

# **REVISION OF THE U.S.-JAPAN STATUS OF FORCES AGREEMENT (SOFA): Relinquishing U.S. Legal Authority in the Name of American Foreign Policy**

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## ABSTRACT

*Couched at the intersection of international law and foreign policy, and with an eye toward the Asia-Pacific, this study illuminates how Status of Forces Agreements (“SOFAs”) can forcefully shape bilateral security relations.*

*SOFAs are international agreements that determine which country possesses jurisdiction over crimes committed by American soldiers stationed abroad. While they are enacted to promote “smooth working relations” between sending and host states, in Japan, the SOFA has devolved into one of the most contentious issues confronting the U.S.-Japan security alliance (“Security Alliance”). The SOFA has been recast as a symbol of American imperialism in the eyes of the Japanese, engendering bitter resentment amongst the host nation toward its western ally. Whether or not this perception of SOFA inequity is in fact justified, there is no doubt that the effects of such perception are real. As intimated by the current debate over the relocation of the Marine Corps Air Station Futenma, the profound resentment catalyzed by the SOFA now challenges the long-term viability of maintaining a forward deployment of U.S. military forces in Japan, the very foundation of the Security Alliance.*

*Yet, in an age where the geopolitics of Northeast Asia are defined, in large part, by the precarious re-rise of China and the ever-present nuclear threat posed by North Korea, and as the U.S. finds itself “pivoting” to the Asia-Pacific, America’s security partnership with Japan has assumed unparalleled importance.*

*To address these issues, traditional tools of foreign policy are traded in for an often-overlooked legal instrument, the Japan SOFA. Revision to the SOFA is crucial to strengthening the Security Alliance. Ultimately*

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*advocating for the expansion of Japan's jurisdictional rights, this paper argues that the U.S. should relinquish legal authority in the name of American foreign policy.*

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## INTRODUCTION

This paper addresses the impact of the Japan Status of Forces Agreement on the U.S.-Japan security alliance (“Security Alliance”).

On January 12, 2011, Rufus Ramsey, a U.S. civilian component stationed at an Okinawa military base, was driving home from work when he fatally struck an oncoming car driven by Koki Yogi, a 19-year-old Japanese national.<sup>1</sup> The U.S. military was afforded criminal jurisdiction over Mr. Ramsey, leaving Japan with no judicial authority over this incident despite it occurring in Japan and taking the life of a Japanese citizen.<sup>2</sup> The U.S. elected not to prosecute Mr. Ramsey, opting instead to suspend his driver’s license for five years.<sup>3</sup> As a result, scores of Japanese citizens, led by the governor of Okinawa, staged protests throughout the prefecture,<sup>4</sup> mourning the loss of Mr. Yogi and decrying the U.S. for its perceived usurpation of jurisdictional power.

At the heart of this controversy stood the U.S.-Japan Status of Forces Agreement (“Japan SOFA” or “Agreement”). SOFAs set out the legal rights and obligations of U.S. soldiers, and civilian components thereof, stationed abroad.<sup>5</sup> Specifically, SOFAs determine which country possesses criminal jurisdiction over offenses committed by American soldiers in the host state.<sup>6</sup> Under the current terms of the Japan SOFA, America retains jurisdiction over soldiers’ acts that are done in the performance of an “official duty.”<sup>7</sup> Since driving home from work qualifies as an “official

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1. Chiyomi Sumida, *Okinawans Protest U.S.-Japan Status of Forces Agreement*, STARS AND STRIPES (June 29, 2011), <http://www.stripes.com/news/pacific/okinawa/okinawans-protest-u-s-japan-status-of-forces-agreement-1.147755>.

2. While the U.S. was initially granted jurisdiction over the case, the protests staged by the Japanese led the U.S. and Japan to reform the SOFA so to allow Japan to exercise jurisdiction over the matter. See The Asahi Shimbun, *US Civilian Worker in Okinawa Indicted for Fatality*, POLITICS (Nov. 25, 2011), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201111250057](http://ajw.asahi.com/article/behind_news/politics/AJ201111250057). Following these revisions, the Naha District Public Prosecutors Office indicted Ramsey. Notwithstanding these reforms, the Japan SOFA still permits the U.S. to exercise jurisdiction over offenses committed by U.S. soldiers performed as part of an official duty that do not involve consumption of alcohol. See Sgt. Rebekka Heite, *Jurisdiction of SOFA Criminal Cases in Japan Now Clarified*, DEFENSE VIDEO & IMAGERY DISTRIBUTION SYSTEM (Mar. 15, 2012), <http://www.dvidshub.net/news/85315/jurisdiction-sofa-criminal-cases-japan-now-clarified#.UYrbPoLZqsF>.

3. Sumida, *supra* note 1.

4. *Id.*

5. Lieutenant Commander Jonathan T. Flynn, JAGC, USN, *No Need to Maximize: Reforming Foreign Criminal Jurisdiction Practice Under the U.S.-Japan Status of Forces Agreement*, 212 MIL. L. REV. 1, 8 (2012).

6. *Id.* In SOFA parlance, the country whose troops are stationed abroad is referred to as the “sending state,” and the country, which, in turn, receives and hosts those foreign troops is called the “receiving state” or “host state.” The U.S. will herein be referred to as the sending state and Japan as the receiving or host state.

7. Treaty of Mutual Cooperation and Security Between the United States and Japan, art. XVII(3)(a)(ii), Jan. 19, 1960, 11 U.S.T. 1633 [hereinafter, U.S.-Japan SOFA].

duty,” the SOFA authorized the U.S. to exercise jurisdiction in the case of Mr. Yogi.<sup>8</sup>

These types of incidents—where a member of the U.S. military commits an offense against a Japanese national, and the SOFA grants the U.S. jurisdiction over the matter—have become anything but atypical. Between September 2006 and December 2010, a reported 62 civilian components of the U.S. military committed crimes against Japanese nationals, yet only roughly half received any sort of discipline.<sup>9</sup> The Japanese have become outraged at the perceived unjustness inherent to this jurisdictional scheme.

In total, the SOFA has become clouded in a perception of injustice. The Japanese view the SOFA as a vestige of American imperialism—as a shield that Washington waves in the face of Japan to allow U.S. troops to commit crimes against Japanese nationals, and get away with it. This perception of U.S. impunity, catalyzed by the SOFA and illuminated by the Yogi incident, has led to the impression “that the United States is not ‘playing fair’ and views itself as ‘superior’ to the host nation.”<sup>10</sup> Thus, it is not so much that these acts are occurring, but rather that the Japanese believe the SOFA prevents them from seeking justice when these acts do arise that has proven damning to the Security Alliance.

Recast as a symbol of inequity, the SOFA has galvanized Japanese nationals to demand the withdrawal of U.S. armed forces from Japan. In recent years, domestic anti-U.S. military base sentiment has forcefully manifested itself by way of mass protests and political elections, wherein the elimination of American soldiers from Japan has become the default rallying cry. Indeed, the current debate surrounding the relocation of the U.S. Marine Corps Air Station Futenma compellingly demonstrates the causative correlation between SOFA application over soldiers’ criminal malfeasance and public opposition toward U.S. military basing in Japan.

The U.S. government’s ability to forward deploy military forces is subject to host consent. It is self-evident, however, that a forward deployment of the American military in Japan is essential to the Security Alliance. While the Japanese people have voiced their wishes to oust U.S. troops from Okinawa, the geopolitics of Northeast Asia militate to the contrary. Given the precarious re-rise of China and the nuclear threat posed by North Korea, and cast within this age of global terrorism, forward deployment continues to be vital to U.S.-Japan security relations.<sup>11</sup> Accordingly, the Alliance now faces the very prospect that could mark its demise: the inability to maintain a long-term forward deployment of American troops in Japan.

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8. Sumida, *supra* note 1.

9. *U.S. Civilian Worker in Okinawa Indicted for Fatality*, THE ASAHI SHIMBUN (Nov. 25, 2011), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201111250057](http://ajw.asahi.com/article/behind_news/politics/AJ201111250057).

10. Ian Roberts McConnel, *A Re-Examination of the United States-Japan Status of Forces Agreement*, 29 B.C. INT’L & COMP. L. REV. 165, 171 (2006).

11. Flynn, *supra* note 5, at 4.

This study sets out to address these issues raised by the Japan SOFA. Specifically, it argues that the SOFA should be amended to afford Japan greater jurisdictional authority over alleged crimes committed by U.S. soldiers, and it proposes amendment to the official duty exception to accomplish this objective. The rationale for expanding Japan's jurisdiction is simple: doing so will serve U.S. foreign policy interests. Revision of the SOFA will erode the perception of injustice underlying the Agreement and thereby mitigate the domestic calls for troop withdrawal, two ends that are critical to the goal of strengthening the U.S.-Japan security alliance. While no amendment to the SOFA can prevent these incidents from occurring, equitable reformation of the Agreement can—by allowing Japanese courts in greater frequency to preside over these cases—eradicate the perception of injustice plaguing the SOFA.

To perform this analysis, this paper proceeds in five parts. Part I begins by providing an overview of SOFAs and the foreign criminal jurisdiction (“FCJ”) provisions contained therein. Special attention is given to FCJ clauses in order to illuminate the underlying significance that SOFAs bear on security relations, and thereby provide a conceptual framework through which to analyze the Japan SOFA.

Part II applies this framework to U.S.-Japan relations. It begins by offering a brief survey of the history of U.S. military criminal conduct in Japan, and then highlights how SOFA application over these acts has triggered acrimonious response from the host population. Part III explores how the resentment engendered by the SOFA has fueled the ongoing domestic push for base elimination in Japan. To validate this point, the current debate over the relocation of the Marine Corps Air Station Futenma (“MCAS Futenma”) is examined.

Upon identifying troop withdrawal as a pointed challenge confronting the Alliance, Part IV calls for revision to the SOFA; specifically, it proposes amending the official duty exception in order to expand Japan's jurisdictional authority. Here, it is argued that SOFA revision is crucial to promoting the long-term viability of a forward deployment in Japan.

Part V offers a rationale, on policy grounds, for why relinquishing legal authority in the name of foreign policy will advance U.S. strategic interests as they relate to the Security Alliance. Specifically, a cost-benefit analysis is performed, where the Japanese criminal justice system and the geopolitical landscape of East Asia comprise, respectively, the constitutive “cost” and “benefit” elements.

Thereafter, I briefly conclude.

## PART I. STATUS OF FORCES AGREEMENTS (SOFAS)

### A. *Before the SOFA—Law of the Flag Theory*

Prior to the emergence of SOFAs in U.S. foreign policy, the “Law of the Flag” principle, a customary international law doctrine,<sup>12</sup> governed

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12. Steven G. Hemmert, *Peace-keeping Mission SOFAs: U.S. Interests in*

U.S. troop presence in foreign states.<sup>13</sup> Per this doctrine, American soldiers stationed abroad were subject exclusively to the laws of the sending state (i.e., U.S. law) and thus were immune from prosecution by the receiving state.<sup>14</sup> The rationale driving America's adherence to the Law of the Flag theory centered on military efficiency: "subjecting visiting military personnel to the receiving state's laws," it was argued, "would interfere with the military commander's ability to enforce good order among the unit."<sup>15</sup> Thus, driven by this aim of preserving commanders' authority, the U.S. rejected the prospect of exposing its soldiers to foreign courts.

Yet by the midpoint of the twentieth century, the Law of the Flag doctrine began to wane as the prevailing theory.<sup>16</sup> The United States started to concede that considerations for host state sovereignty required, in certain situations, that American troops be subject to the receiving state's criminal jurisdiction.<sup>17</sup> This paradigm shift resulted in the introduction of Status of Forces Agreements.<sup>18</sup>

## B. *SOFAs in General*

SOFAs are bilateral (or multilateral)<sup>19</sup> agreements between the U.S. and foreign states that host American troops, which define and make explicit the legal rights and obligations of U.S. military personnel stationed abroad. Specifically, they "provide for rights and privileges of covered individuals [i.e., American soldiers] while in a foreign jurisdiction and address how the domestic laws of the foreign jurisdiction apply to U.S. personnel."<sup>20</sup> SOFAs, therefore, offer a legal framework that members of the U.S. Armed Forces are obligated to comply with while deployed. These frameworks are tailored to accord to the specific objectives and realities inherent to the host-sending states' diplomatic relations.<sup>21</sup> To date, America is a signatory to over 100 such agreements with nations across the world.<sup>22</sup>

SOFAs, however, are not security arrangements, in and of themselves. SOFAs do not "authorize specific exercises, activities, or missions...

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*Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 217 (1999).

13. See Major Steven J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994).

14. Hemmert, *supra* note 12, at 218.

15. Lieutenant Commander Timothy D. Stone, JAGC, USN, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 232 (2006).

16. Lepper, *supra* note 13, at 170.

17. *Id.*

18. To be precise, the enactment of the North Atlantic Treaty Organization (NATO) SOFA is regarded as marking the end of the Law of the Flag theory. *Id.* at 171-72.

19. The NATO SOFA is the only multilateral SOFA in which the U.S. is a party to. See Flynn, *supra* note 5, at 8. Moreover, it is also considered to be the "blueprint for all other U.S. status agreements worldwide." See Lepper, *supra* note 13, at 172.

20. R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? I (2012).

21. See *id.* at 1.

22. Flynn, *supra* note 15, at 8.

[and] do not address the rules of war, the Laws of Armed Conflict, or the Laws of the Sea.”<sup>23</sup> In the event that armed conflict breaks out between parties to a SOFA, the Agreement ceases to have any legal effect.<sup>24</sup> In other words, SOFAs are peacetime instruments that govern soldiers’ conduct only when hostilities cease to exist. This limitation in scope has caused the international security community to far too often overlook the *de facto* importance of SOFAs in bilateral security relations. For, while it is recognized that SOFAs do not constitute security regimes, *per se*, all rights, privileges, and special protections owing to troops stationed abroad are codified in these agreements.<sup>25</sup> Most central, however, and the reason why SOFAs bear tremendous importance for security relations, is that they contain foreign criminal jurisdiction provisions.

*i. Foreign Criminal Jurisdiction*

FCJ clauses, embedded in all status of forces agreements, determine which country possesses the legal authority to prosecute crimes committed by U.S. soldiers while deployed in the host state.<sup>26</sup> They serve as legal fora across which the U.S. and foreign states decide, *ex-ante*, whether the United States or the host state will have jurisdiction over American soldiers.<sup>27</sup> A fundamental premise underlying FCJ clauses, then, is that both the U.S. and the foreign governments consent to forego, in certain situations, any claim to jurisdictional authority over crimes committed by American soldiers.<sup>28</sup>

The state possessing jurisdiction, alone, determines what punishment, if any, an individual will receive. Where the U.S. maintains jurisdiction, the American soldier is immune from the host state’s laws and its prosecutorial discretion.<sup>29</sup> Accordingly, if U.S. soldiers perpetrate offenses against citizens of the receiving state and, per the FCJ, America is assigned jurisdiction, the host country is often left without any recourse to pursue in the event that the U.S. elects not to prosecute or issues a lenient sentence. To appreciate the significance, it must be remembered that, absent a governing SOFA, U.S. troops are subjected exclusively to the laws and prosecutorial discretion of the receiving state.<sup>30</sup> Yet, with the

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23. MASON, *supra* note 15, at 1.

24. *Id.*

25. SOFAs govern seemingly all aspects of soldiers’ lives while in the host state—everything from the day-to-day operations of military facilities, to the rules and regulations for customs and duties, taxation, and even employment issues, as they arise in the military context. See Stone, *supra* note 15, at 230.

26. *Id.* at 233.

27. *Id.*

28. *Id.* at 229, 233.

29. MASON, *supra* note 15, at 3 (“The right to exert jurisdiction can result in complete immunity from the laws of the receiving country while the individual is present in that country.”).

30. See Lepper, *supra* note 13, at 172 (“In summary, there are three possible categories of status for U.S. servicemembers facing foreign criminal charges: full criminal immunity under A&T status, no immunity when no agreement exists between

implementation of a SOFA, and thereby an FCJ clause, the host state will often have absolutely no judicial authority over *crimes committed by U.S. soldiers, against host state nationals, in the host state*. Naturally, the consequences of such a jurisdictional scheme on host-sending state relations can be severe.

In sum, SOFAs are enacted to help promote “smooth working relations” between the sending and host state.<sup>31</sup> And, in its attempt to do so while simultaneously administering foreign criminal jurisdictional regimes, SOFAs have forcefully shaped the outlook of larger security apparatuses. A narrative, then, which undergirds this paper is that SOFAs are, in fact, foreign policy tools that profoundly influence security relations.<sup>32</sup> They present tremendous risk to, and yet also an unexplored opportunity for, U.S. bilateral security ties. With this as the theoretical backdrop, we examine the Japan SOFA, a paragon example of the indelible effects that SOFAs have on U.S. security relations.

### C. *Japan SOFA*

The U.S.-Japan SOFA was signed into action as an executive agreement in 1960, on the same day that the Treaty of Mutual Cooperation and Security was enacted.<sup>33</sup> It is regarded as supporting the Defense Treaty,<sup>34</sup> and, as with any such agreement, the Japan SOFA sets forth a series of guidelines and laws that manage the day-to-day working relationship between the U.S. military and Japan.<sup>35</sup> The SOFA is governed by the Joint Committee, a standing body established by the Protocol to Amend Article XVII of the Administrative Agreement, which is tasked with the duty of SOFA interpretation.<sup>36</sup> When the Joint Committee agrees on an interpretation, its members issue a policy statement, which is otherwise referred to as an “Agreed View.”<sup>37</sup>

While the Japan SOFA was officially enacted in 1960, its FCJ provisions were, in large part, drafted eight years earlier as a component of the 1952 Administrative Agreement struck between the two states.<sup>38</sup> The

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the host nation and the United States, and partial immunity when a SOFA allocates jurisdiction between the United States and host nation.”). Indeed, today, the position of the United States is that absent a SOFA, it is presumed “the receiving state should have complete peacetime jurisdiction over all foreign troops inside its territory.” See Hemmert, *supra* note 13, at 220.

31. Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States-Japan Agreement*, 37 USF L. REV. 227, 242 (2002).

32. Stone, *supra* note 15, at 229, 234 (noting that Japan’s FCJ provision is “complex and contentious” because “it is the mechanism the U.S. uses to meet its policy objectives”).

33. *Id.*; see also Gher, *supra* note 31, at 237.

34. Gher, *supra* note 31, at 237.

35. Stone, *supra* note 15, at 229, 234.

36. *Id.* at 234-35.

37. *Id.*

38. See *id.*

Japan SOFA's FCJ provisions, codified in article XVII of the Agreement, establish the procedures for determining which country bears the authority to prosecute offenses committed by U.S. military personnel in Japan. In general, article XVII is regarded as a "shared criminal jurisdictional" regime—i.e., the U.S. and Japan are each afforded exclusive jurisdiction over certain pre-delineated crimes.<sup>39</sup> In all other instances, where neither state is granted exclusive jurisdiction, the SOFA provides for a concurrent jurisdictional scheme. Thus, the U.S.-Japan FCJ is a mixture of both exclusive and concurrent jurisdiction provisions.

*i. Exclusive Jurisdiction*

"Exclusive jurisdiction" means that only a single state possesses authority to exercise jurisdiction. In accordance with the Japan SOFA, America has exclusive jurisdiction over any act committed by U.S. soldiers that is a violation of U.S., but not Japanese, law. For example, if an American soldier is "absent without leave"—an act that is criminal only under the Uniform Code of Military Justice ("UCMJ")—the United States has exclusive criminal jurisdiction to prosecute the offense.<sup>40</sup> Similarly, Japan is entitled to exclusive authority over acts that are crimes only under its domestic laws.<sup>41</sup> While the exclusive jurisdiction clauses of the FCJ are clear-cut and easy to grasp, their application is limited because most acts that are criminal under U.S. law are also illegal under the laws of Japan (e.g., murder, battery, assault).<sup>42</sup>

For all other crimes, article XVII sets forth a concurrent jurisdictional scheme.<sup>43</sup> The FCJ's concurrent jurisdictional clauses have proven most contentious.<sup>44</sup>

*ii. Concurrent Jurisdiction*

Concurrent jurisdiction applies when the act committed is a crime under both U.S. and Japanese law.<sup>45</sup> In such cases, one state is allocated "primary concurrent jurisdiction," while the other is afforded "secondary concurrent criminal jurisdiction."<sup>46</sup> The state that possesses primary jurisdiction has the initial right to decide whether it will exercise jurisdiction over the act. If it opts not to, the state with secondary jurisdiction may step-in and exert jurisdiction.<sup>47</sup> Possessing primary jurisdiction, therefore, is key because it, in effect, gives that state "first dibs."

The concurrent jurisdictional regime grants Japan, as the receiving state, primary jurisdiction over most offenses.<sup>48</sup> This general grant of

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39. See MASON, *supra* note 20, at 3.

40. Flynn, *supra* note 5, at 11.

41. U.S.-Japan SOFA, *supra* note 7, art. XVII(2)(b).

42. Lepper, *supra* note 13, at 173.

43. Stone, *supra* note 15, at 246.

44. Flynn, *supra* note 5, at 12.

45. Hemmert, *supra* note 12, at 222-23.

46. *Id.*

47. Flynn, *supra* note 5, at 12.

48. See Adam B. Norman, *The Rape Controversy: Is a Revision of the Status of*

jurisdiction, however, is subject to three significant carve-outs pursuant to which the U.S. retains primary jurisdiction. The overwhelming majority of cases where the U.S. exercises jurisdiction under the SOFA is attributable to these three exceptions, which are as follows: a.) *inter se* exception; b.) waiver exception; and, c.) official duty exception.<sup>49</sup>

*a. Inter Se Exception*

The *inter se* exception, contained in article XVII 3(a)(i), grants the U.S. primary jurisdiction over offenses that are committed against either “[U.S.] property or security” or “solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent.”<sup>50</sup> Simply put, the *inter se* exception affords the U.S. primary jurisdiction over crimes that only involve the U.S., its property, or its personnel.<sup>51</sup> The rationale underlying this exception is that, when neither persons nor property of the receiving state have been harmed, the receiving state has no significant interest in the ensuing criminal action,<sup>52</sup> and thus it is only logical that the sending state maintain jurisdiction.

*b. Waiver Exception*

The waiver exception is implicated when the state with primary jurisdiction requests the other state waive its right to prosecute.<sup>53</sup> If the state being asked to waive its jurisdiction considers the requesting state’s prosecutorial interest more significant, grant of a waiver request will likely follow.<sup>54</sup> In cases where the requesting-state considers waiver to be of “particular importance,” the state with the primary right to jurisdiction must give “sympathetic consideration” to such request.<sup>55</sup> A state may request a waiver in any situation and for whatever reason. In essence, then, the waiver exception permits the parties to alter the SOFA’s pre-set jurisdictional scheme on an ad-hoc basis;<sup>56</sup> whenever one state requests a waiver and the other state obliges, the requesting state will be awarded jurisdiction, notwithstanding what the terms of the SOFA otherwise provide.

The decision to waive its primary jurisdiction is purely discretionary. In practice, however, receiving states usually accommodate a waiver request made by the U.S., while the U.S. rarely waives its primary jurisdiction.<sup>57</sup> Perhaps this is appropriate since all of these matters concern

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*Forces Agreement with Japan Necessary?*, 6 *IND. INT’L & COMP. L. REV.* 717, 732 (1996).

49. Lepper, *supra* note 13, at 174.

50. U.S.-Japan SOFA, *supra* note 7, art. XVII 3(a)(i); *see also* Flynn, *supra* note 5, at 246-47 (citing as an example of the *inter se* exception, “if two Sailors fight in a local bar, the U.S. has jurisdiction over any ensuing assault charges”).

51. Lepper, *supra* note 13, at 174.

52. Hemmert, *supra* note 12, at 223.

53. U.S.-Japan SOFA, *supra* note 7, art. XVII(3)(c).

54. Lepper, *supra* note 13, at 176.

55. U.S.-Japan SOFA, *supra* note 7, art. XVII(3)(c).

56. Lepper, *supra* note 13, at 174.

57. *Id.*

the prosecution of *American* military personnel. Further, this purported “pro-U.S.” application of the waiver policy is not endemic to the Japan SOFA. In fact, in the context of the NATO SOFA, host European states are even more inclined to comply with U.S. waiver requests than Japan has demonstrated itself to be.<sup>58</sup>

*c. Official Duty Exception*

Most significant of all the FCJ clauses is the official duty exception. Codified in article XVII(3)(a)(ii), the official duty exception vests the U.S. with primary jurisdiction over acts committed by American soldiers that do not involve the consumption of alcohol<sup>59</sup> and which are committed while in the performance of an “official duty.”<sup>60</sup> When a serviceman commits an offense arising out of his duties and functions as a soldier, the U.S. is entitled to jurisdiction over the matter, (in large part) regardless of the attendant circumstances surrounding the act and notwithstanding Japan’s state interest in the matter. The legal justification for the official duty exception is sound: the soldier, in committing the offense, “[was] merely carrying out the wishes of his sovereign government[,] and [b]ecause his government is generally immune from liability for its public official acts,...similar status [should be afforded] to its actors.”<sup>61</sup> As compelling as the *legal* rationale may be, the *policy* implications of the official duty exception have been profoundly adverse to U.S.-Japan relations. Out of all of the provisions contained in the SOFA, the official duty exception has proven to be the most controversial.<sup>62</sup>

Two issues in particular have made application of the official duty exception rather contentious. The first concerns deciding which country is authorized to determine whether an act was performed during an official duty. The Joint Committee, in unequivocal terms, has answered this question in favor of the U.S.—the U.S., alone, determines whether an act arose out of an official duty.<sup>63</sup> Thus, the U.S. is solely permitted to determine when it will have jurisdiction under the official duty exception.

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58. Flynn, *supra* note 5, at 20 (“In Europe, a number of host nations have formally agreed with the United States to presumptively waive all cases over which they have primary jurisdiction.”).

59. It appears that following a meeting held on November 23, 2011, Japan and the U.S., pursuant to the Determination of the Scope of Official Duty memorandum, agreed, *inter alia*, to grant Japan jurisdiction over offenses that involve the consumption of alcohol, regardless of whether such were performed per an official duty. See Sgt. Rebekka Heite, *Jurisdiction of SOFA Criminal Cases in Japan Now Clarified*, DEFENSE VIDEO & IMAGERY DISTRIBUTION SYSTEM (Mar. 16, 2012), <https://www.dvidshub.net/news/85315/jurisdiction-sofa-criminal-cases-japan-now-clarified#.VSNIE5TF-gJ>.

60. U.S.-Japan SOFA, *supra* note 7, art. XVII(3)(a)(ii).

61. See Lepper, *supra* note 13, at 175.

62. *Id.*

63. See Agreed Minutes to Article XVII of Treaty of Mutual Cooperation and Security, art. XVII(3)(a)(ii), U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652. Specifically, the U.S. is authorized to issue a “duty certificate” declaring that the act was, in fact, performed during an official duty, and such certification is presumed valid. See *id.* (“Where a member of the United States armed forces or the civilian component is charged with

It is important to recall that the Joint Committee issued this ruling, and thus that the U.S. and Japan collaboratively consented to this arrangement. Furthermore, if a dispute arises between the U.S. and Japan over whether an act qualifies as an official duty, the SOFA instructs that the issue be referred to arbitration for resolution.<sup>64</sup> Some surmise that this apparent vehicle for appeal is illusory because issuance by the U.S. of a duty certificate “effectively plac[es] a U.S. service member beyond the grasp of the Japanese criminal justice system.”<sup>65</sup> Practice supports this position, as receiving states almost always accept a U.S. official duty determination without resorting to the appeals process.<sup>66</sup> However, the U.S. is granted, pursuant to a mutually assented to contract (i.e., the Japan SOFA), the right to render official duty determinations, and it is precarious to fault a party to a contract for exercising the very rights it is afforded under that contract. Even more so, as it is the host state that accepts official duty certificates without objecting, it is difficult to criticize America for the result of the actions taken by its SOFA-counterpart.

The second issue that plagues the official duty exception concerns determining what conduct constitutes an “official duty.” The standard of “performance during an official duty” is invariably vague, and nowhere in the SOFA’s text is the term defined.<sup>67</sup> Supplemental efforts have sought to define the term as meaning “any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage.”<sup>68</sup> Unfortunately, this formulaic definition does little to clear up the uncertainty. Thus, while the Joint Committee clarified that it is the U.S. that makes this determination, neither the SOFA drafters nor its implementers have established the standard by which such determination is to be made.<sup>69</sup>

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an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of an official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.”).

64. U.S.-Japan SOFA, *supra* note 7, art. XVIII(8).

65. Ian Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 66 (2008).

66. Lepper, *supra* note 13, at 176 (“[I]n the vast majority of cases, the receiving state accepts the sending state’s official duty determination”).

67. Flynn, *supra* note 5, at 12-13.

68. Stone, *supra* note 15, at 249. Stone cites this definition from the Agreed View Thirty-Nine and the U.S. Forces Japan Criminal Jurisdiction Manual.

69. It would be inaccurate, though, to state that application of the official duty exception is entirely without guidance. Most instructively, simply because an act is performed by a soldier while on duty, it does not necessarily mean that such act qualifies as an “official duty.” See Youngjin Jung and Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT’L L. REV. 1103, 1133 (2003). Where a serviceman commits a crime while performing an unauthorized or proscribed military act, the said act would not qualify as an official duty. Accordingly, in the context of crimes arising from a soldier’s commission of a private automobile to and from a duty station is considered an official duty act (per the “Home-to-Work” rule), see Stone, *supra* note 15, at 249, any crime

The ambiguity resulting from the absence of any pre-set standard for enforcing this FCJ provision, combined with the allowance for the U.S. to self-adjudicate what qualifies as an official duty, has caused this jurisdictional exception to become the target of host state rebuke. Receiving states have assailed the clause as the “last vestige” of the Law of the Flag theory.<sup>70</sup> In Japan in particular, application of the exception has triggered acrimonious debate over the fairness of the SOFA in general. Assignment of jurisdiction on the basis of the official duty exception can “spark not only a legal dispute on the interpretation of an international agreement but also can very swiftly spread political and emotional turmoil on a national basis.”<sup>71</sup>

### iii. U.S. Policy of Maximization

Beyond the text of the FCJ itself, the U.S. policy of maximization is central to the application of the SOFA’s criminal jurisdictional regime, in total. For all SOFAs to which it is a signatory to, the U.S. adheres to a philosophy of maximizing its jurisdictional rights.<sup>72</sup> This policy, rooted in an over 60-year-old U.S. Department of Defense (“DoD”) Directive, compels U.S. commanders abroad to seek aggressive application of the FCJ.<sup>73</sup> Accordingly, the U.S. has zealously sought to apply the three jurisdictional carve-outs discussed above. In navigating the ambiguities implicit to the official duty exception, the U.S. defaults to maximization as its guiding principle. The maximization policy also drives the United States Forces Japan (“USFJ”) to vigorously pursue waivers in cases where the receiving state is granted primary jurisdiction.<sup>74</sup> Conversely, the maximization policy obliges the U.S. to reject the receiving states’ requests for waiver.<sup>75</sup>

It is difficult to discern the precise impact of this approach to SOFA application. There are no readily apparent methodologies that can accurately determine whether jurisdictional outcomes would be different had the maximization policy not been in place. Nevertheless, it seems fair to suggest that the DoD Directive has, to some appreciable extent, expanded America’s jurisdictional reach.<sup>76</sup> And regardless of how one views the

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that thereafter occurs will no longer fall under the official duty exceptions. *See* Sumida, *supra* note 1.

70. Lepper, *supra* note 13, at 175.

71. Will H. Carroll, *Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a Definition*, 12 A.F.L. REV. 284, 284 (1970).

72. Lepper, *supra* note 13, at 179.

73. Flynn, *supra* note 5, at 6.

74. *Id.* at 14.

75. Specifically, per the maximization policy, where the Designated Commanding Officer (“DCO”) concludes that a denial of a host state’s waiver request best serves the interests of the United States, such waiver request may be rejected. *See* Lepper, *supra* note 13, at 179.

76. Indeed, it has been maintained by some that it is the maximization policy—and not necessarily the FCJ, in and of itself—that has fueled Japanese resentment of the SOFA. *See* Flynn, *supra* note 5, at 6.

effects of the maximization policy on SOFA enforcement, it is undeniable that this policy, when combined with the jurisdictional scheme set forth in the FCJ, has cast an indelibly adverse effect on the Security Alliance. A mere cursory look to the recent history of U.S.-Japan ties leaves no doubt.

## PART II. APPLICATION OF THE SOFA IN JAPAN

In Japan, application of the SOFA's criminal jurisdictional provisions has been met with unwavering opposition. As one author noted, "While the overall relationship of the United States-Japan alliance has been characterized as 'positive and promising' alleged U.S. service member misconduct in Japan underscores the main source of contention between the two nations: foreign criminal jurisdiction."<sup>77</sup> The origin of Japan's abhorrence of the SOFA is no mystery. Recent history of the U.S.-Japan security alliance is littered with regrettable offenses committed by USFJ members.

As discussed above, in 2011, a civilian component of the Army and Air Force Exchange Service ("AAFES") fatally struck a 19-year-old Japanese national, Koki Yogi, with his vehicle.<sup>78</sup> Because Mr. Ramsey was driving home from work when this incident occurred, per the official duty exception, the U.S. retained criminal jurisdiction.<sup>79</sup> Following an administrative hearing, the U.S. opted only to issue a license suspension as punishment.<sup>80</sup> Incensed by this exercise of U.S. jurisdiction, public demonstrations broke out and waves of Okinawans, led by their governor, protested that the SOFA had precluded the Japanese from seeking justice.<sup>81</sup> While Japanese authorities eventually indicted Mr. Ramsey pursuant to a subsequent agreement struck between Japan and the U.S.,<sup>82</sup> the Koki Yogi incident aptly illustrates the correlation between USFJ malfeasance and Japanese disillusionment with the SOFA.

In 2005, another official duty crime occurred, sparking similar criticism from the Host population. There, a U.S. sailor struck three elementary school-aged boys with her automobile in Hachioji City, Tokyo, only to then drive away from the scene of the crime.<sup>83</sup> The offender was arrested by Japanese authorities but was later released pursuant to a certificate stating that she was "on duty" when the act occurred.<sup>84</sup> The incident sparked demands for SOFA revision and pleas for Japan to rid itself of

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77. Wexler, *supra* note 65, at 66.

78. Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, STARS AND STRIPES (Nov. 25, 2011), <http://www.stripes.com/mobile/news/aafes-employee-indicted-in-fatal-collision-1.161616>.

79. *See id.*

80. *See id.*

81. Sumida, *supra* note 1.

82. Tritten & Sumida, *supra* note 78.

83. AKAHATA, *U.S. Sailor in Hit-and-Run Freed Unjustifiably*, JAPAN PRESS WEEKLY (Jan. 4, 2006), <http://www.japan-press.co.jp/2006/2462/usf2.html>.

84. *Id.*

U.S. military bases.<sup>85</sup> Neither of these requests was granted. Instead, just one year later, in 2006, an inebriated U.S. serviceman robbed and fatally battered a middle-aged female Japanese national.<sup>86</sup> And, two years after that, a U.S. Navy deserter stabbed a taxi driver with a large kitchen knife, which again prompted calls for SOFA reform.<sup>87</sup>

The most notorious of all offenses have occurred in the prefecture of Okinawa. There have been a series of deeply regrettable acts committed by U.S. soldiers against local Okinawans, including the 1995 kidnapping and gang rape of a 12-year-old Japanese girl by three U.S. servicemen.<sup>88</sup> Following this heinous act, the Japanese staged mass demonstrations, protesting the basing of the U.S. military in Japan.<sup>89</sup> Japan's then-prime minister, Ryutaro Hashimoto, furnished former President Bill Clinton with a request to return the Futenma air base back to Japanese control.<sup>90</sup> These pointed reactions by the Japanese are arguably a byproduct of the past, as well; for, "the history of the alliance is littered with such incidents going all the way back to the '50s: the bored sentry taking a potshot at a passing train with lethal results; the serviceman who chased civilians around in a jeep while shooting at them with a flare gun; the guard who simply gunned down foraging farmers in cold blood; and the pilot who misjudged his effort to buzz a cyclist at the end of the runway and sliced her in half instead, to name but a few."<sup>91</sup>

As deeply troubling as these incidents are, it would be a *gross* misstatement to contend that such acts accurately capture the regard that the U.S. harbors toward its Japanese ally. While these offenses are not aberrations, nor are they the norm. Ex-pats of all types, whether U.S. soldiers or otherwise, and in all contexts, whether in Japan or elsewhere, invariably commit crimes against the host population. Thus, this paper recounts the foregoing transgressions not in an attempt to tacitly represent that such conduct characterizes the state of the Security Alliance. Rather, this aspect of U.S.-Japan ties is recited to convey the deep-rooted resentment that it has engendered amongst the Japanese toward the USFJ and the SOFA. "[S]uch events not only erode the United States-Japan alliance, but help to underscore the primary source of conflict between the two nations: criminal jurisdiction."<sup>92</sup>

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85. In response to SOFA application over this incident, the *Japan Press Weekly* proclaimed, "Let us abrogate the Japan-U.S. Security Treaty and get Japan free of U.S. bases." *Id.*

86. Flynn, *supra* note 5, at 9.

87. *Id.* at 41-42.

88. Beina Xu, *The U.S.-Japan Security Alliance*, COUNCIL ON FOREIGN RELATIONS (Dec. 3, 2013), <http://www.cfr.org/japan/us-japan-security-alliance/p31437>.

89. *Id.*

90. *Id.*

91. Colin P.A. Jones, *SOFA: An Unequal Treaty that Trumps the Constitution?*, THE JAPAN TIMES (Aug. 3, 2013), <http://www.japantimes.co.jp/community/2013/08/05/issues/sofa-an-unequal-treaty-that-trumps-the-constitution/#.U3GTVCiVs5s>.

92. Gher, *supra* note 31, at 229.

It is worth noting that, when examining public perception of the SOFA in Japan, reference to “the Japanese” warrants distinction. As many of the crimes perpetrated by the USFJ against the host population have occurred in or around Okinawa, much of the public criticism of the SOFA arguably has arisen from that prefecture, as opposed to mainland Japan. It is further recognized that Okinawa is, of course, geographically and culturally distinct from the Japanese mainland. However, with respect to any analysis concerning the impact of the SOFA on U.S.-Japan security relations, such distinction is of little consequence.

For starters, while the thrust of public censure of the SOFA may originate from Okinawa, there is little, if any, support for the contention that such sentiments are contrary to those held by the mainland Japanese. It is not that the remaining Japan prefectures affirmatively support the SOFA, rather they may perhaps just be more tempered in their views. Moreover, it must be remembered that U.S. military basing in Japan is Okinawa-specific—approximately 65 percent of all USFJ personnel are based in Okinawa because it offers unparalleled geographic strategic military advantage.<sup>93</sup> The distinction, then, between Okinawa and mainland Japan with respect to the origin of SOFA disillusionment is a meaningless observation because the main source of the criticism is coming from the one part of the country that the Alliance cannot do without. Finally, even if, *assuming arguendo*, public opposition to the SOFA were restricted to the Okinawa Prefecture, such opposition, in and of itself, has proven sufficient to profoundly impact USFJ-Japan relations.<sup>94</sup>

### PART III. THE SOFA: A THREAT TO THE SECURITY ALLIANCE

The question that naturally arises is how exactly domestic rejection of the SOFA (wherever in Japan it may be originating from) is damaging the U.S.-Japan security alliance—that is, why is the criminal conduct of a maligned few threatening the two countries’ security relations? The answer is simple: troop withdrawal. Japanese disillusionment over these crimes and the SOFA’s application thereof is threatening the long-term viability of maintaining a forward deployment of U.S. soldiers in Japan.

Public protests and political elections are perhaps the two most direct manifestations of a peoples’ will; and, in the context of the U.S.-Japan security alliance, each has operated to conclusively show that U.S. military crimes, in the collective, have caused the Japanese to demand the withdrawal of U.S. forces from Japan. Following crimes perpetrated by U.S. soldiers, Japanese citizens have staged mass demonstrations, renouncing the SOFA and explicitly calling for the elimination of U.S.

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93. Xu, *supra* note 88.

94. Accordingly, because this paper is solely concerned with assessing the impact of the SOFA on U.S.-Japan security ties, it employs a more general definition of “Japanese,” as opposed to something more reflective of the complex and nuanced reality of the term.

troop basing in Japan.<sup>95</sup> Even more compellingly, this causative correlation between soldiers' criminal malfeasance and Okinawans' demand for troop withdrawal is demonstrated by the current debate over the relocation of the Marine Corps Air Station Futenma ("MCAS Futenma").

#### A. *MCAS Futenma*

MCAS Futenma concerns the relocation of the U.S. Marine Corps Air Station Futenma from Ginowan City, Okinawa to Henoko village located in Nago City, Okinawa.<sup>96</sup> The debate over base relocation arose amidst public outrage that ensued following the 1995 Okinawa rape incident.<sup>97</sup> Following this tragedy, Okinawans demanded the complete elimination of the Airbase.<sup>98</sup> Tokyo and Washington, however, stipulated that the air base could only be relocated, not eliminated. Camp Schwab in Henoko village was eventually identified as the target relocation area.<sup>99</sup>

The Futenma Relocation Facility ("FRF") debate has dragged on for nearly 20 years,<sup>100</sup> largely because citizen protests and local politics have derailed base transfer efforts, particularly in the past two years.<sup>101</sup> In December of 2013, then-Okinawa Governor Hirokazu Nakaima,<sup>102</sup> with backing of the presiding Liberal Democratic Party in Tokyo,<sup>103</sup> approved landfill permits requisite for constructing the new air base.<sup>104</sup> One month later, in January of 2014, the people of Nago City re-elected a mayor,

95. See generally Michael J. Green & Mike M. Mochizuki, *The U.S.-Japan Security Alliance in the 21st Century*, COUNCIL ON FOREIGN RELATIONS (Feb. 1998), <http://www.cfr.org/japan/us-japan-security-alliance-21st-century-study-group-report/p8724> ("Events such as the rape incident in Okinawa and massive public demonstrations in Japan against the U.S. troop presence call into question the long-term stability of the alliance between the two nations.").

96. Sheila A. Smith, *The Constancy of Contest with Okinawa*, COUNCIL ON FOREIGN RELATIONS (Jan. 23, 2014), <http://blogs.cfr.org/asia/2014/01/23/the-constancy-of-contest-with-okinawa/>.

97. Martin Fackler, *In a City on Okinawa, Mayor's Re-election Deals a Blow to Marine Base Relocation Plan*, NEW YORK TIMES (Jan. 19, 2014), <http://www.nytimes.com/2014/01/20/world/asia/city-on-okinawa-deals-blow-to-plan-to-move-marine-base.html>.

98. Eric Talmadge, *Futenma Shift Puts U.S. in Limbo Between Okinawa, Tokyo*, THE JAPAN TIMES (Feb. 25, 2014) <http://www.japantimes.co.jp/news/2014/02/25/national/futenma-shift-puts-u-s-in-limbo-between-okinawa-tokyo/#.U0IH-iiVs5s>.

99. EMMA CHANLETT-AVERY & IAN E. RINEHART, CONG. RESEARCH SERV., R42645, *THE U.S. MILITARY PRESENCE IN OKINAWA AND THE FUTENMA BASE CONTROVERSY* 10 (2012).

100. Talmadge, *supra* note 98.

101. Smith, *supra* note 96.

102. It is worth noting that former Governor Nakaima won re-election in 2010 on an *anti-base* platform only to years later reverse course on the base relocation issue. See Martin Fackler, *Okinawa Voters Replace Governor with Opponent of U.S. Base*, N.Y. TIMES (Nov. 16, 2014), [http://www.nytimes.com/2014/11/17/world/okinawa-elects-governor-who-opposes-us-base.html?\\_r=0](http://www.nytimes.com/2014/11/17/world/okinawa-elects-governor-who-opposes-us-base.html?_r=0).

103. Mina Pollmann, *Okinawan Politics Back in International Spotlight*, THE DIPLOMAT (Nov. 5, 2014), <http://thediplomat.com/2014/11/okinawan-politics-back-in-international-spotlight/>.

104. Fackler, *supra* note 97.

Susumu Iamine, who campaigned largely on an anti-base platform and who promised to use all his political capital to block the Futenma relocation.<sup>105</sup> Since being re-elected, Mayor Iamine has indicated nothing to inspire hope that his stance on MCAS Futenma may change. Moreover, in November of 2014, Takeshi Onaga, who, as with Mayor Iamine, staunchly opposes base relocation, beat out incumbent Nakaima in a landslide victory to become the next governor of Okinawa.<sup>106</sup> Immediately following his election, Governor Onaga averred, “The new military base will not be built,” vowing to rescind Mr. Nakaima’s prior approval of landfill permits.<sup>107</sup>

Underlying and driving this political impasse is the unyielding domestic public opposition toward U.S. military basing. It requires no grand leap in logic to contend that, following Mr. Nakaima’s approval of land permits, the elections of Mayor Iamine and Governor Onaga, politicians who have long championed anti-base platforms, represent a direct expression of local nationals’ rejection of the U.S. armed forces in Japan.<sup>108</sup> To be sure, within hours of former Governor Nakaima approving MCAS Futenma relocation, reportedly some 2,000 Japanese came upon the Okinawa prefectural government offices to denounce the governor’s decision.<sup>109</sup> And soon thereafter, the prefectural assembly passed a resolution calling for the then-governor’s resignation, which, though without legal force, was viewed as an “unprecedented censure of a sitting governor in Okinawa.”<sup>110</sup>

These acts of anti-base defiance were merely a continuation of recent history. One year earlier, in January of 2013, an estimated 41 mayors

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105. *Id.* Remarkably, Tokyo purportedly sought to financially persuade Nago City’s electorate to side with Mr. Iamine’s pro-Futenma counterpart, Bunshin Sue-matsu, by way of offering an aid package worth approximately \$500 million, yet all to no avail.

106. Fackler, *supra* note 102.

107. *Id.* (“Political analysts said the result showed that resentment of the presence [of the U.S. military in Okinawa], long seen by many islanders as an unfairly heavy burden, remained as strong as ever.”).

108. Smith, *supra* note 96 (“[E]veryone understands that Inamine’s re-election highlights the continued resistance to government plans, and will complicate construction plans in coming months.”); see also Toko Sekiguchi, *Japanese Mayor Opposing U.S. Base Relocation Wins Again*, THE WALL ST. J. (Jan. 19, 2014), <http://www.wsj.com/articles/SB10001424052702304027204579330484232722104/> (characterizing the mayor race as “a referendum on whether to bring the base to Nago,” and observing that “[o]pinion polls had shown an overwhelming majority of residents opposing the relocation”). See generally Fackler, *supra* note 97 (noting that the “relocation has been fiercely opposed by Okinawans, who want the base — the Marine Corps’ Air Station Futenma — off their island altogether”).

109. Trefor Moss, *Okinawa & Futenma: Deal or No Deal?*, THE DIPLOMAT (Jan. 16, 2014), <http://thediplomat.com/2014/01/okinawa-futenma-deal-or-no-deal/>.

110. Smith, *supra* note 96. Indeed, the head of the Nago City Assembly, Yuichi Higa, was quoted as saying, “What the governor has done is unforgivable . . . Residents who are opposed will surely resort to the use of force . . . to stop this from happening.” *Japan Okinawa Leader Approves U.S. Airbase Relocation*, BBC NEWS (Dec. 27, 2013), <http://www.bbc.com/news/world-asia-25524007>.

from Okinawa trekked to the mainland to protest military basing before Tokyo, staging a demonstration of some 4,000 locals in Hibiya Park.<sup>111</sup> Quantitative indicia also illustrate the Japanese public's hostility toward troop presence. In a 2007 joint survey conducted by the Gallup and *Yomiuri Shimbun*, Japanese citizens were asked whether U.S. military forces stationed in Japan should be strengthened, maintained, reduced, or completely eliminated. Choosing from these four options, a plurality of the respondents polled (42.2 percent, to be exact) expressed a desire for reduction of the U.S. military in Japan.<sup>112</sup> Moreover, by a ratio of nearly ten to one (9.8 percent to 1.3 percent), the Japanese favored complete withdrawal over an increase in troop presence.<sup>113</sup> Consider further that, prior to Mr. Nakaima's approval of the FRF, in a December 2013 joint poll conducted by the *Asahi Shimbun*, *Okinawa Times*, and *Ryukyu Asahi Broadcasting Corp.*, only 22 percent of Okinawans expressed approval for base relocation; 64 percent of the respondents wanted the governor to reject the relocation plans.<sup>114</sup>

At the time of this writing, the MCAS Futenma relocation project still sits in political limbo. While Washington and Tokyo desire the air base to be transferred, the people of Nago City, as represented by Mayor Iamine and Governor Onaga, remain resolute in opposing such plans.<sup>115</sup> The current state of affairs presents the capital cities with the decision to either prolong the relocation debate for another four years when Nago City's next mayoral election will take place, or attempt to proceed with base construction plans in the face of Mayor Inamine and his electorate's objections, a move which, as Japan watchers forewarn, could ignite yet even more mass protests.<sup>116</sup> However the MCAS Futenma debate unfolds, it is clear that the stationing of the U.S. military in Okinawa stands as one of the most contentious issues confronting the Alliance.<sup>117</sup>

## B. *Troop Withdrawal*

The controversy surrounding MCAS Futenma reflects the Host state's long accrued resentment toward the U.S. military, and, more significantly, foreshadows a future where Washington is no longer able to base

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111. Smith, *supra* note 96.

112. James Simpson, *Why Do Half of U.S. Voters Want Their Troops out of Japan?*, JAPAN SECURITY WATCH NEW PAC. INST. (Feb. 6, 2011), <http://jsw.newpacificinstitute.org/?p=4389>.

113. Simpson, *supra* note 112.

114. Norio Yatsu, *Asahi Poll: 64% of Okinawa Voters Want Rejection of Reclamation Plan for U.S. Air Base*, THE ASAHI SHIMBUN (Dec. 17, 2013), [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201312170044](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201312170044).

115. In February of 2014, U.S. Ambassador to Japan, Caroline Kennedy, met with the Nago City mayor to discuss base relocation, only for Mayor Inamine to once again restate his opposition to the plans. See *Nago Mayor Tells Kennedy of His Opposition to Futenma Base Relocation*, THE ASAHI SHIMBUN (Feb. 13, 2014), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201402130038](http://ajw.asahi.com/article/behind_news/politics/AJ201402130038).

116. Fackler, *supra* note 97.

117. Xu, *supra* note 88.

its soldiers in Japan. This position that domestic anti-base resentment, as illustrated by the MCAS Futenma debate, undermines the long-term viability of maintaining a forward military presence in Japan is substantiated by both logic and history. Regarding the former, it is axiomatic to state that the continued basing of the U.S. military in Japan requires host consent. While such consent comes from the Japanese government, the Japanese government is subject to the will of its constituency. If domestic pressures continue to mount, the leaders in Tokyo may be obliged to concede to the outspoken wishes of its electorate.<sup>118</sup> While the Japanese national government desires the continued presence of the U.S. military within its borders, its people, whom the government is subject to, may be the final arbiters over the matter.<sup>119</sup> As one scholar surmised, “[I]t would be strategic folly for the United States to underestimate Japan’s building domestic pressures against its Japan-based military assets. Maintaining a peacetime military presence abroad requires consent from the host nation, and domestic pressures have caused the United States to lose such consent in the past.”<sup>120</sup>

To that end, history, indeed, points to a potential ominous future for the Security Alliance. The prospect of the U.S. losing its forward deployment capabilities is not without precedent. Washington “experienced a total loss of its French bases in the 1960s, partial loss of its Spanish bases in the 1970s, and total loss of its Philippine bases in the 1990s.”<sup>121</sup> This most recent case, involving the Philippines’ Subic Bay naval base, arose, in large part, out of the mounting public opposition over U.S. military basing. In a debate before the Senate of the Philippines regarding Subic Bay, American troop presence was “assailed as a vestige of colonialism and an affront to Philippine sovereignty.”<sup>122</sup> It is critical to recognize that the Subic Bay base shutdown occurred notwithstanding the fact that the Philippines’-then president, Corazon C. Aquino, had fought to keep the military installation in place.<sup>123</sup> Over two decades later, in May of 2014, the U.S. and the Philippines entered into a new defense agreement.<sup>124</sup> The

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118. Flynn, *supra* note 5, at 7.

119. *See id.* (“Japan needs U.S. military bases to further their foreign policy objectives and national security, but, if popular sentiment is strongly against U.S. bases, Japanese leaders may have no choice but to acquiesce to the desires of its populace.”); Min Ji Ku, *Criminal Jurisdiction over the U.S. Service Members Who Sexually Assaulted an Okinawan Woman in Japan*, CRIM. L. PRAC. (Nov. 16, 2012), <http://wclcriminal-lawbrief.blogspot.com/2012/11/criminal-jurisdiction-over-us-service.html> (“Although both the U.S. and Japan have shared security concerns, the Japanese government will not completely ignore the domestic unrest created by anti-American sentiments.”).

120. Flynn, *supra* note 5, at 4-5.

121. *Id.*

122. David E. Sanger, *Philippines Orders U.S. to Leave Strategic Navy Base at Subic Bay*, N.Y. TIMES (Dec. 28, 1991), <http://www.nytimes.com/1991/12/28/world/philippines-orders-us-to-leave-strategic-navy-base-at-subic-bay.html>.

123. *Id.*

124. Juliet Eilperin, *U.S., Philippines to Sign 10-Year Defense Agreement amid Rising Tensions*, WASH. POST (Apr. 27, 2014), <http://www.washingtonpost.com/world/>

lesson learned from Subic Bay, however, is clear: elimination of key forward deployment bases in the Pacific may occur even where the host government desires to the contrary. Accordingly, although it is understood that the Prime Minister Shinzo Abe-led administration is firmly committed to maintaining U.S. forces in Japan, such is not dispositive; for, governmental wishes are subject to the will of the electorate it serves. Taking from history, it becomes clear that the U.S. “places its critical relationship with Japan in jeopardy by not adequately addressing the Okinawan concerns over the fundamental inequality of the U.S.-Japan SOFA.”<sup>125</sup>

The U.S., in recognizing this situation, has implemented piecemeal measures in an attempt to prevent base-removal from reoccurring, this time in Japan. Such efforts have included restricting alcohol consumption, imposing curfews, issuing public apologies for soldiers’ transgressions, and providing monetary payments to victims and their families.<sup>126</sup> Most dramatically, in April of 2012, the U.S., in a move aimed at reducing the footprint of American soldiers in Japan,<sup>127</sup> agreed to transfer a sizable contingency of its USFJ troops—some 9,000 U.S. marines—to Guam, Hawaii, and Australia.<sup>128</sup> As demonstrated by the MCAS Futenma relocation efforts, however, all of these measures have been to no avail. Something more needs to be done.

#### PART IV. POLICY RECOMMENDATION: REFORMATION OF THE SOFA

As the foregoing has made clear, the Security Alliance faces the prospect of compromising its long-term ability to forward deploy American forces in Japan. In response, this paper submits as a policy recommendation that the Japan SOFA be revised to grant Japan greater jurisdictional authority over crimes committed by U.S. soldiers. Reformation of the SOFA’s FCJ regime is critical to ensuring the continued presence of the U.S. military in Japan because it is the application of the SOFA’s foreign criminal jurisdictional scheme over military offenses, and not these crimes in and of themselves, that is driving the Japanese to press for troop withdrawal. This proposition is grounded in the perception of injustice that has come to define the SOFA in the eyes of the Japanese.

##### A. *The Utility of SOFA Revision As a Policy Tool*

As Japanese nationals continue to believe that U.S. soldiers are allowed to commit offenses<sup>129</sup> and yet seemingly evade commensurate punishment in turn, the Japan SOFA has gradually devolved into a symbol of inequity.<sup>130</sup> When crimes are committed by foreign troops against host

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us-philippines-to-sign-10-year-defense-agreement-amid-rising-tensions/2014/04/27/a04436c0-cddf-11e3-a75e-463587891b57\_story.html.

125. McConnel, *supra* note 10, at 173.

126. Flynn, *supra* note 5, at 4-5.

127. CHANLETT-AVERY & RINEHART, *supra* note 99, at 1.

128. *Id.*

129. See Gher, *supra* note 31, at 242.

130. At a House of Councilor’s Judiciary Committee meeting held in 2011, a Diet

nationals and, due to the SOFA's FCJ provisions, neither the host state's courts nor its government bears any authority over such acts, it is easy to see how a perception of injustice arises. The human condition instructs that a person harmed desires to see the wrongdoer held accountable. Indeed, as one scholar has noted, "[w]hen SOFA personnel commit crimes, the public's desire seems focused on ensuring justice is done within their system, not on obtaining revenge against the U.S. military."<sup>131</sup>

Yet the current legal framework provided by the SOFA's FCJ has allowed U.S. troops in certain highly publicized cases to evade the Japanese criminal justice system altogether. American soldiers, upon inflicting injury on host nationals, are able to do so without ever having to step foot into a Japanese courtroom or stand before a jury comprised of the victim's peers. Regardless of the jury finding or the punishment given, when it is not the host state that issues such a finding or imposes such sentence, the perception of injustice naturally arises. Even if, hypothetically, it were known, *ex-ante*, that the outcome of a trial—whether tried before a U.S. court-martial or Japanese criminal tribunal—would be exactly the same, suspicion of injustice would arise in the former but not the latter scenario.

In sum, the Japanese have come to believe that the SOFA denies them the right to seek justice in the face of American soldiers' criminal acts.<sup>132</sup> The FCJ has been re-characterized by the Japanese as a shield that protects American troops from facing accountability<sup>133</sup>—as a legal mechanism that not only permits but also enables soldier misconduct. This perception of the SOFA has become so firmly rooted in the Japanese psyche that now, when criminal acts arise that do not even implicate the FCJ in any meaningful way, Japanese media and political groups nevertheless associate such "FCJ-irrelevant" cases with SOFA revision.<sup>134</sup> Consequently, the perception of injustice has led the Japanese to harbor feelings of bitter resentment toward the SOFA, the U.S., and thus the Alliance, and, as we have seen, the demand for troop withdrawal has

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member, Satoshi Inoue, requested a report on the crimes committed by U.S. military members in Japan. The U.S., at the request of Japan's Ministry of Justice, provided statistics showing that during the time period of September 2006 through December 2010, offenders did not receive any judicial punishment in nearly half of the cases. Neither was there indication that such figures were an anomaly to years past. See Sayuri Umeda, *Japan; United States: Reviewing Criminal Jurisdiction over Civilian Employees Under the Status of Forces Agreement*, LAW LIBRARY OF CONGRESS (Dec. 7, 2011), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402910\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402910_text).

131. Flynn, *supra* note 5, at 62-63.

132. Gher, *supra* note 31, at 244.

133. *Id.* at 241-42 ("At this point, critics believe the current SOFA enables these offenses because it is fundamentally unfair, biased, and accords American criminal offenders special treatment.")

134. Flynn, *supra* note 5, at 43-44 (noting that the 1995 Okinawa rape incident "jumpstart[ed] the engine of military-basing protest in Japan," and that since then, "[while] [the] seriousness and numbers of military-related crimes have not necessarily worsened . . . each publicized crime has seemed to accelerate the engine of protest.").

followed therefrom.<sup>135</sup> In short, it is the SOFA that is harming U.S.-Japan security relations.

Accordingly, SOFA revision stands as the most effective policy recommendation at Washington and Tokyo's disposal. Reformation of the foreign criminal jurisdictional provisions will reduce the impact of U.S. troop presence in Japan by helping to eradicate amongst the Japanese the perception—whether real or otherwise—that the SOFA permits American soldiers to commit crimes and get away with them. Expanding Japan's authority to exert its laws and prosecutorial discretion over soldiers' crimes will restore confidence amongst the Japanese that justice is being done and that the U.S. military is not being afforded SOFA-aided impunity. It is the operation of the SOFA in preventing Japan from exercising jurisdiction, and not merely the predicate criminal act itself, that is damaging the Security Alliance. Therefore, while reformation of article XVII cannot stop these acts from occurring, this limitation to SOFA revision is not fatal or even relevant to the underlying policy objective. Revision of the FCJ will extend Japan's jurisdictional reach and thereby reduce the number of cases where the host state is left without legal redress upon one of its citizens harmed by an American soldier. In so doing, the perception of injustice will gradually dissipate, as U.S. military offenders are tried before Japanese courts for the entire country to witness.<sup>136</sup>

Washington and Tokyo, themselves, have recognized that SOFA revision is key to reducing the footprint<sup>137</sup> of American troops in Japan and thus quelling the calls for troop withdrawal. Just in recent years a Japanese media publication, *The Yomiuri*, reported that Washington had agreed to talks concerning SOFA reform because it “worry[ed] [that] the issue could have political ramifications for other important issues[,] [including] planned relocation of the U.S. Futenma Marine Air Station on Okinawa.”<sup>138</sup> Tokyo, as well, acknowledged that the SOFA is the problem. In 2011, former Japan Foreign Minister Koichiro Gemba, in an attempt to mitigate anti-base resentment in Okinawa, traveled to the prefecture and promised the host population that Tokyo would press America for reformation of the SOFA.<sup>139</sup> More to the point, the Japanese government has

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135. *Id.* at 44 (“In short, U.S. maximization policy represents more than de facto jurisdictional control. It is one of the symbols of all perceived negative impacts of U.S. military bases, ingrained into the core of Japanese anti-base discourse.”).

136. *See* Gher, *supra* note 31, at 242 (“The unjustified and heinous crimes that continue to occur on Japanese soil have threatened the United States-Japan partnership.”).

137. *See* Stone, *supra* note 15, at 231 (speaking in terms of “reduc[ing] the American footprint” in Japan when discussing the debate over relocation of the USFJ).

138. Steve Heman, *Japan Wants More Say Over U.S. Troops on Okinawa*, GLOBALSECURITY.ORG (Nov. 26, 2011), <http://www.globalsecurity.org/military/library/news/2011/11/mil-111126-voa03.htm>.

139. “Japan’s foreign minister is promising Okinawans that Tokyo will press Washington to give Japanese authorities more jurisdiction over U.S. forces on the island. The pledge comes as the United States and Japan are trying to reach a compromise over a controversial relocation of an American air station on the southern

“repeatedly requested that its current SOFA be amended, claiming that criminals are neither being brought to justice nor deterred.”<sup>140</sup> In total, both governments recognize the SOFA as a principal source of host population-USFJ conflict. And, even if SOFA revision were itself not sufficient to entirely extinguish the demand for troop withdrawal, it certainly stands as the most substantial measure the two countries can undertake to address the problem.<sup>141</sup>

This policy proposal, therefore, does **not** rest on whether or not the SOFA in fact obstructs the pursuit of criminal justice by granting impunity to the U.S. military. Such an inquiry is outside the scope of this study largely because the answer is immaterial to resolving the problem we seek to address. Whether Japan’s perception of SOFA inequity is justified or otherwise, the effects of such perception are real. As demonstrated by the reoccurring mass protests and the drive to fight off troop basing, the Japanese regard the SOFA as a vestige of American imperialism and as a symbol of inequity. Mitigating this effect, rather than normatively addressing the merits of its cause, presents the most effective means to solving the problem.

#### B. *Amend the Official Duty Exception*

The issue is clear—the SOFA is harming the Security Alliance by destabilizing the prospect of continued forward deployment in Japan. To address this problem, this paper has called for reforming the SOFA to expand Japan’s jurisdictional rights. The question that arises at this point, then, is: how exactly can the SOFA’s FCJ provisions be revised to expand Japan’s criminal jurisdiction in order to eradicate the perception of injustice and thereby quell the push for troop withdrawal? While many agree that reformation of the FCJ is crucial to the U.S.-Japan alliance,<sup>142</sup> a consensus regarding how to accomplish this goal has not been as forthcoming. This paper submits that the most effective means for accomplishing the stated goal requires amending the official duty exception.

##### *i. Why the Official Duty Exception?*

Options for expanding Japan’s jurisdiction under the SOFA are actually quite limited. As noted above, under the FCJ’s current terms,

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Japanese island. The visit to Okinawa by foreign minister Koichiro Gamba is seen as an attempt to assuage continuing resentment by the islanders towards both Tokyo and Washington about the burden imposed on Okinawa of hosting the U.S. military.” *Id.*

140. Gher, *supra* note 31, at 242.

141. See McConnel, *supra* note 10, at 174. While acknowledging that alteration of the SOFA may not “entirely assuage the lasting resentment of Okinawan populace towards sixty years of continued U.S. military presence in Okinawa,” the author argues that such a measure would be a “substantial step in demonstrating to the Okinawans, and the Japanese people in general, that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere?”

142. See, e.g., *id.* (“Recognizing the continued importance of the U.S.-Japan relationship, the United States should seize this opportunity to reassess its inherently unequal approach to jurisdictional apportionment.”).

America is afforded jurisdiction only in a limited number of circumstances. The U.S. possesses exclusive jurisdiction solely over acts that are illegal under American but not Japanese law, and it bears primary concurrent jurisdiction only pursuant to three jurisdictional carve-outs: *inter se* exception, waivers, and official duty cases.

With the goal being to create a SOFA that will better support the U.S.-Japan security alliance, the provisions relating to U.S. exclusive jurisdiction and the *inter se* exception can be quickly eliminated as avenues for reform because their impact on sending-host state relations is de minimis. It can hardly be contended that Japanese nationals have been catalyzed to protest over instances where a soldier's actions do not even constitute a crime under Japanese law (i.e., U.S. exclusive jurisdiction), or in cases in which the offense only harms U.S. (and not Japanese) persons or property (i.e., *inter se* exception). These two areas of the FCJ implicate neither Japanese state nor civic interests because they do not involve crimes against, or harm to, host state persons or property. Revision to either of these provisions, therefore, would do little, if anything, to reduce the footprint of the USFJ. What remain as viable options for expanding Japan's jurisdiction, then, are the official duty exception and the waiver exception. This paper proposes revision of the former rather than the latter.

Recommendations that favor amending the waiver provision generally have called for either the U.S. to cease requesting waivers from Japan or, conversely, for the U.S. to waive its own right to primary jurisdiction in greater frequency.<sup>143</sup> Any revision, however, that requires changing the precedent of the waiver provision—i.e., that seeks to encourage the U.S. to waive its primary jurisdiction and to dissuade it from seeking such waivers from Japan—is wholly inadequate. The practice of the U.S. requesting waivers has become firmly entrenched as the norm, to the point where it is considered “automatic” in concurrent jurisdiction cases.<sup>144</sup> This is so despite that the text of the SOFA already attempts to limit issuance of waiver requests by stipulating that consideration for such a request shall only be afforded “sympathetic consideration” where the requesting state's prosecutorial interest in the matter is of “particular importance.”<sup>145</sup> As follows, there is no basis for believing that revisions that seek to accomplish what the restrictive language of “particular importance” already purports to do will be successful. State practice is inherently difficult to undo. And, when such norms exist notwithstanding legal instruments that purport to combat the operation of such norms, the likelihood of reversing that custom is only further diminished.

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143. See, e.g., Flynn, *supra* note 5, at 68 (“The U.S. military in Japan should cease attempts to obtain jurisdiction over offenses when Japan has the exclusive or primary right.”).

144. Gher, *supra* note 31, at 234.

145. U.S.-Japan SOFA, *supra* note 7, art. XVII(3)(c).

Moreover, recognition of this pro-U.S. waiver precedent reveals a more fundamental problem to proposed FCJ amendments that center on the waiver clause: the SOFA grants the very right that such recommendations seek to take away. Waiver proposals ask the U.S. to cease requesting waivers and to forego rejecting waiver requests served upon it. Article XVII of the SOFA, however, grants America these very rights. In effect, in order for waiver revisions to be successful, the parties to the SOFA must sit on their legal rights. Merely asking the U.S. to forego exercising the very rights that the Agreement provides is no revision at all; if anything, it is merely a suggestion, with no binding legal force behind it.

Indeed, any attempt to revise the SOFA by changing the way the waiver provision is exercised is futile because there is no enforcement mechanism to obligate the parties to so act. In order to create a more equitable and efficient SOFA, the language of the Agreement must be revised to compel the parties, by law, to act (or abstain from acting). Treaties influence state behavior only if there are consequences for failing to comply with such laws. The SOFA cannot impose such consequences on the U.S. for demanding waivers or rejecting host state waiver requests because the provisions contained therein entitle America to do just that. In total, “recommendations” calling for waiver revision boil down to a few normative proposals asking the U.S. to act in a certain way that will limit its jurisdictional reach, yet providing no legal obligation commanding it to do so nor promising any consequences for its failure to do so.

Expanding Japan’s jurisdictional authority, therefore, can only be accomplished if the SOFA revision grants Japan the *legal right*—and not merely a moral entitlement—to exert greater jurisdiction. In order to do so, any change to the SOFA must be memorialized by way of mandatory (e.g., “shall”), rather than permissive (e.g., “may”), language. Implementing mandatory language into article XVII will oblige the parties to grant Japan greater jurisdictional authority, and thus will operate as an enforcement mechanism. Under such revision, a failure to comply with mandatory directives contained in the SOFA would constitute a breach thereof.

## *ii. Proposed Revision to the FCJ*

With all other avenues for FCJ reform foreclosed, and given that any change to the SOFA must be drafted so to legally obligate the parties to so act, this paper proposes the following revisions to the official duty exception:

- Eliminate entirely, with respect to both soldiers and civilian components covered under the SOFA, the official duty exception for cases of “grave offenses.” “Grave offenses,” as the term is used herein, is strictly limited to acts that result in death or permanent disability, or constitute rape.

- Drafting Language: *For all alleged offenses that result in death or permanent disability, or constitute rape (hereinafter “grave offenses”), there shall be an irrefutable presumption that the authorities*

*of Japan possess the primary right to exercise jurisdiction even if such offense arises out of an act or omission done in the performance of an official duty.*

Thus, where a U.S. soldier commits a crime against a Japanese national while in the performance of an official duty that results in death or permanent disability to, or constitutes a rape of, that victim, Japan will have jurisdiction.

Japan is granted the absolute right to jurisdiction over grave offenses, which will mitigate local nationals' criticisms of the SOFA and thereby quiet the call for troop withdrawal. In general, the gravity of the offense influences the likelihood that a grant of U.S. jurisdiction over such offense will generate local protest; the more serious the offense is, the more likely that Japan and its citizenry will have a strong interest in the adjudication of the matter.<sup>146</sup> By granting Japan jurisdiction over grave offenses—acts that present a substantial risk of domestic turmoil breaking out if the U.S. were to be given jurisdiction over—a significant impetus driving Japanese discontent over the SOFA will be eliminated.

- Create a *rebuttable* presumption that Japan possesses exclusive jurisdiction over all non-grave offenses committed by U.S. military personnel in the line of duty.

- Drafting Language: *There shall be a strong presumption that the authorities of Japan possess the right to exercise exclusive jurisdiction over non-grave offenses allegedly committed by U.S. soldiers and civilian components thereof that arise out of an act or omission done in the performance of an official duty.*

Pursuant to judicial presumption, in all likelihood, Japan will have jurisdiction over non-grave, official duty cases. However, by rendering it only a probability, and not an absolute certainty, that Japan will be granted jurisdiction, the U.S. still retains the prospect of defeating the presumption and assuming judicial control. Where the offense is non-grave, the anticipated Japanese state interest in the matter will be less forceful, and, consequently, the chances that exercise of U.S. jurisdiction over such matters would be hotly contested by Japanese nationals is far less likely. Accordingly, this proposed revision grants only a presumption, and not an absolute entitlement, to Japan in hopes of striking the proper balance between revising the SOFA so to lessen the footprint of American troops, while still respecting and safeguarding America's underlying state interest in applying its judicial system.

- Where the U.S. seeks to overcome the presumption in favor of Japan's right to jurisdiction over non-grave, official duty cases, the U.S. must timely notify Japan of its intention to do so.

- Drafting Language: *Where the military authorities of the U.S. endeavor to contest the Host State's right to jurisdiction over*

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146. For discussion regarding the Koki Yogi incident, see, e.g., *supra* at Introduction.

*non-grave offenses arising out of an act or omission done in the performance of an official duty, they must notify the authorities of Japan, in writing, of their intention to do so no later than twenty (20) days following the commission of the act.*

By stipulating that the U.S. may only request jurisdiction, this provision makes clear that such demand is not dispositive; compliance with this procedural requirement is only necessary, and not sufficient, for the U.S. to reclaim jurisdiction. Moreover, the timing requirement of 20 days ensures that Japan will be given notice of America's intention to contest jurisdiction.

- In such cases where the U.S. is authorized to, and in fact does, contest Japan's right to jurisdiction over non-grave, official duty cases, the issue is referred to the Joint Committee for resolution. At the hearing before the Joint Committee, the U.S. must proffer "clear and convincing" evidence for why it should be granted jurisdiction.

- Drafting Language: *Upon the military authorities of the U.S. timely contesting Japan's right to jurisdiction over a non-grave offense arising out of an act or omission done in the performance of an official duty, the matter shall be referred to the Joint Committee, as is established under Article XXV of this Agreement. The Joint Committee will determine which State shall possess jurisdiction over the offense. The military authorities of the U.S. shall be granted the right to jurisdiction only upon submission of clear and convincing evidence. Any ruling rendered by the Joint Committee is conclusive and not subject to appeal.*

The Joint Committee is an apt authority to preside over jurisdictional disputes. Per article XXV, the Joint Committee is comprised of one representative from each of the two governments.<sup>147</sup> The SOFA instructs that the Joint Committee may advise "on all matters requiring mutual consultation regarding implementation of this Agreement."<sup>148</sup> Since this body is established pursuant to the SOFA, the members that comprise it will possess extensive knowledge of the Agreement, the parties, and the FCJ. Further, utilizing a governing apparatus already established under the SOFA is cost-efficient. Most importantly, because the Joint Committee is comprised of one representative from each country, the Japanese people, seeing that their country has equal representation in the process, will be inclined to respect the decision adopted by the Committee.

Moreover, by referring the issue to the Joint Committee, this proposed SOFA revision sidesteps the problems inherent to the waiver provision and the SOFA language of "particular importance." As discussed above, both of these FCJ provisions deal with situations where, in concurrent jurisdiction cases, one state opposes the other state's right to exercise primary jurisdiction. Each fails because they leave it in the hands of the

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147. U.S.-Japan SOFA, *supra* note 7, art. XXV(2).

148. *Id.*, art. XXV(1).

parties themselves to resolve the dispute—it is on the state without jurisdiction to pursue a waiver request only with temperance, and it is on the state accorded primary jurisdiction to decide whether or not to forego its right to jurisdiction. Rather than leaving it to the will (and extra-judicial considerations) of the parties, referring the matter to the Joint Committee renders moot the parties' discretion over the matter. As follows, the problems that have plagued the waiver provision will be avoided.

Additionally, the evidentiary standard employed heretofore will expand Japan's jurisdiction and thereby positively impact the perception of SOFA. The U.S. may defeat the judicial presumption only if it furnishes the Joint Committee with clear and convincing evidence. At law, the clear and convincing evidentiary standard requires that the party with the burden prove that it is "substantially more likely than not that it is true."<sup>149</sup> In the context of the SOFA, this means that America would have to demonstrate that it is "substantially more likely than not" that it should possess jurisdiction over the non-grave, official duty offense. This standard is less rigorous than the "beyond a reasonable doubt" standard used in criminal law, yet more demanding than the "preponderance of evidence" standard found at civil law. The clear and convincing standard, therefore, presents a proper balance between furthering the goal of expanding Japan's jurisdiction, while still rendering it feasible for America to prosecute cases where Japan's state interest is not as compelling.

In total, this proposed revision—by way of the burden-shifting scheme, Joint Committee, and clear and convincing evidentiary standard—will expand Japan's jurisdictional rights while still respecting America's. Placing the burden on the U.S. and having a neutral, equally-comprised body (i.e., the Joint Committee) decide the issue will do much to eradicate the perception of injustice currently underlying the SOFA.

- If the Joint Committee is unable to issue a unanimous decision within the required time period, the matter will be sent to arbitration for final resolution.

- Drafting Language: *Upon the Joint Committee failing, within thirty (30) days from the date that the matter was referred to the Committee, to render a unanimous resolution of the jurisdictional dispute, the matter shall be decided before an arbitration panel pursuant to the procedures established under Article XVIII(2)(b) of this Agreement. Any decision rendered by the arbitrator shall be binding and final.*

Given that the Joint Committee is made up of one member from each of the two countries, there will always be the chance that the Committee is unable to reach a unanimous agreement. To that end, arbitration

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149. LEGAL INFO. INST., *Clear and Convincing Evidence*, CORNELL U. L. SCH., [http://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](http://www.law.cornell.edu/wex/clear_and_convincing_evidence) (last visited May 13, 2014).

serves as a necessary contingency—as a “Plan-B” in case of gridlock at the Joint Committee.

Arbitration is a form of alternative dispute resolution.<sup>150</sup> As with a trial before a judge and jury, arbitration involves a proceeding where each of the parties puts forth evidence, and a professional juror, the arbitrator, issues a binding decision on the merits.<sup>151</sup> In recent years, both at the domestic and international-level, arbitration has emerged as an increasingly popular forum for dispute resolution. Indeed, the Japan SOFA, under article XVIII, already provides for arbitration of disputes involving property damage.<sup>152</sup>

This proposal merely seeks to extend the SOFA’s arbitration provisions to FCJ disputes concerning non-grave, official duty cases that cannot be resolved by the Joint Committee. In accordance with the SOFA’s already-established arbitral procedures, a sole arbitrator will hear the case, and that arbitrator will be “selected by agreement between the two Governments from amongst the nationals of Japan who hold or have held high judicial office.”<sup>153</sup> The outcome of the arbitration, as in property disputes, will be conclusive.

Given that the U.S. and Japan have already consented to arbitration elsewhere in the SOFA (i.e., under article XVIII), implementation of arbitration with respect to the FCJ should not be problematic. Further, a provision for arbitration will help to eradicate the perception of injustice. The arbitrator will, per article XVIII, be a Japanese national. Having a Japanese citizen preside over the arbitration will further assuage any domestic concerns over SOFA inequity.

- Finally, while admittedly this proposed FCJ revision (because it incorporates burden-shifting, the Joint Committee, and arbitration) is more extensive than the current provisions, considerations for time-efficiency and judicial economy are still satisfied. Per these proposed revisions, the U.S. must contest jurisdiction, if at all, within 20 days upon commission of the act; the Joint Committee is required to rule within 30 days thereafter; and, arbitration, if required, must also conclude within 30 days. At a maximum, the entire process for determining jurisdiction will occur within less than three months. Three months, when compared to litigations over jurisdiction under U.S. law, is quite truncated. In sum, this dispute resolution process will not greatly prolong the process, and this also will aid in restoring confidence amongst Japanese that the FCJ is being administered in an equitable manner.

- Finally, all of the foregoing proposed revisions to the FCJ are immunized from operation of the waiver clause.

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150. See generally AM. ARBITRATION ASS’N, *Arbitration*, <https://www.adr.org/aaafaces/services/disputeresolutionservices/arbitration> (last visited May 13, 2014).

151. See generally *id.*

152. U.S.-Japan SOFA, *supra* note 7, art. XVIII.

153. *Id.*, art. XVIII(2)(c).

- Drafting Language: *None of the provisions to article XVII herein provided under this sub-section shall be subject to the waiver provision, as is established pursuant to Article XVII(3)(c) of this Agreement.*

As discussed above, the waiver provision can operate to short-circuit, on an ad hoc basis, the SOFA's pre-set jurisdictional framework. In order to eliminate the prospect that the parties might subvert these proposed revisions and thereby derail the stated goal of expanding Japan's jurisdictional rights, this provision renders void the waiver clause with respect to these amendments. Thus, where Japan is granted jurisdiction over a grave, official duty offense, or where the Joint Committee so assigns Japan jurisdiction over non-grave offenses, the U.S. is foreclosed from requesting waiver of Japan's jurisdiction.

In total, this amendment to the SOFA will expand Japan's jurisdictional rights and limit the ability of either country to unilaterally determine which state gets jurisdiction, two ends that are critical to eradicating the perception of SOFA inequity. By eliminating the official duty exception entirely for grave offenses, a considerable portion of crimes (such as the Koki Yogi incident) that would otherwise have been tried before U.S. court-martials will now be presided over by Japanese courts. Further, the judicial presumption in favor of Japan for non-grave, official duty cases and the burden of producing clear and convincing evidence to rebut such a presumption will effectively entitle Japan to jurisdiction in those instances, as well. Moreover, beyond merely expanding Japan's jurisdictional rights, these revisions will, in official duty cases, transfer the power to determine the jurisdictional question over to the Joint Committee (and, in certain cases, an arbitrator), a reform that will do much to eliminate the appearance of FCJ-impropriety.

#### PART V. POLICY RATIONALE: A COST-BENEFIT ANALYSIS

Even those who both recognize the problem that the perception of SOFA-impunity is threatening the long-term viability of maintaining a forward deployment in Japan, and agree with the recommendation of expanding Japan's jurisdictional authority by amending the FCJ, may nevertheless struggle with the rationale underlying these two arguments: that extending Japan's jurisdiction by limiting America's will serve U.S. foreign policy interests as they relate to the Security Alliance.

Such concern is well taken. After all, this whole policy debate surrounds the men and women who commit themselves to serving our country abroad. They sacrifice their own well-being to make sure that ours is protected, and they do so in a manner that no other segment of our society can similarly lay claim to. This is irrefutable, and this paper does not endeavor to challenge, let alone marginalize, these acts of unparalleled service. As follows, and as critics to this paper may well submit, it sounds in ignorance to claim that further exposing our military to foreign

courts for acts performed while protecting our country (i.e., official duty cases) would advance American foreign policy interests. A brief survey of the geopolitical landscape of Northeast Asia, however, along with an examination of the Japanese criminal justice system, persuasively establishes just that. To justify the foregoing SOFA amendments to the FCJ *on policy grounds*, a cost/benefit analysis is undertaken, where the costs to U.S. interests of expanding Japan's jurisdictional authority are weighed against the benefits thereto.

#### A. *The Benefits—Geopolitics of Northeast Asia Today*

When assessing the benefits of expanding Japan's jurisdictional authority to American foreign policy interests, it must be remembered exactly what extension of Japan's jurisdictional rights constitutes. As this paper has set forth, expanding Japan's jurisdictional reach will, by eradicating the perception of impunity plaguing the SOFA, mitigate the domestic calls for U.S. base elimination. Thus, the "benefits" of this SOFA revision concerns not the predicate act itself (i.e., enlarging Japan's jurisdictional rights), but rather the results that will follow therefrom (i.e., promoting the long-term viability of forward deploying U.S. troops in Japan). In other words, in assessing the utility of this SOFA revision, the inquiry becomes: What are the benefits to U.S. foreign policy of continued maintenance of a forward deployment in Japan? With this in mind, we turn to the geopolitics of Northeast Asia.

The U.S.-Japan security alliance, codified in the Treaty of Mutual Cooperation and Security Between Japan and the U.S. ("US-Japan Security Treaty"), represents an exchange of inter-state promises, where the U.S. commits to defending Japan in the event of an armed attack on the archipelago, and, in turn, America is granted the right to base its armed forces in Japan.<sup>154</sup> Enacted in 1960, the security landscape of Northeast Asia today has rendered the performance of these promises never of greater importance.

The narrative of Asia security relations in the twenty-first century continues to be defined, in large part, by the precarious re-rise of China ("People's Republic of China" or "PRC") and the ever-looming nuclear threat posed by North Korea ("Democratic People's Republic of Korea" or "DPRK"). The PRC and the DPRK, in the collective, present pointed challenges to the US-Japan security alliance.

##### i. *China*

Since commencing its transformation from a centrally planned to a market-oriented economy, China, with its 1.3 billion citizens, has experienced significant economic development, averaging an astounding ten percent GDP growth rate in recent years.<sup>155</sup> In 2010 it surpassed Japan

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154. *Id.*, arts. V, VI.

155. *China Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last updated Apr. 1, 2014).

to become the second largest economy in the world,<sup>156</sup> and, according to some studies, China will eclipse America as the world's fiscal superpower by the year 2019.<sup>157</sup> Along with its rapid ascendency to global economic prowess, Beijing has dedicated its checkbook to bolstering its military capabilities.<sup>158</sup> It has been reported that, from 2005 through 2006, "China's military expenditures accounted for 4.3% of gross domestic product (GDP), compared to the United States' 4.06%."<sup>159</sup> To date, Beijing's military spending continues to expand at alarming rates, increasing by 10.7 percent from 2012 to 2013 and 12.2 percent from 2013 to 2014, making it now second only to the U.S. in military financing.<sup>160</sup>

In turn, these unprecedented military and economic advances have emboldened China to re-assert its presence on the geopolitical stage, as evidenced by, *inter alia*, the territorial disputes it has become entrenched in with its Asia neighbors.<sup>161</sup> As it seeks to re-peg its rank in the international order, the PRC endeavors now to introduce a "new model of major power relations."<sup>162</sup> While the introduction of a new world superpower is not necessarily a problem that the U.S. and Japan must combat, Beijing's conduct in the international arena has rendered its re-rise an issue that the Security Alliance must strategically navigate.

## ii. North Korea

Situated just over 1,000 miles east of Beijing is North Korea. The DPRK's geopolitical posture has presented its own unique and equally concerning policy considerations. As China endeavors to elevate into a world power, the DPRK has sought to become a recognized nuclear power. Since 2006, North Korea has boastfully performed three underground nuclear tests, the most recent of which occurred in February of 2013.<sup>163</sup>

156. Xu, *supra* note 88.

157. *Catching the Eagle*, THE ECONOMIST (Aug. 22, 2014), <http://www.economist.com/blogs/graphicdetail/2014/05/chinese-and-american-gdp-forecasts?>

158. Flynn, *supra* note 5, at 23.

159. *Id.* at 23-24.

160. Edward Wong, *China Announces 12.2% Increase in Military Budget*, N.Y. TIMES (Mar. 5, 2014), [http://www.nytimes.com/2014/03/06/world/asia/china-military-budget.html?\\_r=0](http://www.nytimes.com/2014/03/06/world/asia/china-military-budget.html?_r=0).

161. For an overview of the maritime disputes China has become enmeshed in, see generally *China's Maritime Disputes*, COUNCIL ON FOREIGN REL., [http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/> \(last visited May 13, 2014\). Recently, in May of 2014, China provoked a maritime confrontation with Vietnam over the location of a Chinese oilrig off Vietnam's shores in the South China Sea. Upon Vietnamese Sea Guard vessels confronting China, the PRC responded by firing water cannons at the Vietnamese vessels and demanding their withdrawal. See Gerry Mullany & David Barboza, \*Vietnam Squares Off with China in Disputed Seas\*, N.Y. TIMES \(May 7, 2014\), \[http://www.nytimes.com/2014/05/08/world/asia/philippines-detains-crew-of-chinese-fishing-vessel.html?\\\_r=0\]\(http://www.nytimes.com/2014/05/08/world/asia/philippines-detains-crew-of-chinese-fishing-vessel.html?\_r=0\).](http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/)

162. John Podesta et al., *Towards a New Model of Major Power Relations*, CHINA U.S. FOCUS (Feb. 21, 2014), <http://www.chinausfocus.com/foreign-policy/towards-a-new-model-of-major-power-relations/>.

163. *North Korea's Nuclear Tests*, BBC NEWS (Feb. 12, 2013), <http://www.bbc.com/news/world-asia-17823706>.

Though its efforts have been met only with international condemnation and rounds of United Nations-issued sanctions,<sup>164</sup> Pyongyang remains undeterred in its quest for nuclear statehood and thus there is no basis to believe that North Korea will suddenly cease proceeding on its nuclear path.

Illustrated by the U.S.-led Six Party Talks to which Japan was an active participant in,<sup>165</sup> concerns over the prospect of a nuclear North Korea have been well-taken by both Washington and Tokyo. The risk that the DPRK could unleash its nuclear capabilities in the Northeast Asia theatre or export its nuclear know-how to fellow rogue states or stateless terrorist organizations is undoubtedly a legitimate threat to the continued peace and security of the region. Further, these risks are compounded by the unrelenting bellicose posture assumed by North Korea in the geopolitical arena. Coercive rhetoric echoed from Pyongyang has become anything but atypical.<sup>166</sup> Even more troubling, North Korea has proven itself willing to resort to unprovoked military force. It has repeatedly performed illicit missile tests into the Sea of Japan<sup>167</sup> and, in 2010, launched an artillery attack on its neighbor to the South that resulted in the death of two South Korean soldiers.<sup>168</sup> As these acts illustrate, North Korea presents a formidable security concern for the U.S. and Japan.<sup>169</sup>

The precarious re-rise of China and the nuclear threat posed by North Korea presents a markedly challenging security landscape within which Japan is situated and to which the U.S. is now “pivoting”<sup>170</sup> toward. “Policy coordination between Japan and the US,” as one foreign policy

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164. See, e.g., Victor Cha & Ellen Kim, *North Korea's Third Nuclear Test*, CENTER FOR STRATEGIC & INT'L STUD. (Feb. 12, 2013), <http://csis.org/publication/north-koreas-third-nuclear-test>.

165. See, e.g., Jayshree Bajoria & Beina Xu, *The Six Party Talks on North Korea's Nuclear Program*, COUNCIL ON FOREIGN REL. (Sept. 30, 2013), <http://www.cfr.org/proliferation/six-party-talks-north-koreas-nuclear-program/p13593>.

166. See, e.g., *Daydream Believers*, THE ECONOMIST (May 3, 2014), <http://www.economist.com/news/asia/21601525-korean-unification-less-likely-be-gradual-and-peaceful-nasty-brutish-and-quick-daydream>. In response to President Obama's visit to Seoul in April of 2014, North Korea issued a statement warning that it “must settle its final scores with the U.S. through an all-out nuclear showdown.”

167. Duyeon Kim, *Fact Sheet: North Korea's Nuclear and Ballistic Missile Programs*, THE CENTER FOR ARMS CONTROL AND NON-PROLIFERATION (July 1, 2013), <http://arms-controlcenter.org/fact-sheet-north-koreas-nuclear-and-ballistic-missile-programs/>.

168. In November of 2010, North Korea struck a South Korean island, Yeongyeongdo, with a barrage of artillery shells, killing two South Korean soldiers. See Jack Kim & Lee Jaw-won, *North Korea Shells South in Fiercest Attack in Decades*, REUTERS (Nov. 23, 2010), <http://www.reuters.com/article/2010/11/23/us-korea-north-artillery-idUSTRE6AM0YS20101123>.

169. Flynn, *supra* note 5, at 25.

170. Approximately four years ago, the U.S. commenced a foreign policy focus dubbed the “Pivot to Asia,” which calls for Washington, its allies, and its partners to redirect international strategic efforts toward the Asia-Pacific region. See generally Kurt Campbell & Brian Andrews, *Explaining the U.S. 'Pivot' to Asia*, CHATHAM HOUSE (Aug. 2013), [http://www.chathamhouse.org/sites/default/files/public/Research/Americas/0813pp\\_pivottoasia.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/Americas/0813pp_pivottoasia.pdf).

research institute put it, “will be more important than ever in this evolving environment...Both countries must be better able to signal resolve, both to adversaries and to allies. This requires not only statements of purpose, but actual progress in the resolution of thorny issues that have hindered alliance modernization.”<sup>171</sup> Thorniest of all, this paper submits, is the issue of continued maintenance of a forward deployment of U.S. troops in Japan.

### *iii. Forward Deployment*

The basing of American soldiers in Japan has long constituted the very foundation of the Security Alliance.<sup>172</sup> The policy concerns brought on by China and North Korea have injected even greater significance to maintaining a forward deployment in Japan. The re-rise of China and the prospect of a nuclear North Korea necessitate, perhaps now more than ever, that the current number of U.S. troops in Japan remain the same.<sup>173</sup> An American military presence in Japan serves as a critically effective deterrent to Chinese assertiveness and North Korean combativeness.<sup>174</sup> This is largely due to the geostrategic importance of Japan in the Northeast Asia theatre. Okinawa, which hosts more than half of all USFJ members,<sup>175</sup> is situated less than 1,000 nautical miles from Beijing and approximately 800 miles from Pyongyang and Tokyo.<sup>176</sup> Consequently, Japan is recognized as the “most significant forward-operating platform for the U.S. military in the region.”<sup>177</sup> Forward deployment not only provides the military might needed to respond to a China or DPRK provocation directed at Japan, but, even more so, it stands as an unequivocal deterrent for ensuring that such provocations never arise.<sup>178</sup>

Furthermore, cast within an age where America finds itself pivoting its foreign policy focus from the Middle East to Asia, the continued presence of U.S. troops in Japan is equally crucial to U.S. national security interests.<sup>179</sup> As former Defense Secretary Chuck Hagel affirmed in December of 2013, “The realignment effort is absolutely critical to the United States’ ongoing rebalance to the Asia-Pacific region and our ability to maintain a geographically distributed, operationally resilient,

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171. *19th Annual Japan-U.S. Security Seminar—Executive Summary*, CENTER FOR STRATEGIC & INT’L STUD. (Mar. 15-16, 2013), [http://csis.org/files/attachments/140321\\_ExecutiveSummary.pdf](http://csis.org/files/attachments/140321_ExecutiveSummary.pdf).

172. Stone, *supra* note 15, at 230.

173. Flynn, *supra* note 5, at 68.

174. *Id.* at 65

175. Talmadge, *supra* note 98.

176. CHANLETT-AVERY & RINEHART, *supra* note 99, at 1.

177. *Id.*

178. Laura Araki, *An Interview with Jennifer Lind*, NAT’L BUREAU OF ASIAN RES. (May 11, 2012), <http://www.nbr.org/research/activity.aspx?id=249> (“The alliance defends Japan from North Korea and serves as an insurance policy against a potentially dangerous China.”).

179. *See generally* CHANLETT-AVERY & RINEHART, *supra* note 99, at 1.

and politically sustainable force posture in the region.”<sup>180</sup> A strong U.S. military presence in Japan, therefore, constitutes an integral asset to the foreign policy interests of both Washington and Tokyo.

Thus, where some have chided that “[t]he United States must fashion SOFAs that reach beyond its own national interests and equitably address the needs and concerns of the receiving nation,”<sup>181</sup> this paper contends that, given the current security landscape confronted by Northeast Asia, these two goals are not mutually exclusive but, in fact, reaffirming. By advancing its own national interests, the U.S., in the context of SOFA revision, will simultaneously be “equitably addressing the needs and concerns [of Japan].” Washington and Tokyo, for both independent and mutually shared reasons, need U.S. troops in Japan. This paper, therefore, operates from the underlying premise that states should craft foreign policy by assuming a self-interested approach, so long as they do so with an eye toward international law. Expanding Japan’s jurisdictional rights by amending the SOFA would do just that.

#### B. *The Costs—Further Exposing U.S. Troops to Foreign Courts*

The geopolitics of Northeast Asia requires that American troops remain in Japan. In order to accomplish this objective, however, the SOFA must be amended to expand Japan’s jurisdictional authority over American soldiers. And this brings costs.

##### i. *The Argument: A Deficient Japanese Criminal Justice System*

The costs of expanding Japan’s jurisdiction centers on America’s general state interest that its troops are provided maximum protection, both on the battlefield as well as in the courtroom. The well-being and safety of American soldiers is, of course, of primary importance to U.S. foreign policy interests. Yet it is largely contended that Japan’s criminal justice system is “structurally deficient and incompatible with the American idea of due process and an individual’s right to defend themselves.”<sup>182</sup> Where the U.S. legal system is crafted around a “due process” model that seeks to promote the accused’s rights and liberties, Japan’s “crime-control” model is concerned more with deterring criminal conduct.<sup>183</sup>

In application, these contrasting approaches to criminal justice manifest in notable differences in procedure and adjudication. In Japan, the prosecutor is afforded “near absolute” authority.<sup>184</sup> The Japanese prosecutor is entitled to proffer summary rather than verbatim statements from the defendant, is not subject to cross-examination at trial, and, in general, operates absent the adversarial relationship with the de-

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180. *U.S. Welcomes Deal on Relocating Futenma Air Base*, JAPAN TODAY (Dec. 28, 2013), <http://www.japantoday.com/category/politics/view/u-s-welcomes-deal-on-relocating-futenma-air-base>.

181. Gher, *supra* note 31, at 230.

182. Flynn, *supra* note 5, at 48.

183. Wexler, *supra* note 65, at 67; Gher, *supra* note 31, at 244.

184. Wexler, *supra* note 65, at 67; Flynn, *supra* note 5, at 48-49.

fense that is integral to the U.S. legal system.<sup>185</sup> Without the adversarial interplay between prosecution and defense, it is contended that, in Japan, the “governments’ version of events go virtually unchallenged” and that “Japanese trials are a mere judicial ratification of prosecutorial and police actions.”<sup>186</sup> It is also argued that, in a system where confessions are highly valued, Japanese interrogation procedures are in direct conflict with America’s; “detentions in Japan can last as long as twenty-three days without access to an attorney, and physical abuse and food deprivation are not uncommon.”<sup>187</sup> An additional alleged deficiency in the Japanese pre-indictment stage concerns the diminished right to remain silent by the accused, a cornerstone of the liberties that the U.S. constitution affords American defendants.<sup>188</sup>

These aspects, among others, of Japan’s legal system lead to the belief that Japan’s criminal justice system is inept to accord U.S. soldiers the due process rights that America holds fundamental.<sup>189</sup> Thus, the fight over criminal jurisdiction is not so much about securing “home field advantage” as it is with ensuring that American service members are granted the constitutional liberties that they would otherwise receive under U.S. law.<sup>190</sup> As the argument runs, subjecting soldiers to Japanese courts unnecessarily exposes them to the risk of unfair treatment.<sup>191</sup> Relegating American soldiers to Japan’s legal system, therefore, constitutes the costs at stake here.

*ii. Response: SOFA-embedded Legal Protections*

Notwithstanding the foregoing differences between the American and Japanese legal systems, rejection of SOFA revision on the ground that Japan’s criminal system is structurally deficient is misguided because the SOFA provides the accused with legal protections even where Japan is awarded jurisdiction.

SOFAs represent a hybrid between two states’ legal systems. These instruments are “negotiated to blend and accommodate the difference between the United States and a host nation’s Governmental systems and cultures.”<sup>192</sup> As such, the FCJ provisions, beyond allocating jurisdiction, also establish a series of legal protections for U.S. soldiers that are triggered upon Japan being granted jurisdiction and that otherwise do not apply if the defendant were not an American soldier. In short, due process rights and constitutional liberties are built-in to the SOFA to provide sufficient due process protections for American service members. As follows, the alleged inherent unfairness of Japan’s criminal jus-

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185. Wexler, *supra* note 65, at 67; Flynn, *supra* note 5, at 48-49.

186. Flynn, *supra* note 5, at 48-49 (internal quotations omitted).

187. Wexler, *supra* note 65, at 67.

188. Flynn, *supra* note 5, at 55.

189. Lepper, *supra* note 13, at 181.

190. *Id.*

191. Wexler, *supra* note 65, at 67.

192. Lepper, *supra* note 13, at 233-34 (internal quotations omitted).

tice system is not relevant to the debate because, regardless of which state gets jurisdiction, U.S. soldiers, unlike any other expat who is tried by Japanese courts, will still be afforded SOFA-protections throughout the criminal proceeding. Performing a comparative analysis between the U.S. and Japan criminal justice systems, therefore, is fruitless. Instead, the proper inquiry focuses on the rights and procedures provided for by the SOFA upon Japan exercising jurisdiction.

Per article XVII, U.S. soldiers facing prosecution before Japanese courts are granted a series of procedural safeguards and constitutional rights, which, in total, substantially mitigate the divide between the American and Japanese criminal justice systems. The starting point for all SOFA rights is Sec. 5(b) of the FCJ, which requires that Japan “notify promptly [the U.S.] of the arrest of any member of the United States armed forces.”<sup>193</sup> Upon receiving such notification, U.S. officials meet with the suspect and inform him of his rights under the SOFA.<sup>194</sup> This provision “allows US officials to track the process of the investigation and ensures service members are advised of their SOFA protections prior to interrogation.”<sup>195</sup> Those protections include, but are not limited to: the right to a prompt and speedy trial; the right to be informed, in advance of trial, of the charges made against him; the right to be confronted with the prosecution’s witnesses and, conversely, to be allowed to present witnesses in his favor; and, the right to secure legal counsel of their choosing.<sup>196</sup> Further, SOFA personnel are protected from double jeopardy—the chance of being tried for the same offense by the same sovereign on more than one occasion—as is otherwise provided for under U.S. law pursuant to the Fifth Amendment.<sup>197</sup>

Moreover, beyond procedural and substantive rights, soldiers tried before Japanese courts are afforded access to Japanese language interpreters.<sup>198</sup> In the event of being tried in a foreign country, it seems obvious that interpreter services are crucial to ensuring fair interrogation and trial proceedings. SOFA defendants, however, “are the only foreigners afforded this right[;] [indeed][,] [t]he Japanese Ministry of Justice reported that in 1998, nearly one of every eight foreign suspects was convicted without the services of an interpreter.”<sup>199</sup> Perhaps most significant out of all SOFA rights is the right of an accused soldier “to communicate with a representative of the Government of the United States and to have such a representative present at his trial.”<sup>200</sup> This representative, though not the defendant’s actual defense counsel, is usually a Judge Advocate General (“JAG”) who ensures that the SOFA-rights of the accused are

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193. U.S.-Japan SOFA, *supra* note 7, art. XVII(5)(b).

194. *Id.*; Flynn, *supra* note 5, at 55-56.

195. Stone, *supra* note 15, at 250.

196. U.S.-Japan SOFA, *supra* note 7, art. XVII(9).

197. Lepper, *supra* note 13, at 177.

198. U.S.-Japan SOFA, *supra* note 7, art. XVII(9)(f).

199. Stone, *supra* note 15, at 251.

200. U.S.-Japan SOFA, *supra* note 7, art. XVII(9)(g).

respected throughout the criminal process.<sup>201</sup> Such continued access to a U.S. government official throughout the criminal investigation and proceeding diminishes the risk of abuse and coercive tactics.<sup>202</sup>

In the collective, these SOFA rights and privileges, though still falling short of the constitutional protections that American defendants receive under U.S. law, “substantially mitigate the potential unfairness of an American serviceperson tried in a Japanese court.”<sup>203</sup> In fact, in highly publicized SOFA cases, it may be more likely that the suspect will receive a lighter sentence if tried before a Japanese tribunal than before a U.S. court-martial.<sup>204</sup> So, criticisms of the Japanese legal system notwithstanding, its criminal justice system, when exercised in the context of the SOFA, is not nearly as unfair and perilous for the accused American soldier as some may contend it to be.

### C. *Weighing the Costs Against the Benefits*

The results of this cost-benefit analysis are two-fold: i.) the benefits of a forward U.S. military presence in Japan are significant, given the challenging geopolitical landscape of Northeast Asia; ii.) the costs of further exposing U.S. troops to the Japan criminal justice system are not as pernicious as otherwise held because the SOFA provides key rights and protections even where the soldier is turned over to Japanese courts.

Well aware of America’s obligation to protect the members of its armed forces, it is nevertheless submitted that, on policy grounds, considering the compelling need for preserving the Alliance’s ability to forward deploy troops in the Asia-Pacific, expansion of Japan’s jurisdictional authority will advance U.S. foreign policy interests. Accordingly, and working from the position that increasing Japan’s rights under the FCJ will promote the long-term presence of the U.S. military in Japan, it is put forth that the U.S. and Japan should amend the SOFA in the manner prescribed herein.

## CONCLUSION

The Japan SOFA has devolved into one of the most contentious issues confronting the Security Alliance. The current terms of the FCJ have operated to permit U.S. soldiers to commit crimes against local nationals and yet evade Japan’s legal system. While such an occurrence may arise from application of any SOFA, in Japan, as history instructs, the resulting impact on sending-host state relations has been profound. An aura of penal invincibility for American soldiers has become entrenched in the Japanese psyche; local nationals believe that the SOFA prevents them

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201. Lepper, *supra* note 13, at 181-82.

202. Flynn, *supra* note 5, at 55.

203. Gher, *supra* note 31, at 246.

204. See Flynn, *supra* note 5, at 61-62 (“[A] number of publicized cases demonstrate the benefit SOFA personnel derive from the benevolence of the Japanese system at police, prosecutorial, and trial stages.”).

from seeking justice over wrongs committed by their Alliance counterparts. As a result, the SOFA has become marred by a perception of injustice, which, as demonstrated by MCAS Futenma, now challenges the long-term prospect of maintaining a forward deployment of U.S. troops in Japan.

In response, this paper proposes expanding Japan's jurisdictional authority by way of revising the official duty exception. Empowering Japan with the legal right to prosecute crimes that are committed against its own people and within its own territories will substantially mitigate the perception of injustice that is clouding the SOFA and underlying the domestic push for troop withdrawal.

Calling on America to voluntarily abdicate its own legal rights and thereby further expose its soldiers to foreign courts is, admittedly, a difficult proposition to undertake. To that end, this study seeks to illustrate why doing so will advance U.S. foreign policy interests in the Asia-Pacific. By examining the geopolitical landscape of Northeast Asia today and analyzing the structural sufficiency of the Japanese criminal justice system, it becomes apparent that relinquishing legal authority in the name of foreign policy will benefit U.S. strategic interests in the context of the Security Alliance.

The U.S., therefore, is herein called on to implement the foregoing revisions to the FCJ to further its own interests: reform the SOFA's criminal jurisdiction provisions to quiet domestic opposition in order to ensure continued troop presence in Japan, and thereby advance American foreign policy.