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How to Handle Offending Troops Overseas: The U.S. Military's Legal Strategy During the Cold War

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Abstract

The peacetime deployment of U.S. forces in foreign countries goes against traditional notions of sovereignty. How did such deployment become legitimate following World War II? This article examines the legal strategy that the U.S. military employed to make American troop presence more palatable to foreign publics and to critics at home: granting certain legal authority over offending troops to host countries, while seeking to shield troops from trials in host-country courts. The military also used local, informal ties with hosts to guarantee fair legal treatment for troops and worked to convince skeptics that U.S. troops faced no legal threat. The mitigating of legal tensions helped the military create conducive political conditions for its presence abroad and likely contributed to the durability of U.S. deployments. The Cold-War practice contrasts sharply with the contemporary desire of the United States to maintain complete jurisdiction over its troops.

Keywords

Europe, law, political science, international relations

Introduction

The American military presence worldwide defines the global security environment since World War II. By stationing hundreds of thousands of troops in Western Europe,

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East Asia, and other regions, the United States has sought to deter aggression, reinforce alliances, and facilitate smooth resource flows. More surprising perhaps is the willingness of host countries to allow U.S. troops to deploy in their midst, since foreign military presence entails a significant sacrifice of local sovereignty: The U.S. military may use its power to wield authority over the host or to take action inconsistent with the host's policies. Furthermore, large concentrations of foreign troops might also create negative by-products for adjacent communities, including noise and environmental pollution and degradation, damage to roads and fields during maneuvers, crime and prostitution (Calder, 2007; Kawana & Takahashi, 2021). These negative effects have occasionally fueled domestic mobilization and civil-society opposition against U.S. bases (Kawato, 2015; Yeo, 2011). Yet, host-country governments have allowed the United States to establish military bases on their territory and remain there for decades, with at least some level of domestic consent (Allen et al., 2020). How did the long-term, peacetime hosting of U.S. troops become a viable policy for host countries?

Scholars of international relations have rarely tackled this fundamental question directly (Schmidt, 2020), but possible answers come to mind. The most obvious one is security: U.S. forces protected hosts against external threats and allowed them to reduce their own defense efforts (Martinez Machain & Morgan, 2013). Furthermore, through economic assistance, and the prestige that comes from an association with the United States, U.S. deployments helped host governments consolidate their domestic support and foster political stability (Braithwaite & Kucik, 2018; Cooley, 2008). This study shines a light on an overlooked *legal* aspect of U.S. troop deployments that facilitated their acceptance by hosts: the sharing of criminal jurisdiction over troops between the U.S. military and local authorities. Indeed, while a military force would be expected to seek immunity from local jurisdiction, the U.S. military granted hosts certain authority to try offending troops since the early days of the Cold War. Such authority, the military believed, was necessary for the establishment of security cooperation. At the same time, the military sought to ensure that troops got fair treatment from foreign courts or, preferably, received a waiver from those courts' jurisdiction. To achieve such protection for troops, the military established local, informal ties with hosts' legal authorities and sought to resolve controversies cooperatively rather than through pressure. Furthermore, the U.S. military worked to mitigate tensions at home. The notion of U.S. troops' being prosecuted and punished by foreign courts faced criticism within the United States. To assuage critics' concerns, the military strived to demonstrate that the legal arrangements with hosts were working well to the benefit of American forces.

This article lays out the military's four-pronged legal strategy: granting certain legal authority over troops to host countries; shielding troops from local criminal responsibility or guaranteeing adequate legal treatment by hosts; using informal ties with hosts in pursuit of the latter goal; and reassuring skeptics at home. Existing literature typically focuses on one of those elements: the military's attempt to protect troops from local trial and punishment (Gao, 2009; Koo, 2011). The following analysis demonstrates that the

protection of troops from foreign justice was only one element in a broader legal strategy aimed at legitimizing U.S. deployments in the eyes of foreign publics as well as the American public. This legal strategy assumed particular importance during the 1950s and 1960s—the period examined here—when both the foreign and American publics had to get used to the idea of a permanent U.S. military presence abroad. Furthermore, this period saw significant involvement of U.S. troops in crimes against host-country citizens, ranging from assault to rape and homicide (Efrat 2021, 2022). This extensive criminality made the military's strategy for resolving legal tensions even more critical.

The following analysis is primarily based on the annual reporting of the military and the Department of Defense (DoD) to a Senate subcommittee that monitored the jurisdictional arrangements with foreign countries: Subcommittee to Review Operation of Article VII of the NATO Status of Forces Treaty, established in 1955 by the Senate Committee on Armed Services. In hearings before the subcommittee, the military explained how it performed the delicate dance: protecting U.S. troops from foreign justice—and convincing U.S. critics of that—while showing respect for hosts' legal authority. Mitigating the tensions arising from troop crime allowed the military to create conducive conditions for its presence abroad and obtain public support at home. While security interests have stood at the heart of U.S.-host relations, the military's legal strategy helped to grease the wheels of these relations. These insights contribute to an emerging scholarly interest in how foreign populations perceive the U.S. military (Allen et al., 2020), and they yield implications for contemporary practices concerning jurisdiction over troops abroad. In recent years, the United States has become reluctant to cede its jurisdiction over troops, and the concluding section contrasts the current U.S. approach with the earlier, more cooperative American attitude.

Foreign Criminal Jurisdiction over Military Personnel

During war and in times of peace, the military forces of one country may find themselves in the territory of another. While sovereigns are typically responsible for punishing offenses committed on their national territory, including offenses committed by foreigners, international law traditionally excluded foreign military forces from the criminal jurisdiction of the countries hosting them. This exclusion is often traced to the ruling of the U.S. Supreme Court in *The Schooner Exchange v. McFaddon* (11 U.S. (7 Cranch) 116 (1812)). It came to be known as "law of the flag" principle and was soon embraced by the U.S. government and other governments with forces outside their borders. During World War II, the United States and Britain put this principle into effect and obtained exclusive jurisdiction over their forces on friendly foreign soil (U.S. Senate, 1953a, pp. 42–43). To this day, the principle of immunity from local criminal jurisdiction governs the deployment of troops in peacekeeping missions (Odello & Burke, 2016).

The notion of immunity for foreign military forces derives from the principles of state sovereignty and equality of states, which mean that one state should not exercise its legal authority over another (Fleck, 2013, p. 616). Such an immunity also aims to ensure effective performance of military forces, free from the interference of the host's legal institutions (Lepper, 1994, p. 171) and to support unit morale. Furthermore, government willingness to deploy forces abroad—and public support for such deployments—might diminish if troops are at risk of being tried by a foreign legal system that seems unfair by one's standards (International Security Advisory Board, 2015).

Yet, following World War II, the United States decided to break with law-of-the-flag doctrine. The NATO Status of Forces Agreement (SOFA), signed in 1951 by the United States and its NATO allies, marked the revolutionary American recognition of the need to relinquish some jurisdictional authority over U.S. troops. At the same time, the NATO SOFA, and SOFAs signed with other countries, sought to minimize the exposure of U.S. troops to foreign jurisdiction and to prevent U.S. troops from facing potentially unfair criminal-justice systems. The NATO SOFA enshrines this logic in its key provision—Article VII—which divides criminal jurisdiction over U.S. personnel between the United States (referred to as the "sending state" in the agreement) and the host country (referred to as the "receiving state" in the agreement). Article VII grants the United States exclusive jurisdiction over offenses that violate U.S. law, but not the law of the host country. For example, if an American servicemember abroad deserts the military, they come under exclusive U.S. jurisdiction. Conversely, the host country holds exclusive jurisdiction over offenses that break its laws, but not those of the United States. Yet most offenses committed by troops typically fall under the "concurrent jurisdiction" of the United States and the host country. In such cases, either the United States or the host hold the primary right to exercise jurisdiction—that is, the right to prosecute first—depending on the character of the alleged offense. The United States has primary jurisdiction over offenses solely against its property or security or where the offender and victim are both Americans (e.g., an offense committed by a U.S. servicemember against another servicemember). The United States also holds primary jurisdiction over acts or omissions performed as part of an official duty. In all other cases, the host country gets the primary right to exercise jurisdiction and try offending troops. Practically speaking, these are offenses of civilian nature committed while off-duty, ranging from traffic offenses to robbery and rape (Egan, 2006, pp. 299–301).

Yet not all troops perpetrating such crimes actually face trial before host-country courts, since Article VII establishes the option of *waiving* the primary right to exercise jurisdiction in concurrent cases. The state holding the primary right in a specific case is required to give "sympathetic consideration" to a request from the other state for a waiver of its right if the other state considers such waiver as particularly important. Below, we examine why the military supported the notion of foreign jurisdiction over troops—and how it worked to limit that jurisdiction through waivers.

The U.S. Military's Legal Strategy

The Surprising Support for Foreign Jurisdiction over Troops

When the NATO SOFA was brought before the Senate for ratification in 1953, it met with heavy criticism. For the senatorial critics, let by Senator John Bricker (R-OH), the SOFA "reflects a callous disregard of the rights of American armed forces personnel" based on a misguided internationalist sentiment (U.S. Senate, 1953a, p. 3). They forcefully argued that troops should remain under exclusive U.S. jurisdiction and not be tried in foreign courts that, in their view, failed to offer due process (U.S. Senate, 1953a, p. 7; U.S. Senate, 1953b, pp. 19–20). According to the critics, in American courts troops enjoyed protections such as a prohibition on cruel and inhuman punishment, but they might not enjoy such guarantees before foreign courts, as "Americans insist on a higher standard of civil and political rights than their neighbors" (U.S. Senate, 1953a, p. 7). Furthermore, critics asserted that foreign courts would be biased and prejudiced against U.S. troops (U.S. Senate, 1953a, p. 82).

One might have expected the military to join the critics in support of maintaining exclusive American jurisdiction over troops. Yet, throughout the Senate debate over the NATO SOFA ratification—and in a later debate on a possible revision of the SOFA—representatives of the military and the Department of Defense expressed the *opposite* view: rather than criticizing the agreement, they strongly endorsed it as essential to the functioning of the alliance. According to Adm. Lynde McCormick, Supreme Allied Commander Atlantic, the SOFA was "urgently needed if the North Atlantic Treaty Organization is to operate other than haltingly; if harmonious relations are to be fostered among treaty nations" (U.S. Senate, 1953b, p. 35). Secretary of Defense Charles Wilson argued that the exclusive jurisdiction demanded by SOFA critics fitted colonial times, but the United States was now dealing with sovereign nations and equal partners in a cooperative effort to defend the free world (U.S. Senate, 1953b, p. 22). Senior officers similarly emphasized the need to respect allies' sovereignty by placing U.S. troops under their jurisdiction. According to General Alfred Gruenther, Supreme Allied Commander Europe,

> While all the other NATO countries are agreed that their soldiers will receive fair hearings in the courts of the others, the United States would be alone in maintaining that its people can only be tried by United States courts. We would thus seem to place ourselves in a unique category. I can assure you no alliance can efficiently and successfully function if one of the partners thus sets itself apart from the others. Our troops are not in wartime occupied countries. They are on the territory of sovereign friends … (U.S. House of Representatives, 1957, p. 14).

General Lauris Norstad, who succeded Gruenther as Supreme Allied Commander Europe, expressed a similar view, suggesting that the NATO SOFA:

> …was worked out in recognition of the fact that host nations are sovereign states. Regardless of their size, their sovereignty is just as important to these nations as our sovereignty is to the American people. It is something that is sacred to all people. … I think it is absolutely preposterous for us to think we can tell these people that their sovereignty is not important and the rights that we insist we have in our own country we are not willing for them to have and exercise in their own. (U.S. House of Representatives, 1957, pp. 15–16).

Such statements expressed the military's view of NATO allies not as countries under U.S. subjugation, but as sovereign partners whose legal authority over their territory should be respected. Furthermore, whereas critics suggested that foreign legal systems might treat troops unfairly and even cruelly, military representatives downplayed differences between American and foreign justice. For example, senators critical of the SOFA argued that in NATO countries there was no presumption of innocence (U.S. Senate, 1953a, pp. 19–20). General Norstad forcefully denied that:

> Now there are many misconceptions and much misinformation going around about how these foreign courts work. For example, some time ago I heard the objection that French law was unfair to our people because it contained no presumption of innocence. That is absolutely and incredibly wrong. The presumption of innocence does exist in French law, under the Napoleonic Code, just as in English law (U.S. House of Representatives, 1957, p. 16).

Statements such as this convey the military's ability to rise above the ethnocentric views of SOFA opponents. Whereas the senatorial critics saw foreign justice as inferior to U.S. justice, the military saw no necessary contradiction between foreign courts and due process. Indeed, while the NATO SOFA entailed some compromise, the military saw it as "the best arrangement we can make with our allies when you consider the important issues of sovereignty which are involved" (General Omar Bradley, chairman of the Joint Chiefs of Staff, in *Congressional Record* 99 (1953), p. 8770). Furthermore, the military warned lawmakers about the ominous consequences of a failure to ratify the NATO SOFA due to the jurisdictional concerns: A rejection of the agreement would cripple NATO, which builds on a spirit of mutual trust and confidence; and it would harm the U.S. military position and U.S. military personnel in Europe (U.S. Senate, 1953b, pp. 11, 36).

The willingness to subject U.S. troops to foreign criminal jurisdiction constituted the fundamental premise of the military's legal policy. By treating hosts as sovereign countries whose legal authority should be respected, rather than dismissed, the military sought to diffuse tensions that might arise from troop criminality, avoid antagonizing host countries' civilian populations, and create a more welcoming environment for U.S. presence.

Obtaining Maximum Legal Protection for Troops

While the military and DoD agreed to grant hosts jurisdiction over troops, they also sought to provide troops with the strongest legal protection possible, "at all costs and in every instance" (Brig. Gen. George Hickman, Assistant Judge Advocate General of the Army, in U.S. Senate, 1956, p. 32). This effectively translated into three interrelated goals: first and foremost, shield troops from trials before host-country courts; second, if troops did end up in local courts, ensure the fairness of trials; third, for those troops that were convicted and sentenced to confinement, verify the appropriateness of prison conditions.

The first goal—shielding troops from trial—seems to contradict the first tenet of the military's legal policy. If the military supported the exercise of foreign jurisdiction over troops, why work to effectively limit the exposure of troops to foreign justice? This apparent inconsistency reflects the military's balancing act: on the one hand, a need to show respect for hosts' sovereignty and legal authority to facilitate security cooperation; and, on the other hand, a belief that troops were better protected under U.S. jurisdiction and should remain, whenever possible, "within the military conclave" (Brig. Gen. Hickman in U.S. Senate, 1955, p. 19). The waiver option in the NATO SOFA's Article VII served as the primary channel of protecting troops from criminal accountability before local courts, and U.S. authorities employed it extensively. The policy of the DoD and military authorities in the field was to seek waivers *in every case of concurrent jurisdiction* (U.S. Senate, 1957, p. 30). Since host-country authorities agreed to waive their jurisdiction in a significant percentage of cases, waivers considerably reduced the chances of a servicemember's being tried by a foreign court (U.S. Senate, 1956, p. 15).

DoD, however, considered the NATO SOFA's arrangements only as an acceptable minimum and encouraged U.S. authorities, wherever possible, to ensure that more waivers were granted through bilateral agreements or understandings. For example, in a supplementary agreement with Germany, the Federal Republic agreed to an *automatic* waiver of its primary right to exercise jurisdiction under Article VII, but retained the right to terminate the waiver where a major interest of German administration of justice made it necessary to exercise German jurisdiction (U.S. Senate, 1964, p. 16).

When American troops did stand trial in foreign courts, the U.S. military sought to ensure they enjoyed the fair-trial guarantees enshrined in paragraph 9 of Article VII of the NATO SOFA (e.g., right to a speedy trial, to legal representation, and to an interpreter). The monitoring of trial fairness included country-law studies: in each host country, U.S. military authorities conducted a study of the local substantive and procedural criminal law, including a comparison to the procedural safeguards of a fair trial in U.S. courts (U.S. Senate, 1956, p. 6). In addition, the military sent an observer to attend every trial of a U.S. servicemember. The observers—required to be lawyers, except in minor cases—followed the progress of trials and submitted a report examining whether the proceedings complied with the procedural safeguards secured by a

pertinent SOFA and whether the accused received a fair trial (U.S. Senate, 1956, p. 7; U.S. Senate, 1958, p. 2).

The third element in the protection of troop rights concerned prison conditions. DoD required that troops confined in foreign penal institutions be visited at least every 30 days, at which time the conditions of confinement be observed, and that action be taken in case of mistreatment or substandard prison conditions (U.S. Senate, 1956, p. 8). DoD sought to assure that troops held in foreign prisons received all the rights and protections of personnel confined in U.S. military facilities (U.S. Senate, 1965, p. 26).

In summary, DoD and the U.S. military made significant efforts to protect the welfare and rights of U.S. personnel and to ensure that they were not harmed by the exercise of foreign jurisdiction (U.S. Senate, 1957, p. 32). Protecting troops from foreign justice was crucial for the individual troops themselves, but it was also essential for the successful operation and morale of U.S. forces, for assuring troops that the military had their back, and for maintaining U.S. public support for overseas deployments, as we discuss below.

Building Local, Informal Relations with Hosts

To provide maximum legal protection for troops, the military's legal strategy included a third tenet: a preference for informal contacts with host countries' legal authorities. The aversion to formal channels was manifested through the infrequent use of the official complaint mechanisms prescribed by the Senate resolution accompanying the 1953 ratification of the NATO SOFA (4 U.S.T. 1928–29). The resolution instructed that if U.S. military authorities believed that a servicemember might be denied a fair trial, and the host rejected the request for a waiver, then the military should request the State Department to press such a request through diplomatic channels, with notification given to Congress. The resolution also instructed that trials that failed to comply with Article VII safeguards shall be reported by U.S. military authorities to the State Department who will act to protect the rights of the accused. These formal procedures were implemented through a DoD Directive and regulations of the different services (reprinted in U.S. Senate, 1956, p. 7; U.S. Senate, 1967, p. 19), but seem to have been invoked rarely. In 1953–1954, the formal procedure called for by the Senate resolution was invoked only once (U.S. Senate, 1955, pp. 11, 21). In 1955, the Senate resolution was not invoked in a single case (U.S. Senate, 1956, pp. 5, 18).

Rather than rely on formal mechanisms of complaint, the U.S. military sought to build local ties with host-country authorities to elicit their cooperation in the legal protection of servicemembers (U.S. Senate, 1956, p. 32). The task of developing local-level arrangements and establishing effective liaison with host-country officials fell primarily to the judge advocates of the three services, who forged ties with ministry of justice officials, procurators and prosecutors (U.S. Senate, 1966, p. 18; U.S. Senate, 1957, p. 41). As Brig. Gen. Charles Decker, Assistant Judge Advocate General of the Army, described to the Senate subcommittee: "We have worked well with the lawyers and judicial officials of other countries; we have come to know and understand them"

(U.S. Senate, 1958, p. 60). For example, in 1956 the military reported that the principal Army judge advocate in France had been holding a weekly conference with representatives of the French Ministry of Justice at which all pending cases were discussed and means devised to solve potential problems; that same year, judge advocates, State Department personnel, and Italian officials met for a series of conferences in Rome to develop operating procedures under the SOFA (U.S. Senate, 1956, p. 32). According to Maj. Gen. George Hickman, Judge Advocate General of the Army, "A great deal has been accomplished through effective liaison and working arrangements at the local level. The results achieved to date through tact and intelligence in the handling of our relations with local civilian authorities have been outstanding" (U.S. Senate, 1957, p. 31–32). What exactly did such local-level ties achieve?

First and foremost, the cooperative working relations with host-country authorities contributed to the high percentage of waivers (U.S. Senate, 1957, p. 3). Waivers were the outcome of greatest interest to the military, and they were achieved through "excellent local liaison" (U.S. Senate, 1966, p. 4). Second, prison authorities in host countries exhibited a "conscientious attitude toward the welfare of confined United States personnel" and took action to correct problems identified by U.S. representatives in prison visits (U.S. Senate, 1957, pp. 25, 30; U.S. Senate, 1965, p. 28). Consider the following examples from Italy. When local procurators refused to recognize the determination of American military authorities that offenses occurred in the performance of official duty and were thus subject to U.S. jurisdiction, American military representatives pleaded with the Italian executive branch which exerted its influence on the judiciary accordingly, leading to the resolution of the cases to the military's satisfaction (U.S. Senate, 1958, pp. 51–52). The work of U.S. representatives also led Italian authorities to "become very sympathetic toward our problems" and to grant more waivers than before (U.S. Senate, 1959, p. 12). The contacts with local Italian officials further helped to guarantee a fair trial and light sentences to U.S. servicemembers. One case involved a drunk U.S. servicemember whose car struck and killed three girls on their way to school. Given the public uproar, Italian authorities postponed the trial to allow for a cooling-off period. When the trial was held, the punishment was merely a suspended sentence to confinement (U.S. Senate, 1959, p. 23) This case represents a broader Italian trend of imposing minimum sentences on U.S. troops (U.S. Senate, 1957, p. 36).

Even with the cooperative attitude of host-country authorities, the U.S. military did hold certain concerns about the legal treatment of troops. Some countries—notably Turkey—were reluctant to waive their jurisdiction over troops (U.S. Senate, 1959, p. 2); in several countries— such as Turkey, France, and Japan—the legal process often suffered delays (U.S. Senate, 1958, pp. 49–50; U.S. Senate, 1957, p. 17; U.S. Senate, 1963, p. 2); and in some cases, the foreign court procedure was seen as very different from the American one and hence unjust (U.S. Senate, 1956, pp. 25, 42–43). But even in these problematic cases, the U.S. military showed sensitivity toward the practices and constraints of hosts. Before the Senate subcommittee, military and DoD representatives recognized that hosts may be reluctant to waive a case because they "have their own

position to maintain, and their own public to satisfy … when they have refused a request for a waiver, they have felt that it was more important to them in the local scene to have the man tried in their courts" (Brig. Gen. Alan Todd, Assistant Judge Advocate General of the Army, in U.S. Senate, 1961, p. 10; U.S. Senate, 1966, p. 20). For example, in addressing a case where U.S. servicemembers tore down the Turkish flag, DoD's Assistant General Counsel Benjamin Forman remarked: "You can't expect a waiver in that kind of a case" that inflames public opinion (U.S. Senate, 1961, p. 29). Occasionally, military representatives excused delays in the legal process, suggesting these were inherent to the local procedure or perhaps indicative of the care that local courts used in bringing a case to a conclusion (U.S. Senate, 1958, pp. 49–50; U.S. Senate, 1960, p. 20; U.S. Senate, 1965, p. 17).

Of course, the local, informal ties with hosts' legal authorities were not the only reason for the latter's cooperativeness. The primary reason was that host countries enjoyed U.S.-provided security. Yet, hosts could not just bow before American authorities, since they also needed to satisfy their domestic public—a public that wished to see offending troops held accountable (Angst, 2001; Kirk, 2002). Given these conflicting pressures on hosts, an informal U.S. approach—focused on effective local liaison, coupled with sensitivity toward hosts' constraints—struck the right balance. It likely yielded greater cooperation from hosts and, ultimately, stronger protections for troops compared with what a heavy-handed approach would have produced.

Assuaging Critics

The idea of subjecting U.S. troops to foreign jurisdiction faced resistance in Congress even after the 1953 ratification of the NATO SOFA. Critics persisted in their campaign against this agreement and similar jurisdictional arrangements with foreign countries: "[W]hy should we force our men into foreign courts to be tried in a hostile atmosphere, before hostile courts, without the humane rules of procedure set forth in our Constitution and laws?" (Rep. Frank Bow (R-OH), U.S. House of Representatives, 1955, p. 10). In 1957, the House Committee on Foreign Affairs approved a resolution calling for a revision of the NATO SOFA and similar arrangements, or the withdrawal of the United States from them, so that foreign courts would have no jurisdiction over U.S. servicemembers (U.S. House of Representatives, 1957).

In this climate of skepticism from some lawmakers, the military had to ensure political support for the jurisdictional arrangements with host countries and prevent their subversion by Congress. For the military, a major revision of the NATO SOFA would have devastated the alliance "with the gravest consequences to the essential security of our country" (General Gruenther in U.S. House of Representatives, 1957, p. 13). The military thus strived to defend the NATO SOFA and similar arrangements in its presentations to the Senate subcommittee that monitored these arrangements. In the data they submitted, and in annual hearings before the subcommittee, military and DoD representatives repeated the same positive message, year after year: the jurisdictional arrangements were generally working well; any problems were limited in number and

significance. DoD's Assistant General Counsel Monroe Leigh acknowledged as much in the first hearing before the subcommittee: "We hope to convince the members of the subcommittee … that on the whole the [NATO SOFA] treaty has been working out very satisfactorily. … there is no reason whatsoever to be alarmed about the practical working of this treaty" (U.S. Senate, 1955, pp. 6–7). This assessment relied, first and foremost, on the rates of waivers. Before the subcommittee, the military annually presented—and took pride in—the high waiver rate granted by foreign legal authorities, indicating the significant efforts of the military to shield troops from foreign courts and the cooperativeness of hosts in giving up their jurisdiction (U.S. Senate, 1958, p. 2). Importantly for SOFA critics, a high waiver rate meant that in the majority of cases subject to foreign jurisdiction, troops did *not* stand trial before foreign courts. For instance, the military reported that in 1966 host countries waived their primary right to exercise jurisdiction in 83% of relevant cases (U.S. Senate, 1967, p. 36).

A second piece of evidence to reassure skeptics was the very low rate of troops sentenced by foreign courts to serve time in prison. For example, the 1966 data showed that of the 10,385 U.S. personnel tried by foreign courts, only 105 individuals—1%—received an unsuspended prison sentence.

Third, the military annually asked commanders in the field for their assessment of the impact of the local jurisdictional arrangements (U.S. Senate, 1962, p. 16). Before the subcommittee, the military and DoD annually delivered the same upbeat message: "our commanders report that the morale and discipline of our forces have not been adversely affected nor has there been a detrimental effect on the accomplishment of our military missions in the various countries" (DoD's Assistant General Counsel Benjamin Forman in U.S. Senate, 1960, p. 1).

Occasionally, the military did report that the jurisdictional arrangements exerted an adverse effect on force mission or morale in specific countries. For example, the delays in legal processes in Turkey and French Morocco hurt troop morale (U.S. Senate, 1955, p. 28; U.S. Senate, 1956, p. 32). Yet, despite individual difficulties, the military argued, the NATO SOFA and similar arrangements provided a workable, satisfactory, fair, and equitable jurisdictional framework, which reduced the frictions with hosts (U.S. Senate, 1957, p. 3; U.S. Senate, 1959, p. 24; U.S. Senate, 1961, p. 7).

The military and DoD also sought to dispel rumors and refute false information that circulated among the public and in the press: "As the public better understands the NATO Status of Forces Treaty and similar agreements, and becomes aware of our experience in operating under them, we believe certain popular misconceptions and misunderstandings may be corrected, and the administration of these agreements made easier" (DoD's Assistant General Counsel Leigh in U.S. Senate, 1957, p. 2). Recognizing the importance of U.S. public support for the agreements, DoD resolved to foster broad public knowledge through the dissemination of information on the operation of the jurisdictional arrangements (U.S. Senate, 1956, p. 2; U.S. Senate, 1957, p. 2). The hearings before the Senate subcommittee served as an important channel for educating the public and setting the record straight (U.S. Senate, 1957, p. 12; U.S. Senate, 1965, p. 26). The military and DoD denied allegations that U.S. troops had been

subjected to unfair trials, maintaining that "foreign courts are dealing fairly and indeed generously with our servicemen" with no indication of retaliation against troops, discrimination or prejudice (Secretary of Defense Wilson in U.S. House of Representatives, 1957, pp. 13–14; U.S. Senate, 1958, p. 32). Similarly, the military and DoD sought to dispel rumors that troops "are being imprisoned under conditions so primitive or medieval as to shock the sensibilities." Rather, the military argued, foreign prisons compared favorably with most U.S. prisons, and imprisoned troops received the same privileges they were entitled to in American prisons (General Gruenther in U.S. House of Representatives, 1957, p. 14). Furthermore, whereas critics charged that thousands of U.S. troops were languishing in foreign jails, the actual number was several dozen (U.S. Senate, 1955, p. 25).

To reassure critics, the military and DoD often praised hosts' cooperativeness: hosts "lean far over backward to be fair and cooperate" (General Norstad in U.S. House of Representatives, 1957, p. 15; U.S. Senate, 1966, p. 2). In particular, the high waiver rate was an "excellent showing of the cooperation our representatives in the field have been able to obtain from foreign authorities" (DoD's Assistant General Counsel Leigh in U.S. Senate, 1956, p. 5). Furthermore, DoD and military representatives confirmed that troops received lighter punishments from foreign courts than they would have received from U.S. military or civilian courts for similar offenses (U.S. House of Representatives, 1957, p. 15; U.S. Senate, 1964, p. 4; U.S. Senate, 1965, p. 22). Specifically, "the foreign countries are leaning farther over toward not putting our people in jail than would be the case if they were tried by courts-martial" (Maj. Gen. Hickman in U.S. Senate, 1958, p. 32). As a result, troops much preferred to be tried by host-country courts than by courts martial! (U.S. Senate, 1958, p. 45).

In summary, DoD and the military were well aware of the mistrust that many in the United States harbored toward foreign justice. They recognized the importance of diffusing the skeptics' suspicions in order to preserve the jurisdictional arrangements underlying U.S. deployments. Their success is demonstrated in the disbanding of the Senate subcommittee that monitored these arrangements in the early 1970s. The military apparently convinced lawmakers that the arrangements were working well, making further monitoring unnecessary.

Implications and Conclusions

Crimes committed by troops threatened to be a thorn in U.S.-host country relations. We explained how the U.S. military tackled this challenge, showing attentiveness to host-countries' sensitivities and constraints. By easing legal tensions and expressing some respect for hosts' sovereignty, the military mitigated potential frictions, avoided unnecessary controversy and antagonism, and fostered constructive engagement. These insights speak to a larger scholarly gap concerning the origins of U.S. overseas basing. As Schmidt (2020) explains, peacetime foreign military presence, which goes against traditional notions of sovereignty, presents a real puzzle—one that scholars have taken for granted. While many studies examine the dynamics and effects of U.S. bases, they

typically overlook the underlying fundamental questions: How did the permanent presence of foreign military forces become a viable policy option? Why did host countries consent to such presence? This article advances our understanding of how the military created a hospitable climate for the permanent stationing of U.S. troops abroad. Hosts' exercise of criminal jurisdiction over troops made it easier for foreign audiences to accept American troops in their midst; the limited exposure to foreign justice and the ensuring of fair treatment made it easier for the American public to accept overseas troop deployment. By dialing down legal tensions and showing sensitivity to the concerns of multiple audiences, the military lowered the threat that troop criminality posed to U.S. deployments. While activists, the media, and the public in host countries occasionally expressed outrage over offenses committed by troops (Kirk, 2002; Curtin, 2012), the military's strategy helped limit the damage that legal frictions might have caused to the relations with hosts and to the American public's crucial support for overseas deployments. As Allen et al. (2020, 328) argue, "U.S. security guarantees, and any accompanying policy concessions, typically require some level of domestic consent. … Where public opposition to a foreign military presence increases, the cost to host state political elites for maintaining these relationships also increases." Through its legal strategy, the military lowered the public opposition to U.S. presence.

This study also contributes to our broader understanding of the dynamic of basing arrangements. Basing arrangements—agreements between U.S. authorities and hosts that govern American military presence on the hosts' territory—have traditionally received little scholarly attention. As Cooley and Spruyt (2009, 102–103) explain, Realists considered these arrangements merely as the products of alliances, external threats, and the pressures of the international environment. Critics of U.S. foreign policy focused on the asymmetries of power between the United States and host countries, viewing the United States as an imperialist power that violated hosts' sovereignty and coerced them to accept its demands (Johnson, 2000). Yet, a recent body of literature on basing arrangements has altered our understanding of the political dynamic underlying U.S. overseas bases. This literature deemphasizes the role of coercion and power differentials in U.S.-host relations; it suggests that hosts did maintain their sovereignty and did *not* come under U.S. control (Cooley & Nexon, 2013, 1038). While the Soviet Union penetrated the domestic authority structures of its Eastern European clients, U.S. authorities were excluded from host-country institutions and decision-making processes. As Schmidt (2014, 827) argues, the practices of U.S. overseas basing "emerged through processes of deliberation between sending and hosts states, not imposition and coercion. … deliberations between the U.S. and its allies took place among actors who saw themselves as equals." Given the overwhelming American power, one would expect basing arrangements to be heavily biased in the U.S. favor, but during the Cold War the U.S. power advantage did not guarantee favorable basing rights terms. Instead, host countries obtained ever-increasing compensation packages from the United States and limited the U.S. military's use rights over the facilities (Cooley & Spruyt, 2009, 104).

By shining a light on an understudied aspect of U.S. basing, this study further enhances our understanding of the origins of U.S.-host relations as less coercive than one might expect. By ceding certain criminal-jurisdiction authority, the United States treated its NATO allies as partners whose sovereignty deserved some respect, rather than countries under U.S. domination. The arrangements and understandings with local authorities similarly indicated cooperation among sovereigns rather than American control. While U.S.-host relations involved power asymmetry and American pressure, the United States did not dictate its desired legal outcomes.

Going beyond the existing literature, this study examines an overlooked dimension of U.S. overseas basing: how it played out domestically with the American public. The subjection of troops to hosts' jurisdiction did not sit well with parts of the American public and many members of Congress. The military thus engaged in a two-level game: fostering the relations with hosts abroad while endeavoring at home to win public support for overseas deployments.

Finally, the American jurisdictional practice examined here—sharing jurisdiction over troops with hosts—contrasts sharply with contemporary U.S. practice. Over half of U.S. SOFA agreements use the NATO SOFA model of shared jurisdiction; yet, since the 1970s, the United States has increasingly sought to secure *exclusive* criminal jurisdiction over its troops abroad and shield them completely from trials before host-country courts. The clearest expression of this shift came with the 2003 adoption of the Global SOFA Template (GST) as a standard text to allow the United States to conclude SOFAs faster with broader protections for troops (Filippucci, 2018). The GST asks the host country to grant U.S. troops "the privileges, exemptions, and immunities equivalent to those accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations." This "equivalent A&T status" (for "administrative and technical") is just a step below full diplomatic immunity, and it completely exempts troops from local criminal jurisdiction. Such a broad protection is the "ideal outcome from the U.S. point of view" (International Security Advisory Board, 2015, 36). To reinforce that outcome, the GST also asks the host to declare that it "recognizes the particular importance of disciplinary control by United States Armed Forces authorities over United States personnel and, therefore, authorizes the Government of the United States to exercise criminal jurisdiction over United States military personnel while in [host country]."

As one would expect, host countries have often resisted a GST-based SOFA due to the breadth of its protections and absence of reciprocity (International Security Advisory Board, 2015, 37), but recent SOFAs often build on the GST or otherwise secure complete U.S. jurisdiction over troops.[1]

The current U.S. goal of maximizing jurisdiction over troops—ideally, obtaining exclusive jurisdiction—shows less respect for the hosts' sovereignty than the shared-jurisdiction formula examined in this article. At the height of the Cold War, the United States was mindful of hosts' sensitivities and of the norms of self-determination and colonial delegitimation. In today's environment, the United States feels greater confidence to deprive hosts of jurisdiction over crimes that troops commit on their territory.

But this study demonstrates that it is indeed possible for the United States to show greater cooperativeness and share jurisdiction with hosts, while still providing adequate legal protection for troops and reassuring skeptics in the United States. The shared-jurisdiction structure worked well during much of the Cold War, and future research may examine why the United States has chosen to replace it with an exclusive-jurisdiction model that host countries may find unequal and unfair.

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Note

1. See for example, the U.S.-Guatemala SOFA, effected by exchange of notes November 25 and December 1, 2020; U.S. Rwanda-SOFA, signed May 28, 2020.

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