of a member of a force or civilian component with respect to any profitable enterprise, other than his employment as such member, in which he may engage in the receiving State, and, except as regards his salary

and emoluments and the tangible movable property referred to in paragraph 1, nothing in this Article shall prevent taxation to which, even if regarded as having his residence or domicile outside the territory of the receiving State, such member is liable under the law of that State.

3. Nothing in this Article shall apply to "duty" as defined in paragraph 12 of Article XI.

4. For the purpose of this Article the term "member of a force" shall not include any person who is a national of the receiving State.