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**MILITARY LAW—Military Jurisdiction over Crimes
Committed by Military Personnel Outside the
United States: The Effect of *O'Callahan*
*v. Parker***

The authority of Congress to bestow upon the armed forces exclusive jurisdiction over military offenses is derived from article I, section 8 of the Constitution, which grants Congress the power to "make Rules for the Government and Regulation of the land and naval Forces."¹ In addition, because disciplinary requirements make

1. This power has been exercised by Congress by conferring jurisdiction on the military in the Uniform Code of Military Justice [hereinafter UCMJ] art. 2, 10 U.S.C. § 802 (1964), as amended, (Supp. IV, 1965-1968).

impracticable the application in military trials of all of the procedural safeguards afforded defendants in civilian trials, the Constitution specifically provides that certain of these safeguards need not be recognized by military courts.² For example, the fifth amendment's requirement for grand jury indictment is specifically exempted in "cases arising in the land and naval forces."³ This exemption has also been interpreted to remove from the military court system the jury trial requirement of the sixth amendment.⁴ In addition to these express constitutional mandates concerning procedural exemptions, there also exists a traditional skepticism as to the ability of the military establishment to provide tribunals with other procedural qualifications "deemed essential to fair trials of civilians."⁵ At least on the surface, then, it seems clear that a criminal defendant is the beneficiary of significantly fewer procedural safeguards when he is tried in a military court than he is when he is tried in a civilian court. Consequently, it is essential that there be well-defined criteria for determining when military jurisdiction should attach.

Until recently, it had generally been considered that the minimum condition necessary to justify the invocation of military jurisdiction was the offender's "status" as "a person who can be regarded as falling within the term 'land and naval forces.'"⁶ In *O'Callahan*

2. *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969).

3. U.S. CONST. amend. V.

4. See *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

5. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955):

And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualification that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Action has been undertaken, however, to alleviate some of the more serious objections to trial by a military tribunal. See generally Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1969); Nelson & Westbrook, *Court-Martial Jurisdiction over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 56-64 (1969); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 UCLA L. REV. 1240 (1968). See also Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, § 6 (Magazine), at 32.

6. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 241 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Grafton v. United States*, 206 U.S. 333 (1907); *Johnson v. Sayre*, 158 U.S. 109 (1895); *Smith v. Whitney*, 116 U.S. 167 (1886); *Coleman v. Tennessee*, 97 U.S. 509 (1879); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See also the dissenting opinion of Justice Harlan in *O'Callahan v. Parker*, 395 U.S. 258, 275 (1969), noting that prior to that decision, military status had consistently been considered by the Court as a "necessary and sufficient condition for the exercise of court martial jurisdiction."

v. Parker,⁷ however, the United States Supreme Court determined that while military status is still requisite to the attachment of military jurisdiction, it is not a sufficient basis in and of itself to warrant trial by a military tribunal. In a five to three decision authored by Justice Douglas, the Court held that in order for military jurisdiction to attach, the crimes for which prosecution is sought must have been "service-connected."⁸ Thus, there has emerged a two-pronged test for ascertaining the proper attachment of court-martial jurisdiction: (1) the offender must have the status of being a member of the armed forces, and (2) the offense must be service-connected.

The ramifications of this dramatic development in military law are extensive. Because the Court in *O'Callahan* established new standards to be met at the initial jurisdictional stages of the judicial process, the effect of the decision may be expected to pervade almost all aspects of military justice.⁹ A particularly significant issue is raised by the application of the decision in foreign locations, where the denial of military jurisdiction presents intricate practical problems which do not result from a similar denial in domestic situations. The purpose of this Note, then, is to examine the *O'Callahan* holding with regard to its applicability to situations involving crimes of a nonmilitary nature committed by servicemen while serving under peacetime conditions in foreign countries.

I. THE HOLDING AND IMPACT OF O'CALLAHAN

The defendant involved in the *O'Callahan* decision was an Army sergeant stationed in Hawaii; while on leave and in civilian clothes, he broke into a girl's hotel room and assaulted and attempted to rape her. He was convicted at a court-martial on charges of attempted rape, housebreaking, and assault with intent to rape.¹⁰ His conviction was affirmed by the Army Board of Review and by the United States Court of Military Appeals.¹¹ A petition for a writ of habeas corpus was denied by a United States district court without discussion of the merits,¹² and the denial was subsequently affirmed by the United

7. 395 U.S. 258 (1969).

8. 395 U.S. at 272.

9. For an extensive analysis of the practical effects and implications of *O'Callahan v. Parker*, as it applies to the military generally, see Nelson & Westbrook, *supra* note 5. See also Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853; Note, *Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts*, 64 NW. U. L. REV. 930 (1970).

10. These are offenses under the UCMJ arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1964).

11. *United States v. O'Callahan*, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).

12. *United States ex rel. O'Callahan v. Parker*, 256 F. Supp. 679 (M.D. Pa. 1966).

States Court of Appeals for the Third Circuit.¹³ The Supreme Court then granted certiorari to consider the limited issues:

Does a court-martial . . . have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off post and while on leave, thus depriving him of his constitutional rights to indictment by grand jury and trial by a petit jury in a civilian court?¹⁴

In deciding this question, the Court in *O'Callahan* emphasized that the military court-martial lacked important procedural provisions. The Court concluded that the advantages of a grand jury indictment and of trial by jury were not to be denied inexorably to members of the armed forces, but rather that the authority of the military to take jurisdiction is limited to situations in which the denial of such protections is based on the "special needs of the military."¹⁵ Hence, the Court established the "service-connected" test. In so reversing the petitioner's conviction, Justice Douglas stated that certain of the facts incident to O'Callahan's crimes removed those offenses from the scope of service-connection and therefore placed them beyond the limits of the military's judicial competence. Justice Douglas then enumerated those facts:

In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

Finally, we deal with peacetime offenses, not with authority

13. United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968).

14. O'Callahan v. Parker, 393 U.S. 822 (1968).

15. 395 U.S. at 262-67, 272-73.

It should be noted at this point, however, that there may be some confusion as to the exact basis of the Court's objection in *O'Callahan* to the procedural adequacy of courts-martial. While the objection is specifically declared to be founded on the desire to preserve these "two important constitutional guarantees"—that is, the rights to grand-jury indictment and trial by jury—395 U.S. at 273, the majority opinion devoted substantial effort to demonstrating that not only do military courts deny these two specific constitutional safeguards, but also that they are constituted and conducted in such a way as to make them "singularly inept in dealing with the nice subtleties of constitutional law," which are essential to the implementation of a fair trial. 395 U.S. at 265. Thus, while the case might, at first blush, be considered as resting merely on the denial of the rights to grand-jury indictment and jury trial, it appears that the Court relied, at least to some extent, on the inherent infirmities of military tribunals as guarantors of a "fair trial" as that term is understood in the civilian courts. See Nelson & Westbrook, *supra* note 5, at 34 n.167.

stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.¹⁶

As is lamented by Justice Harlan in his dissent,¹⁷ the majority opinion has, by this enumeration, failed to illuminate to any meaningful extent the general criteria for determining when an offense is service-connected. Instead, the listed factors, hinged as they are on the specific facts of the case, suggest at best only particular situations which indicate an absence of military significance. Nonetheless, it seems that if any meaningful principles for the future application of *O'Callahan* are to emerge from the decision, they will have to be gleaned from the implications of these factors. In this connection, two commentators have suggested that to require strict adherence to these specific factors in every case in order to support a finding of no service-connection would be effectively to emasculate the thrust of *O'Callahan* by limiting its application to situations in which the facts involved are substantially similar to the facts of *O'Callahan*.¹⁸ The correct approach, therefore, should not be one of viewing each factor as absolute and indispensable but rather as one of enlisting these factors as aids or weighing elements in the determination of whether the particular crime in question is sufficiently related to the military that it can justify trial in military courts.¹⁹

In order to utilize these factors as meaningful indicators of whether military jurisdiction should attach, it is necessary to understand the underlying concern that was intended to be encompassed by the term "service-connected." As is noted specifically by the majority opinion in *O'Callahan*, the justification for the implementation of a specialized system of military courts is derived from the concept of the "special needs of the military."²⁰ Furthermore, the general thrust of the opinion indicates a concern for the diminution of liberty that is perpetrated by an expansion of jurisdiction beyond the extent required by military exigencies. Thus, the requirement that there be a finding of service-connection in order to warrant the imposition of military jurisdiction seems to embrace the notion that the term "service-connected" embodies an assurance that the crime

16. 395 U.S. at 273-74.

17. 395 U.S. at 274-75.

18. Nelson & Westbrook, *supra* note 5, at 26.

19. In this connection, see Nelson & Westbrook, *supra* note 5, at 29-32, suggesting a "multi-factor" approach to the determination of service-connection.

20. 395 U.S. at 265.

in issue is of sufficient military significance to create a special military need for the disposition of the matter within the military system. In light of this concern for special needs, it appears that the function of the enunciated factors is to focus attention in the particular case on the underlying need of the military for acquiring jurisdiction. Thus, while the factors may be used as guidelines in the determination of service-connection, they should not become ends in themselves.

II. THE "SERVICE-CONNECTED" TEST ABROAD: SCOPE OF THE PROBLEM

As indicated previously, the purpose of this Note is to examine the *O'Callahan* holding in the context of the problems peculiar to its application outside of the territorial confines of the United States. To isolate these particular problems, this Note will assume that the crime or offense in question is sufficiently unrelated to the military that under *O'Callahan* it would clearly be outside of the scope of military jurisdiction but for the fact that it was committed by a serviceman while serving in a foreign country. Thus, it is to be accepted in the discussion of any problem throughout this Note that all of the *O'Callahan* factors necessary to obviate military jurisdiction have been satisfied except those which relate to the fact that the crime was committed beyond the territorial limits of the United States. For example, it can be assumed that the offense was committed off-post, while the offender was out of uniform, and that the alleged crime had no connection whatsoever with the offender's military duties. Moreover, because the present discussion concerns a peacetime situation, two other factors which might otherwise apply in a foreign setting can also be considered inapplicable: it can be assumed that the offense in question was not committed either in "an armed camp under military control, as are some of our far-flung outposts"²¹ or "in the occupied zone of a foreign country."²² These last two factors are rendered inapplicable by delineating the present scope of analysis to include only those powers of Congress that may be exercised in times of peace for the general implementation of "military justice"; excluded are those powers involved in situations of "martial law" and those exercisable under the "war powers."²³

It seems clear, then, that the single factor emerging from the *O'Callahan* decision which does not support the immediate denial of

21. See text accompanying note 16 *supra*.

22. See text accompanying note 16 *supra*.

23. For discussions of the differences among military law or justice, the law of war, and martial law, and of the various constitutional powers under which each is invoked, see Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366-70; Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461, 463 (1961); Nelson & Westbrook, *supra* note 5, at 52-55.

military jurisdiction in the foreign context is that the "[c]ivil courts [may not be] open."²⁴ If military jurisdiction is denied and no adequate alternative civilian tribunal is available, the offense may go unpunished; such a situation could have adverse effects on military discipline and could lead to potential conflicts with the government and people of the host state. If a civilian court is available, however, so that the offender may be prosecuted and punished, the fear of unrestrained criminal activity is largely eradicated. It may become necessary, therefore, in order to avert the attachment of military jurisdiction, to demonstrate the availability of an adequate alternative tribunal which can dispose of the offense involved and can thereby fulfill the military's special needs to preserve discipline and to maintain amicable relations with the host nation.

III. ALTERNATIVE CIVILIAN COURTS AS AN ABSOLUTE REQUIREMENT

Before turning to the question of the accessibility of alternative fora, it is important to examine the underlying assumption that such an alternative is an absolute prerequisite to the evasion of the military's jurisdictional grasp. As stated above, this assumption is founded on the notion that the military's needs for maintaining internal discipline and favorable relations with the host state are sufficient grounds to justify the imposition of a military trial when no civilian courts are available, even though the offense in question is otherwise unrelated to the military. Thus, it is necessary to determine whether this conception is a valid basis for vesting an offense otherwise independent of the military with a sufficient military connection that court-martial jurisdiction is proper. If such a basis is inadequate to justify a military trial, the issue of available alternatives becomes moot and the attachment of military jurisdiction is effectively precluded.

In its consideration of cases involving the *O'Callahan* doctrine, the United States Court of Military Appeals has apparently held that alternative civilian courts are indispensable to the frustration of military jurisdiction. In the initial case construing *O'Callahan*, the military court, in holding that the military is without jurisdiction to try a soldier for crimes committed off-post, while off duty, and against civilians, emphasized that in no fewer than eight instances did Justice Douglas' opinion in *O'Callahan* refer to the availability of civilian courts.²⁵ From this fact the Court of Military Appeals

24. See text accompanying note 16 *supra*.

25. United States v. Borys, 18 U.S.C.M.A. 547, 549, 40 C.M.R. 257 (1969): The grant of certiorari itself refers to crimes cognizable "in a civilian court" and accused's right to "trial by a petit jury in a civilian court," [*O'Callahan v. Parker*, 395 U.S. at 261]; the opinion adverts to the practices "obtaining in the regular courts," *id.*, page 265; to a "civilian trial," *id.*, page 266; to "the 'Ordinary Process of Law,'" *id.*, page 269; to "civil, not military courts," *id.*, page 270; to

concluded that if no service-connection can be found, the defendant "is to be relegated to the civil authorities."²⁶ This basic attitude, stressing the reliance on civilian courts to dispose of matters so excluded from military cognizance, has been crystallized in subsequent decisions of the military court construing *O'Callahan*.²⁷ Typical of this attitude is the court's broad declaration in *United States v. Keaton* that "[e]ssential to this holding [that a court-martial is *without* jurisdiction] is the fact that the crime must be cognizable in the civil courts of the United States. . . ."²⁸ Thus, it appears that the approach adopted by the highest military tribunal absolutely requires the availability of an alternative civilian court in order to overcome the military's special needs.

The Court of Military Appeals is not, of course, the final expositor of the issue.²⁹ Nevertheless, its conclusions are relevant since it is the tribunal which will probably formulate the present operating standards for the "service-connected" test;³⁰ and it is likely that if these standards are at all acceptable within the evolving framework of the *O'Callahan* doctrine, the Supreme Court, as newly constituted, will be reluctant to encroach further on military jurisdiction.³¹ The

"trials . . . in civil courts," *id.*, page 271; and to the "[c]ivil courts" as being open, *id.*, at page 273 (emphasis supplied). Finally, the Court decided that, "since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts." *Id.*, at page 274. (Emphasis supplied.)

26. 18 U.S.C.M.A. at 549.

27. See, e.g., the following decisions in which the availability of alternative civilian courts is listed as a factor leading to the conclusion that the military courts are without jurisdiction: *United States v. McGonical*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Safford*, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969); *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969); *United States v. Armstrong*, 19 U.S.C.M.A. 5, 41 C.M.R. 5 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); *United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969); *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); *United States v. Chandler*, 18 U.S.C.M.A. 593, 40 C.M.R. 305 (1969); *United States v. Prather*, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969).

28. 19 U.S.C.M.A. 64, 65, 41 C.M.R. 64 (1969).

29. Since the issue is a constitutional one, the ultimate authority for determining it lies in the United States Supreme Court. U.S. CONST. art. III, § 2.

30. Since further interpretation of *O'Callahan* will take place in a military context, it is in that area that future cases will arise and consequently final exposition *within* the military will be made by the Court of Military Appeals. Interpretation of *O'Callahan* by the military court has already preceded such disposition in the federal district courts. See notes 25-28 *supra* and accompanying text.

31. At the time of the decision in *O'Callahan*, Justice Fortas had resigned, leaving only eight Justices to render the decision. There were five Justices constituting the majority—Justices Douglas, Black, Brennan, Marshall, and Chief Justice Warren. Since that time, Chief Justice Warren's resignation has been accepted and Chief Justice Burger has succeeded him to the bench. At present, no one has been confirmed as a successor to Justice Fortas' seat. It is to be noted that Chief Justice Burger has expressed less than a receptive attitude toward limiting military jurisdiction. See his

military court's holdings with regard to civilian alternatives, however, appear to have been based merely on the literal language of *O'Callahan* and do not seem to have made any meaningful analysis of the underlying concepts.³² Thus, in light of the limited conclusiveness of the military court's decisions, and in light of the somewhat sketchy analysis which it employed, it becomes necessary to ascertain whether the Court of Military Appeals' absolute requirement for an alternative civilian forum is an acceptable consequence of *O'Callahan*.

The series of Supreme Court decisions from which *O'Callahan* can fairly be said to have descended³³ may arguably be seen as support for the proposition that alternative fora are *not* absolutely necessary to divest the military of jurisdiction over crimes committed by servicemen outside of the United States. This line of cases, commonly referred to as the "*Reid* line," in effect prohibited the military from taking jurisdiction over crimes committed by civilians accompanying the armed forces abroad.³⁴ The crimes involved in those cases, like that in *O'Callahan*, were committed in foreign countries and at least implicitly involved the question whether there were alternative courts in which the crimes could be tried. The Supreme Court, however, was not compelled to discuss at any length the problem of alternative tribunals, even though the inescapable result was that the offenses involved went unpunished.³⁵ Instead, the Court apparently was concerned only with the fact that the civilians who had committed the crimes did not possess the requisite status as members of the armed forces. Although the effect on discipline in these cases would admittedly have been less severe than it was in *O'Callahan*, there nonetheless was at least some justification for military jurisdiction in the *Reid* line of cases, since an adverse effect on relations with the host country might have resulted from allowing

dissent as a judge of the Court of Appeals for the District of Columbia Circuit in *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927, 933 (D.C. Cir. 1958), *affd.*, 361 U.S. 281 (1960).

32. See, e.g., the analysis of the court in *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). The decision of the issue in this case was not necessary to the disposition of the case. 19 U.S.C.M.A. at 67. See also *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969), and the cases listed in note 27 *supra*.

33. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Haten*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). The importance of these cases to the decision of *O'Callahan* is exemplified by the extensive reference to them in the opinion. 395 U.S. at 262-67.

34. In *Quarles*, the military was denied jurisdiction over an ex-serviceman even for crimes committed while he was in the military.

35. See Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 435-38 (1960). According to former Chief Justice Warren, however, the Court apparently was not totally insensitive to the problems created by the restriction of court-martial jurisdiction. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 195 (1962).

the crimes to go unpunished. It appears, however, that the Court was largely unconcerned with the satisfaction of the military's special needs thus created by its decisions. By permitting the crimes committed in those cases to go uncorrected, the Court seems to have indicated that, even when civil courts are not accessible, these special needs of the military are not sufficiently persuasive to justify the extension of military jurisdiction to crimes committed by civilians.

Despite the Court's apparent indifference in the past toward the unavailability of alternative courts for the prosecution of the crimes in these analogous situations, Justice Douglas emphasized in the *O'Callahan* opinion that the availability of alternative civilian courts was a crucial consideration in determining service-connection.³⁶ This apparent departure from precedent can, however, be explained by the differences in the bases of analysis in each respective situation. With respect to crimes committed by civilians, apparently no amount of special needs may confer jurisdiction on the military tribunals, because the crucial determination in that situation is merely whether the offender possesses the requisite status as a member of the armed forces.³⁷ In the analysis of offenses by servicemen, however, such status has already been ascertained and the question is one of military need. Since the consideration of alternative fora as an element in the determination of service-connection stems from the concept of special military need, it appears that in the area of crimes committed by civilians, in which the military's special needs are irrelevant, the availability of alternative fora is likewise irrelevant. Consequently, the distinction in status between a civilian and a serviceman seems to preclude the use of the *Reid* line to argue that an adequate alternative forum is not a prerequisite to depriving the military of jurisdiction.

Thus, in light of the frequent mention in *O'Callahan* of available civilian tribunals, in light of the emphasis which the Court of Military Appeals has placed on the availability of these tribunals, and in light of the very real need to control discipline both within the military structure and within the foreign host nation, it does not seem improvident to conclude that the availability of a civilian disciplinary tribunal is absolutely required in order to remove the offense in question from the realm of military jurisdiction.

IV. THE EFFECT OF STATUS OF FORCES AGREEMENTS

The location of the crime in a foreign nation raises a supplementary issue which must be examined prior to undertaking an analysis of what alternative civilian tribunals are available. That

36. See note 25 *supra* and accompanying text.

37. See note 6 *supra* and accompanying text. See also *Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969) (strictly construing the dicta in *O'Callahan* that civilians may never be tried in military courts); *Nelson & Westbrook*, *supra* note 5, at 54-55.

further issue is prompted by the Status of Forces Agreements (SOFA) which are in effect between the United States and virtually every nation in which American troops are stationed.³⁸

The SOFA which has been in effect for the longest period of time, and the one which has served as a model for most other SOFAs, is the NATO SOFA.³⁹ The NATO SOFA provides that jurisdiction over crimes committed in foreign countries by members of visiting forces be allocated between the sending and receiving states. The agreement confers on each respective government exclusive jurisdiction over crimes which are cognizable under that government's law, but which are not cognizable under the law of the other nation.⁴⁰ Over all other crimes, concurrent jurisdiction by both the sending and receiving states is recognized, with primary—or first-choice—jurisdiction designated according to specified criteria. Under these criteria, the host state is vested with primary jurisdiction over all such offenses unless (a) the offense is “solely against the property or security of [the sending] State, or [is] solely against the person or property of another member of the force or civilian component of that State or of a dependent,” or (b) the offense arises out of the “performance of official duty.”⁴¹

38. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces [hereinafter NATO SOFA], June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2845 (effective Aug. 23, 1953); Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, [1963] 14 U.S.R. 506, T.I.A.S. No. 5394 (effective May 9, 1963), *as amended*, July 12, 1968, T.I.A.S. No. 6527; Agreement with the Republic of China on the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, [1966] 17 U.S.T. 373, T.I.A.S. No. 5968 (effective April 12, 1966); Agreement Under Art. VI of the Treaty of Mutual Cooperation and Security with Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510 (effective June 23, 1960); Agreement Under Art. IV of the Mutual Defense Treaty with the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127 (effective Feb. 9, 1967). For a general discussion of Status of Forces Agreements [hereinafter SOFA], see Carlisle, *Official Duty Certificates Under Status of Forces Agreements*, 20 JAG J. 95 (1966).

39. See note 38 *supra*. This is the SOFA existing between the United States and every NATO nation in which the United States has troops stationed. Since SOFAs in effect with countries other than NATO countries are based largely on this NATO SOFA, this agreement should be considered as in effect throughout the remainder of this Note, except when otherwise designated.

40. NATO SOFA art. VII, ¶ 2:

(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving state.

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

41. NATO SOFA art. VII, ¶ 3:

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

These standards established by the NATO SOFA are obviously meant to allow the military authorities of the sending state to retain control over offenses relating primarily to military matters. They seem to coincide, at least partially, with the standards articulated by Justice Douglas for establishing service-connection.⁴² Although the similarities between the two standards are less than complete, it seems that, by following the SOFA provisions, the United States has been practicing a form of the "service-connected" test ever since the adoption of the NATO SOFA in 1953. The question emerging from these similarities is whether the differences between the two sets of standards are sufficiently immaterial to make feasible the satisfaction of the *O'Callahan* requirements merely by application of the NATO SOFA provisions. A finding of sufficient correlation in this regard would make largely irrelevant any further discussion concerning the availability of alternative tribunals, because the existing SOFA system, which is apparently constitutionally valid,⁴³ would operate to alleviate the concerns encompassed by such a discussion.

There are several objections to utilizing the NATO SOFA in this manner. The United States, under the NATO SOFA, has retained concurrent jurisdiction over a wide range of offenses and has, as a matter of course, requested waiver of jurisdiction by the host state in almost all cases.⁴⁴ Moreover, the host state is under no compulsion to exercise its jurisdiction, and in fact it is often reluctant to do so, especially when the crimes are primarily against Amer-

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

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

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

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

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

42. See text accompanying note 16 *supra*.

43. *Wilson v. Girard*, 354 U.S. 524 (1957). See discussion in text accompanying notes 64-70 *infra*.

44. See Carlisle, *supra* note 38, at 96; Levie, *The NATO Status of Forces Agreement: Legal Safeguards for American Servicemen*, 44 A.B.A.J. 322 (1958). The NATO SOFA provides for the recognition of such waivers:

The authorities of the State having the primary right [to jurisdiction] shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Art. VII, ¶ 3(c).

ican citizens or property or otherwise inimical to American interests.⁴⁵ If the NATO SOFA should be applied instead of the *O'Callahan* "service-connected" test, such waivers of jurisdiction would greatly increase the scope of American military jurisdiction, thereby frustrating the primary aim of *O'Callahan*. Even if this increased scope of military jurisdiction could be eliminated by simply abandoning the waiver requests, there would still persist a "jurisdictional gap" caused by the failure of local authorities to prosecute.⁴⁶ Under the "special needs" approach, it does not seem that foreign relations would be damaged by such a failure to prosecute, since the foreign nation could not realistically complain about disruptive behavior that is occasioned by its own failure to acquire jurisdiction. Nonetheless, internal disciplinary problems in the military would remain. Furthermore, foreign relations could quite conceivably be damaged by the increased burden placed on local foreign courts by the sudden abandonment of waiver requests. While there are difficulties in evaluating empirically the effects of attempting to implement *O'Callahan* by utilizing the SOFAs,⁴⁷ it appears from this cursory analysis that many of the practical problems which the "service-connected" test is intended to remedy could be expected to persevere as a result of the application of the NATO SOFA provisions.

Moreover, it appears that in practice the determination of a military connection under the existing provisions of the SOFAs has not rested on particularly meaningful criteria. This inefficient application of the SOFA provisions has resulted largely from the indiscriminate issuance by military commanders of "official duty certificates."⁴⁸ The history behind the negotiation of the NATO SOFA indicates that as differences between nations arose concerning the proper allocation of jurisdiction in particular cases, the determination by the sending state that the crime was committed by the serviceman in the performance of an "official duty" was to take precedence, with areas of grave differences to be decided by diplomatic resolution.⁴⁹ In carrying out this function, some American military commanders have developed the practice of issuing certificates of official duty somewhat indiscriminately and without formulating any distinct bases for their decisions. As a result, recourse

45. See Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 276-80 (1967). See also Girard, *supra* note 23, at 505-06.

46. See discussion of the jurisdictional gap in text accompanying note 98 *infra*.

47. A full-scale empirical analysis is beyond the scope of this Note. However, the data compiled in Ehrenhaft, *supra* note 45, and its analysis at 276-78, may be of some assistance in making such an evaluation.

48. See Carlisle, *supra* note 38; Ward, *Criminal Law and Jurisdiction over American Servicemen in Japan*, 52 A.B.A.J. 61, 62 (1966).

49. Carlisle, *supra* note 38, at 96.

to diplomatic channels has often been required, and the smooth functioning of the SOFA provisions has accordingly been impaired.⁵⁰ While in some instances mechanisms for handling these disputes efficiently have developed,⁵¹ it seems that the SOFA provisions, as presently employed, may be expected only to *approximate* the *O'Callahan* standards. Although reform in the operation of the system appears to be long overdue,⁵² an unrestricted recommendation of the NATO SOFA as a method of effecting the "service-connected" standards of *O'Callahan* must await the implementation and scrutiny of such reforms.

V. FOREIGN CIVILIAN COURTS AS AVAILABLE ALTERNATIVE TRIBUNALS

Having disposed of the preliminary issues, the focus of attention may now be turned to the question of the availability of alternative civilian courts. Since the absolute requirement for an alternative tribunal is founded on the proposition that such courts are necessary to obviate the military's special needs of preserving discipline and maintaining favorable relations with the host state, it follows that in order for the alternative tribunal invoked to supply a satisfactory basis for the denial of court-martial jurisdiction, that tribunal must be constituted so as to satisfy these military needs. Thus, the requirement that an alternative forum be available in order to justify the frustration of military jurisdiction seems to contemplate more than a theoretical alternative. It seems also to require a tribunal that is competent to meet the special military needs and thereby to remove the necessity of disciplinary judicial procedures within the military. The approach to be followed, therefore, in the analysis of the alternative-forum issue, must include not only the initial search for available civilian courts, but also an examination of the abilities of such courts to fulfill the special needs of the military.

In the initial search for potential alternative courts, the tribunal that emerges from the NATO SOFA's allocations of jurisdiction as most obvious is the civilian court system of the host country. For all but that narrow range of offenses over which the United States has retained exclusive jurisdiction,⁵³ the SOFA provisions call either for exclusive jurisdiction in the host country or for concurrent jurisdiction in the host and sending countries.⁵⁴ Thus, it appears

50. *Id.*

51. In Japan, for example, when notice is given by Japanese officials of their nonconcurrence in American determinations of official duty, the issue is submitted for resolution to a joint committee composed of high-ranking American and Japanese officials. See Ward, *supra* note 48, at 62.

52. See Carlisle, *supra* note 38.

53. See the NATO SOFA provisions at note 40 *supra*.

54. See the NATO SOFA provisions at notes 40-41 *supra*.

that these foreign tribunals are readily available for the prosecution of crimes unrelated to military service.

Prior to an examination of the internal qualifications of these courts, it must be determined whether these foreign tribunals fall within the range of civilian courts that was contemplated by the language of *O'Callahan* or whether that opinion limits the acceptable range of choices to courts within the United States. Since the majority opinion in *O'Callahan* referred only to "civilian courts" without specifying any particular tribunals as acceptable,⁵⁵ there emerges from the decision no apparent reason for restricting the acceptable alternatives to American tribunals. Indeed, the Court of Military Appeals, in its decision in *United States v. Borys*,⁵⁶ stressed that Justice Douglas had written of *civilian* courts in contrast to *military* courts; and it thereby implied that foreign civilian courts might fall within the range of acceptable alternatives.⁵⁷ The military court, however, has subsequently retreated from this potentially liberal interpretation of *O'Callahan*⁵⁸ and has stated in *United States v. Keaton*⁵⁹ that in order to negate court-martial jurisdiction, it is essential that the offense "be cognizable in the civil courts of the United States, . . . and that such courts be open and functioning."⁶⁰ This restrictive interpretation by the Court of Military Appeals has apparently stemmed from the conclusion that foreign courts are procedurally inadequate to supplant military jurisdiction, because they fail to guarantee the "benefits of indictment and trial by jury."⁶¹ The military court reasoned that, since a similar failure had been the basis of the objection to the military court-martial in *O'Callahan*, a tribunal providing equally deficient procedures could not serve as a viable alternative. In light of the special-needs rationale of the "service-connected" test, however, it is not readily apparent what military exigencies are satisfied by the imposition of this limitation on acceptable alternative courts. Nonetheless, the indisputable logic of the Court of Military Appeals persists. Because the military court's statement in *Keaton* concerning alternative tribunals was not neces-

55. See note 25 *supra* and accompanying text.

56. 18 U.S.C.M.A. 547, 40 C.M.R. 257 (1969). See note 25 *supra* and accompanying text.

57. 18 U.S.C.M.A. at 549.

58. While the language quoted seems to indicate the liberality of the court in *Borys*, placing that language in the context of the entire opinion may cast doubts on the validity of this conclusion.

59. 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). *Accord*, *United States v. Blackwell*, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970); *United States v. Bryan*, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970); *United States v. Easter*, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); *United States v. Stevenson*, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969).

60. 19 U.S.C.M.A. at 65.

61. 19 U.S.C.M.A. at 67.

sary to the decision,⁶² and because the implication of that statement would place a severe restriction on the application of *O'Callahan* to crimes committed by servicemen in foreign countries, it is essential to examine the validity of the military court's conclusion.⁶³

A. *The Need To Examine Comparative Procedures*

At the outset it should be asked whether a comparison of the procedures of foreign courts with those of courts in the United States is a relevant aspect of the "service-connected" test. As noted by the Court of Military Appeals, *O'Callahan* is based on the determination that the American court-martial is procedurally deficient and therefore should be denied jurisdiction over the prosecution of crimes so long as no special military necessities outweigh this inherent procedural incompetency. From this basis for decision develops the initial tendency to follow the military court's approach which requires that a procedurally superior court be available if the court martial is to be denied. The emphasis of past Supreme Court decisions, however, seems to suggest that this preoccupation with comparative procedures is not an appropriate component of the analysis.

The *O'Callahan* opinion itself, as supported by the conclusions of the *Reid* line of cases,⁶⁴ indicates an apparent disregard for the procedural adequacy of alternative courts. While the Court has expressed in these cases its dissatisfaction with the procedural guarantees provided by the military courts,⁶⁵ it has voiced no corresponding concern for rights available in alternative courts.⁶⁶ The Court seems to be more concerned with imposing restrictions on the extension of military jurisdiction than with ensuring a procedurally competent tribunal for the trial of the accused.

The argument that the procedural adequacy of foreign courts need not be examined is supported by at least one other important

62. In *Keaton*, the crime committed was of a type that had previously been determined to be service-connected, and consequently court-martial jurisdiction was established. Although the court recognized that it could "leave the matter there," 19 U.S.C.M.A. at 67, it nonetheless advanced the dicta that foreign courts are not acceptable alternatives.

63. This Note will examine the procedural adequacy of foreign courts only insofar as those courts may serve as a basis for restricting military jurisdiction. No attempt will be made to examine foreign courts for the purpose of passing judgment on the propriety of granting those courts original jurisdiction over American servicemen.

64. See note 33 *supra*.

65. See, e.g., the quote from *Quarles* cited in note 5 *supra*.

66. A forceful argument can be made, however, that the *Reid* cases are distinguishable because they involved status rather than service-connection. See text accompanying note 34 *supra*. Furthermore, there would seem to have been no need for Justice Douglas to mention specifically the adequacy of procedures in *O'Callahan*, since the result of the denial of court-martial jurisdiction in that case was that the petitioner then became subject to the jurisdiction of a federal district court.

Supreme Court decision. In that case, *Wilson v. Girard*,⁶⁷ the Court upheld a SOFA which provided for the waiver of jurisdiction by the United States over American military personnel serving in Japan. Indeed, the mere existence of the SOFA provisions, with their allocations of criminal jurisdiction to the courts of foreign nations, seems to indicate an acceptance by the United States of the courts of these countries as permissible tribunals in which to prosecute American offenders.⁶⁸ This inference is strengthened by the decision in *Girard*, in which it was held constitutional for the United States to waive its claim of primary jurisdiction in a case over which it held concurrent jurisdiction with Japan, even though such a waiver would surrender the accused soldier to Japanese authorities for trial.⁶⁹ Both the SOFAs and the *Girard* decision, then, serve to sustain the conclusion gleaned from *O'Callahan* and the *Reid* line that comparing procedures is irrelevant.

The decision in *Girard* was based on the holding that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction,"⁷⁰ and that since Japan had retained concurrent jurisdiction over the crimes involved, the waiver provision was constitutional as applied. There was no discussion of the procedural safeguards afforded by the Japanese tribunals, much less a comparison of Japanese procedural guarantees with those constitutionally mandated in the United States; rather, the decision seems to have been on the above-stated broader principles of international law. Thus, it appears from the reasoning of *Wilson v.*

67. 354 U.S. 524 (1957).

68. It should be noted that the NATO SOFA seeks to guarantee an accused at least some degree of procedural fairness in foreign courts. Art. VII, ¶ 9 provides:

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

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the sending State and, when rules of the court permit, to have such a representative present at his trial.

69. The Japanese SOFA, Protocol To Amend Art. XVII of the Administrative Agreement Under Art. III of the Security Treaty Between the United States of America and Japan, Sept. 29, 1953, [1953] 4 U.S.T. 1846, T.I.A.S. No. 2848, is substantially similar, in all relevant respects, to the comparable provisions of the NATO SOFA.

70. 354 U.S. at 529. This issue was considered a difficult one prior to this per curiam decision. See *Re, The NATO Status of Forces Agreement and International Law*, 50 NW. U. L. REV. 349 (1955).

Girard that the adequacy of foreign procedural safeguards is to be considered irrelevant and that the Supreme Court has by negative implication accepted foreign civil courts, as restricted by the procedural guarantees of the SOFAs,⁷¹ as valid alternatives to trial by military authorities.

Perhaps more important than the literal support provided by these cases is the fact that the concept of the irrelevancy of alternative procedures seems to be consistent with the special-needs rationale for applying the "service-connected" test of *O'Callahan*. It appears that no overwhelming need of the military is satisfied by the presence of constitutional safeguards in the foreign tribunals. Indeed, fear of prosecution in procedurally unfair foreign tribunals could have a deterrent effect upon criminal acts and could thereby enhance discipline. While it is true that flagrant violations of the basic right of an accused might arguably have a depressing effect on morale, it must be remembered that, at the present time, certain minimal safeguards must be provided in foreign courts, pursuant to the Status of Forces Agreements.⁷² Thus, in light of the practicalities of the present situation, military expediency does not appear to require a determination of the adequacy of the safeguards provided in those courts. In summary, the emerging attitude of the Supreme Court concerning the irrelevancy of comparative procedures, the apparent constitutional validity of the waiver of jurisdiction under the SOFA provisions, and the compatibility of the special-needs standards with trial in foreign courts, all serve to create a strong argument that a comparison of foreign procedures with those provided by the military is not a necessary part of the "service-connected" test.

Despite the force of these contentions, however, several particularly persuasive practical considerations militate against the results suggested by the above discussion. First, an anomaly is created by failing to undertake a comparison of procedural rights. The Court in *O'Callahan* seems to have determined that whenever the crime involved bears no relationship to the military, a court-martial is in derogation of the accused's specific constitutional rights to a grand-jury indictment and to trial by jury. Yet in such circumstances a foreign tribunal becomes the forum in which the offender is tried; and even though the decision in *Wilson v. Girard* apparently recognized trial in foreign courts as an acceptable alternative to a military trial,⁷³ these tribunals nonetheless frequently deny these same specific rights.⁷⁴ Thus, the offender is put into the seemingly anomalous position of being denied one forum solely because it fails to provide

71. See note 68 *supra*, spelling out these procedural protections.

72. *Id.*

73. See text accompanying notes 67-71 *supra*.

74. See Schwenk *Comparative Study of the Law of Criminal Procedure in NATO Countries Under the NATO Status of Forces Agreement*, 35 N.C. L. REV. 358 (1957).

the necessary procedural safeguards, and being placed into another forum which may fail to provide the same safeguards. If the denial of these two specific rights—grand-jury indictment and trial by jury—is considered to be the basis for limiting military jurisdiction, it is unclear what rights of the accused are being protected by such a limitation when the accused will be denied the same rights regardless of the forum utilized.

If the *O'Callahan* decision can be considered to rest not on the fact that a court-martial may deny an accused specifically enumerated rights, but rather on the broader grounds of the inherent inability of military tribunals to provide a trial that is fundamentally fair,⁷⁵ less of an enigma is created. Under such an interpretation, it appears that while the procedures employed in the foreign courts may not conform to the specifications of the American Constitution, they would nevertheless be subject to an analysis of fairness of the resulting trials. Even if the decision is deemed to have been based on these broader grounds, however, concern for the rights of the accused seems to require an examination of the foreign courts in order to ensure that they can provide the fair trial that the military has been adjudged incapable of guaranteeing.

Thus, in many circumstances, there is a seemingly irreconcilable conflict between the desire to contain military jurisdiction within its permissible sphere and the inability to protect the procedural rights of the accused by so limiting the military's jurisdiction. From this conflict emerges the question whether the often negligible advantages gained by restricting court-martial jurisdiction can in a particular country justify that restriction. In the absence of a comparison of procedures in order to determine the extent of protection afforded to the accused in each system, the denial of court-martial jurisdiction for the mere sake of restricting the range of military cognizance seems to be a futile effort.

A second practical objection to the failure to investigate alternative procedures is derived from the fact that, in many instances, servicemen are in a foreign country, if not against their will, at least not of their own volition. Finding themselves so situated, they find further that they have become subject in all their nonservice activities to a foreign tribunal which may offer them even fewer safeguards at trial than would a military tribunal. This situation is aggravated in the case of a draftee who not only is abroad against his will, but also is in the armed forces involuntarily. The inequities created by these circumstances call forth the basic question whether the United States can or should be permitted to compel its servicemen to become subject to judicial procedures not responsive to the limitations of the American Constitution. While the constitutionality of such a sub-

75. See note 15 *supra*.

jection has apparently been upheld by *Wilson v. Girard*,⁷⁶ the inequities of practical application are not thereby remedied, and these bothersome ethical questions persist.

Third, practical consideration must be given to the influence exerted by the Court of Military Appeals in adopting the position that foreign courts are not acceptable alternatives because they fail to provide those critical procedural safeguards found to be lacking in military courts.⁷⁷ From this determination, it is clear that the Court of Military Appeals has adopted the view that *O'Callahan* rested to an extent on the availability of a *constitutionally adequate* civil court.⁷⁸ While the relative importance of the military court's decision is not easily ascertained, it may safely be assumed that its holdings will not fail to exert some degree of influence on the ultimate disposition of the matter⁷⁹ and will thus strengthen the case for requiring a comparison of procedures.

Therefore, despite the notion that the military's special needs do not seem to require constitutionally sufficient alternatives, and despite at least some case authority for the proposition that comparative procedures are irrelevant to jurisdictional decisions, there are several serious problems presented by a proposal to divest the military of jurisdiction without considering the constitutional adequacy of procedural safeguards provided by foreign civilian courts: (1) the anomaly of denying one court in deference to another which would be deemed inadequate under similar scrutinization; (2) the dubious propriety of compelling persons to serve in places where no constitutionally adequate tribunals are available; and (3) the difficulty in reconciling a proposal to ignore comparative procedures with decisions by the Court of Military Appeals which read *O'Callahan* to require an alternative forum that provides for the specific rights of grand-jury indictment and trial by jury. It seems, then, that before deciding to divest the military of jurisdiction, there must be an examination of procedures afforded by the foreign courts.⁸⁰

B. *Procedural Safeguards in Foreign Courts*

As is shown by the above analysis, there are formidable arguments both for and against requiring scrutinization of the procedural rights provided by alternative courts. The practical significance of this confrontation, however, may arguably be diminished by the existence

76. See the discussion in text accompanying note 67 *supra*.

77. See text accompanying notes 59-61 *supra*.

78. *Id.*

79. See text accompanying notes 29-30 *supra*.

80. In view of the additional judicial resources which would be required in order to undertake a meaningful comparative analysis of foreign procedures, the possibility exists that some courts may simply avoid difficulties by ruling in favor of military jurisdiction.

of two factors within the system of Status of Forces Agreements now in effect. The first factor is that the NATO SOFA and the other similar SOFAs contain a section for certain fundamental procedural guarantees. The second mitigating factor is the high degree of sophistication reached in the judicial procedures of many countries in which American troops are stationed.

In this connection, several commentators have attempted to demonstrate that the combination of these two factors has largely eliminated fears of an unjust trial in a foreign court.⁸¹ While several basic constitutional guarantees are omitted from the SOFA provisions,⁸² objections based on these omissions are largely met by the fact that a "highly developed system of jurisprudence"⁸³ prevails in many of the countries involved.⁸⁴ Indeed, an extensive study, made in 1957, of comparative criminal procedures in the NATO countries concluded that the over-all protection provided in trials in those countries is "on balance equal to that granted by the U.S. Constitution."⁸⁵

Moreover, to the extent that the SOFA and existing procedures fail to provide adequate protection to an American accused of a crime in a foreign country, the United States is not helpless to protect him. Primary in the assurance that travesties of justice do not proceed unchecked is a practice that has evolved from the provision in the NATO SOFA which entitles an accused in a foreign court to the right "to communicate with a representative of the Government of the sending State and when the rules of the court permit, to have such a representative present at his trial."⁸⁶ In American practice, the representative allowed under this section has been referred to as a "trial observer."⁸⁷ Despite the theoretical possibility that the host nation could legally exclude the trial observer, it appears that such observers are rarely barred from foreign judicial proceedings⁸⁸ and that therefore they are available for protection in the vast majority of cases. While it has been suggested that trial observers could be

81. See Levie, *The NATO Status of Forces Agreement: Legal Safeguards for American Servicemen*, 44 A.B.A.J. 322 (1958); Ning, *Due Process and the Sino-American Status of Forces Amendment*, 17 AM. J. COMP. L. 94 (1969); Schwenk, *supra* note 74; Ward, *Criminal Law and Jurisdiction over American Servicemen in Japan*, 52 A.B.A.J. 61 (1966).

82. 99 CONG. REC. 8732 (1953) (remarks of Senator McCarran).

83. See Re, *supra* note 70, at 360.

84. See Levie, *supra* note 81; Re, *supra* note 70; Schwenk, *supra* note 74; Ward, *supra* note 81. It can be contended, however, that a highly developed system of jurisprudence, at least by American standards, exists only in Western countries. See text accompanying notes 109-14 *infra*.

85. See Schwenk, *supra* note 74, at 378.

86. NATO SOFA art. VII, ¶ 9(g). See note 68 *supra*.

87. Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer*, 34 MILITARY L. REV. 1 (1966), provides an extensive study of the functions of the trial observer.

88. Levie, *supra* note 81, at 323-24.

utilized much more effectively than they are under present practice,⁸⁹ they do serve to ensure that, as a minimum, someone is present at the trial who is presumably trained to recognize encroachments on the rights of the accused and whose duty it is to report such deviations to proper United States authorities in order that corrective steps may be taken.⁹⁰

If deviations from the prescribed SOFA procedures are exposed, further measures for the rectification of these departures must be instituted. One obvious measure is diplomatic intervention.⁹¹ While this extreme measure seems to be justified to correct only the very serious departures from required procedures, it appears to be an effective tool in ensuring that those deviations are corrected. Also available is the provision in the NATO SOFA which requires the host country with primary jurisdiction to give "sympathetic consideration" to a request by the sending state for a waiver of jurisdiction, so long as the sending state "considers such waiver to be of particular importance."⁹² Therefore, in situations in which there is concurrent jurisdiction, this fortified request for a waiver seems to provide an effective safeguard against digressions from the required procedure. As an additional protection, the NATO SOFA provides that when such waivers are denied, the military commanders are to seek recourse through diplomatic channels.⁹³ Although these safeguards—the use of a trial observer, diplomatic intervention, and waiver request—do not fulfill the standards of the United States Constitution, they serve at least to enhance the opportunity for an accused serviceman to receive a fair trial in a foreign court.

As a practical matter, then, it appears that the combination of the various safeguards presented above have resulted in a generally operable and acceptable system and that the rights of an accused are not appreciably diminished in a trial in a foreign court. The judicial objection to that system has been virtually nonexistent;⁹⁴ and when

89. See Williams, *supra* note 87.

90. *Id.*

91. Girard, *supra* note 23, at 507 n.215.

92. NATO SOFA art. VII, ¶ 3(c), *supra* note 41.

93. See Levie, *supra* note 81, at 322. Since the sending state has jurisdiction only over persons "subject to the military law of that State" [NATO SOFA art. VII, ¶ 1(a) (emphasis added)], there seems to be some question whether the United States may rightfully request a waiver of jurisdiction when the military courts are closed. It has been suggested—and it seems validly so—that even if the military courts are closed, jurisdiction is retained for purposes of dispensing administrative sanctions, and that a waiver request may be based on that jurisdiction. See Williams, *supra* note 87, at 17. Moreover, if an adequate foreign procedure is determined to be a requisite element of the alternative-forum requirement, military jurisdiction would be reinstated when the foreign court fails to provide the required procedures and the waiver request could be based thereon.

94. There appear to be no recorded cases holding invalid a SOFA's allocation of jurisdiction.

the United States' toleration of foreign jurisdiction has been questioned, the constitutional validity of the SOFA provisions has been upheld.⁹⁵ Thus, it might seem that since the system, as it has operated, has apparently been adjudged constitutionally acceptable, there is little remaining objection to the relegation of a few more servicemen to the jurisdiction of foreign tribunals by the application abroad of the "service-connected" test of *O'Callahan*.

On the other hand, the effectiveness of these factors in mitigating objections to foreign procedures has been significantly diminished by the relatively recent constitutional developments in the area of procedural due process. Before *Reid*, the Supreme Court had adhered to a subjective interpretation of what rights were fundamental to a fair trial; there was no necessary correlation between the rights imposed by the Bill of Rights on the federal government and those held applicable to the states by the due process clause of the fourteenth amendment.⁹⁶ Indeed, the only comprehensive study concerning the constitutional adequacy of foreign procedures—the study which adopted the conclusion that foreign procedures are substantially equal to those exercised by the states⁹⁷—was based on this interpretation of the fourteenth amendment.⁹⁸ In recent years, however, it has been determined, by a process of selective incorporation, that certain of the procedural guarantees of the Bill of Rights are a fortiori essential to a fair trial and are thereby incorporated into the due process clause of the fourteenth amendment.⁹⁹ Substantially all of the procedural requirements of the Bill of Rights are now considered to be vital to the concept of a fair trial and have been imposed on the states by this process.¹⁰⁰

95. *Wilson v. Girard*, 354 U.S. 524 (1957).

96. The following cases are frequently cited in support of this proposition. Each held that a specific right imposed in federal courts by the Bill of Rights was not fundamental to the guarantee of a fair trial nor "implicit in the concept of ordered liberty" [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)], so as to make it applicable to the states under the due process clause of the fourteenth amendment: *Irvine v. California*, 347 U.S. 128 (1954) (exclusion of evidence obtained by unreasonable search and seizure); *Adamson v. California*, 332 U.S. 46 (1947) (privilege against self-incrimination); *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900) (trial by twelve-man jury); *Hurtado v. California*, 110 U.S. 516 (1884) (indictment by grand jury).

97. See note 85 *supra* and accompanying text.

98. See Schwenk, *supra* note 74.

99. Apparently, the first Supreme Court case adopting the incorporation doctrine was *Malloy v. Hogan*, 378 U.S. 1 (1964), which overruled *Twining* and *Adamson*. In that case, the Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." 378 U.S. at 6. For subsequent cases utilizing the doctrine, see note 100 *infra*.

100. See the discussion of *Malloy v. Hogan*, 379 U.S. 1 (1964), in note 99 *supra*. See also the following cases making the indicated rights compulsory on the states: *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury in criminal cases); *Pointer v. Texas*, 380 U.S. 400 (1965)

The importance for present purposes of this change in the attitude of the Supreme Court is embodied in the concept of a fair trial as it is applied to foreign courts. While foreign civil courts may once have been considered to have provided fair trials, it appears that due to the failure of those courts to provide for the specific guarantees of the American Bill of Rights, the resulting trials would not be considered fair under the recent Supreme Court interpretations. Hence, much of the importance of what was written about the fairness of treatment afforded American servicemen in foreign courts has been obviated by the new aspects attributed to the due process clause. Nonetheless, even though applicable foreign procedures may fall short of the recently developed constitutional standards, the impact of the earlier attempts of foreign countries to establish in civilian trials some of the basic elements of fairness remains viable to mitigate, at least to some degree, the inconsistencies encountered in advocating the irrelevancy of investigating the procedural provisions of foreign courts.

C. Acceptability of Foreign Civil Courts as Alternative Tribunals

A comparison between trial in American military courts and that in foreign civilian courts leaves one, at best, with a choice between two constitutionally inadequate tribunals. Even where foreign legal systems are roughly similar to the American model, such as in the NATO countries, it seems that foreign courts possess certain procedural defects which render them at least as objectionable as American courts-martial. These constitutional infirmities are emphasized by the recent trend of decisions incorporating selected provisions of the Bill of Rights into the requirements of the due process clause of the fourteenth amendment. Indeed, the procedural defects in foreign courts render those courts susceptible to the same criticism that was levelled at military courts in *O'Callahan*. The Court's objection in that case to military procedure rested largely on the incompetency of military courts to deal with the "nice subtleties of constitutional law";¹⁰¹ and it is doubtful that foreign courts, regardless of their basic fairness, are any more adept than are military courts at dealing with those "nice subtleties." Basically, then, foreign and military tribunals are comparable and equally inadequate.

(right of confrontation under sixth amendment); *Griffin v. California*, 380 U.S. 609 (1965) (privilege against compulsory self-incrimination—adverse comment on failure to testify not permitted); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unlawful search and seizure). Note that the requirement for indictment by grand jury has not yet been so incorporated. Thus, although the absence of this guarantee was a basic reason in *O'Callahan* for objection to the military trial, it has not yet been made compulsory on the states.

101. 395 U.S. at 265.

Faced with a choice between two inadequate tribunals, the initial urge may be to select the foreign civilian court. The allocation of jurisdiction by the Status of Forces Agreements seems to provide a somewhat workable method for defining service-connection abroad—a method with established channels for compromising differences of opinion. The provisions allowing for waiver of jurisdiction by the United States in deference to foreign demands have been upheld as constitutional,¹⁰² thereby affirming the United States' ability to subject its citizens to foreign trials, even though foreign courts may possess some procedural infirmities. Thus, this adoption of the SOFA assignment of jurisdiction could be a constitutionally acceptable method of applying the "service-connected" test of *O'Callahan* to limit military jurisdiction overseas. Moreover, the traditional approach of the Supreme Court seems to affirm this reliance on foreign courts as alternatives to military tribunals,¹⁰³ and such an approach is consistent with the preservation of the military's special needs.¹⁰⁴

Nevertheless, it is doubtful that such a course of action should be followed. Fundamental in the arguments against that approach is the basic inconsistency of denying one court in deference to another, when both offer comparable procedural safeguards. Moreover, there is at least some possibility of review by American civil courts to correct military courts' flagrant departures from fairness.¹⁰⁵ In addition, denying the United States the ability to control its own servicemen can certainly not be expected to have any affirmative effect on the United States' relationship with the host nation. Indeed, there could be adverse effects on that relationship, since the total burden for prosecuting crimes unrelated to the military would suddenly be placed on foreign authorities, and since those restraints imposed by the internal disciplinary structure of the armed forces would accordingly be obstructed. Of course, the host country can rightfully decline to prosecute crimes over which it has jurisdiction,¹⁰⁶ thereby reinstating military jurisdiction for want of an alternative. But to so permit the whims of the host government to be the basis of the attachment of jurisdiction is not a favorable method of operation.

Perhaps more important in this regard, it is questionable whether a serviceman—if he is going to be placed in a constitutionally deficient court—should be tried in foreign courts where unfamiliar procedures and customs, language and communications problems, and

102. *Wilson v. Girard*, 354 U.S. 524 (1957). See also text accompanying notes 63-64 *supra*.

103. See the discussion at note 64 *supra*.

104. See p. 1033 *supra*.

105. See generally Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970, § 6 (Magazine), at 37.

106. See text accompanying note 46 *supra*.

the possibility of confinement in a foreign land lend considerably to the discomfort associated with being tried in any setting. While it has been shown above that these fears may be largely exaggerated,¹⁰⁷ they nevertheless have been expressed by persons presumably knowledgeable in the workings of international procedures.¹⁰⁸

It could perhaps be argued that there is no valid reason for providing protection from the subjective fears surrounding foreign trial for servicemen, because under the *Reid* doctrine and under standard principles of international law, no similar protections are furnished for civilians accompanying the armed forces abroad. One obvious answer to this argument rests on the greater degree of compulsion exerted by the United States in placing servicemen in the foreign setting. Since the accused soldier has been subjected to the foreign jurisdiction as a direct result of his having been commanded by the United States military to serve there, it seems that the same commanding authority should protect him from undesirable treatment. This point takes on added significance in the case of a draftee. While there is admittedly a certain degree of institutional or governmental coercion involved in placing on foreign soil civilians who are accompanying the armed forces, the compulsion in those circumstances is much less direct and pronounced than it is in the case of servicemen.

In addition, there is a basic distinction between the grounds for denying military jurisdiction in each situation. The initial question in the determination of jurisdiction is one of status as a member of the armed forces. Since civilians fail to meet this requirement, they are improper subjects for a military trial. Servicemen, however, meet the initial status test; and consequently military jurisdiction is denied only when the crime is not service-connected and thus does not create a special need for a military trial. Since this special-need test is subjective and presumably more flexible than is the status test, it is necessary in determining the adequacy of foreign courts as alternative tribunals for trying servicemen, to give more weight to the effect of the unfamiliar procedures and customs surrounding foreign trial.

Finally, it should be noted that in some countries the procedural safeguards provided in an American court-martial are clearly superior to procedures used in trials in local civilian courts. Much of the preceding discussion has focused on the NATO model and has assumed that foreign and military court systems are equally objectionable since they both fail to secure to the accused the full range of Ameri-

107. See notes 81-95 *supra* and accompanying text.

108. See the objections of the late Senator McCarran, *supra* note 82, to the adoption of the NATO SOFA. See also the statement by Senator Bricker that the NATO SOFA "reflects a callous disregard for the rights of American Armed Forces Personnel." 99 CONG. REC. 4659 (1953). See also Justice Clark's dissent in *Reid v. Covert*, 354 U.S. 1, 89 (1957).

can constitutional guarantees. This assumption is somewhat inaccurate, however, because it views all constitutionally deficient courts as *equally* infirm.

There are two factors which tend to make the civil courts of some countries *more* objectionable than are military courts. The first is the conception that the highly lauded ability of foreign courts to produce fair trials is based largely on generalizations about procedures practiced in those nations that are highly influenced by Western culture.¹⁰⁹ In areas in which Western influence is less dominant, however, traditional societal values relevant to the precepts of fairness vary, and the approximation of American constitutional guarantees is often diminished.¹¹⁰ The second and more pervasive factor is the notion that the standards of fairness presently exercised by courts-martial operate to provide a much more desirable tribunal than is indicated by the condescending attitude of Justice Douglas in *O'Callahan*.¹¹¹ A combination of the express statutory recognition of procedural rights¹¹² and expansive interpretations by the Court of Military Appeals¹¹³ has greatly enhanced the basic fairness of military courts.¹¹⁴ In any given situation, therefore, either or both of the above factors may operate to make the military court a less objectionable forum than that which is available in the particular foreign system.

In summary, then, there are conflicting arguments concerning the acceptability of foreign civilian courts. The utilization of such courts as alternatives to military tribunals is strongly suggested by the mere existence of the SOFA allocations of jurisdiction. The constitutional approval of these allocations, together with the Court's traditional approach¹¹⁵ and its resulting compliance with special military exigencies, weigh heavily in favor of the acceptance of foreign courts as viable alternatives. Even though this approach may seem appropriate under such a theoretical analysis, however, the relative absence of

109. See, e.g., Schwenk, *supra* note 74, using as his basis of comparison the procedures practiced in NATO nations; cf. text accompanying notes 83-85 *supra*.

110. See generally Ning, *supra* note 81.

111. See note 5 *supra*, especially Nelson & Westbrook at 56-64.

112. See, e.g., UCMJ art. 32, 10 U.S.C. § 832 (1964) (right to investigation); UCMJ art. 27, 10 U.S.C. § 827 (1964), as amended (Supp. IV, 1965-1968) (right to counsel).

113. See, e.g., *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964) (right to compulsory process); *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964) (right to a speedy trial); *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963) (right of protection against unreasonable searches and seizures); *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962) (privilege against self-incrimination); *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1962) (right to public trial); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (right to confront witnesses).

114. See Nelson & Westbrook, *supra* note 5, at 56-64, enumerating those specific safeguards incorporated into a military trial.

115. See notes 64-71 *supra* and accompanying text.

any practical benefits to be gained by placing servicemen in foreign courts weighs just as heavily against adopting foreign courts as acceptable alternative forums under the *O'Callahan* test. If the procedural deficiencies of foreign and military courts are comparable, the accused gains no benefit from being tried in a foreign court. Indeed, the practical distress incurred by the accused in a foreign trial may be expected to have quite the opposite effect, and in some countries the court-martial is clearly the preferable forum from a procedural standpoint. From a consideration of these factors, therefore, it seems that the alternative of trial in foreign civilian courts should not be a permissible foundation upon which to base the denial of military jurisdiction. That result is easily reached by a literal reading of Justice Douglas' opinion in *O'Callahan*, and it is submitted that this strict reading ought to be given.

VI. AMERICAN CIVILIAN COURTS AS AVAILABLE ALTERNATIVE FORA

Once foreign civilian courts have been examined as possible alternatives, the next step is to determine whether American tribunals or procedures are available or can be made available to eradicate the military's special needs and thereby to negate the necessity for implementing the military's judicial apparatus in order to deal with crimes committed abroad which are unrelated to the military. American tribunals represent potential alternatives to courts-martial in two contexts. First, insofar as foreign civilian courts are considered unacceptable alternative tribunals, the availability of an American tribunal might be a basis for frustrating military jurisdiction, regardless of whether the relevant SOFA allocates jurisdiction over the crime concurrently to the host nation and the United States or exclusively to the United States. Second, even to the extent that foreign courts may be deemed acceptable, American alternatives may in some instances represent the only basis for depriving the military of jurisdiction. Those instances arise because of the jurisdictional gap created either by a grant under the applicable SOFA of exclusive jurisdiction to the United States,¹¹⁶ or by the host country's reluctance to prosecute crimes over which it shares concurrent jurisdiction with the United States. If the United States has been given exclusive jurisdiction over a particular crime by the SOFA provisions, and if that offense is otherwise unrelated to military service, there exists no readily apparent foreign tribunal in which to try the offender. Therefore, if court-martial jurisdiction is to be restrained, it is necessary to satisfy the military exigencies by employing an American tribunal outside the military system. Furthermore, and perhaps more significantly, the im-

116. See Ehrenhaft, *supra* note 45, at 276-80; *cf.* the discussion of this gap in text accompanying note 46 *supra*. See also the NATO SOFA provisions set out in notes 40-41 *supra*.

portance of this gap is heightened by the reluctance often shown by foreign authorities to prosecute crimes which are placed under concurrent jurisdiction by the SOFA provisions, but which primarily involve American interests.¹¹⁷ To the extent that foreign courts decline to try such offenses, there is again a failure of available alternatives unless American civil tribunals are able to bridge the "jurisdictional gap."

Since the procedures of the American tribunals under consideration are subject to constitutional limitations, no discussion of procedural adequacy is necessary, as it is in the case of foreign courts; and consequently the focus of present discussion may be centered on the search for viable alternatives and on the practical difficulties encountered in their implementation. By and large, American civilian courts are not presently available in foreign countries, and so specific governmental action is required in order for them to be established. Thus, the desirability of each alternative set forth below must be tempered with an understanding of the difficulties involved in motivating the appropriate authorities to take the necessary action. For example, the establishment of American tribunals would in every case deprive the host country of existing jurisdiction or otherwise infringe on the host nation's sovereignty and consequently would require delicate diplomatic negotiations. This difficulty is intensified by the fact that the motivating force behind such action would necessarily be based on a desire to thwart military jurisdiction—a motive which is certainly not uniformly possessed by present governmental leadership.

While a wide variety of proposals have been advanced for the use of American civilian procedures to replace courts-martial in situations in which military jurisdiction has been curtailed,¹¹⁸ the alternative suggestions set forth below are limited to those which seem most easily accessible and most relevant to the problems created by the ramifications of *O'Callahan*.

A. American Courts Sitting Abroad

A proposal which seems initially to be a practicable method of supplementing court-martial jurisdiction in foreign countries when special military needs do not otherwise dictate a military trial, is the creation of American federal courts to hear cases in the foreign countries.¹¹⁹ Two basic objections, however, override the feasibility of such an alternative. First, the existing Status of Forces Agreements providing for the encroachment by the American military on an area

117. See text accompanying note 45 *supra*.

118. See, e.g., Ehrenhaft, *supra* note 45, at 280-85; Girard, *supra* note 23, at 503-19.

119. See Ehrenhaft, *supra* note 45, at 282.

of inherent foreign jurisdiction were obtained only after extensive negotiation.¹²⁰ The implementation of overseas American courts would further encroach on the host country's jurisdiction, and further negotiating would be required. The likelihood of the receptiveness of these countries to such extended encroachment is at best doubtful.¹²¹ Second, there are serious questions as to how a jury of unbiased peers, sufficiently independent of military influence, could be selected by such a court.¹²² Indeed, in view of the questionable ability of these courts to provide such a basic constitutional safeguard as the right to an unbiased jury,¹²³ it seems inadvisable to enter into extended negotiations seeking their establishment.

B. Domestic Federal Courts

Another alternative often advanced to handle the prosecution of a serviceman who, while abroad, commits a crime unrelated to the military, is to provide for trial in a federal district court sitting in the United States.¹²⁴ While this alternative is apparently consistent with principles of international law,¹²⁵ as well as with the Constitution,¹²⁶ the primary objection is the problem involved in the securing of witnesses. Although it has been suggested that American citizens could readily be persuaded or compelled to return to the United States to testify, there is apparently no existing system to compel foreign nationals to participate in trials conducted in the United States, nor are their countries likely to favor the institution of such a system.¹²⁷ Moreover, it seems somewhat unconscionable to require foreign citizens to suffer the inconvenience of being transported to the United States in order to testify in the prosecution of a crime committed on their own soil. At any rate, the cost and intricacies of implementing such a system would be so great as to justify its utiliza-

120. See *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953).

121. See Judge (now Chief Justice) Burger's dissent in *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927, 939 n.26(d) (D.C. Cir. 1958).

122. See Ehrenhaft, *supra* note 45, at 282. See also Everett, *supra* note 23, at 375, expressing the opinion that it would be "impossible in these circumstances to empanel a jury conforming to sixth-amendment qualifications. A serviceman, however, may prefer that the jury be under military influence so that they might more easily identify with him, especially in the overseas context.

123. See Ehrenhaft, *supra* note 45, at 282; Girard, *supra* note 23, at 505.

124. Ehrenhaft, *supra* note 45, at 281; Girard, *supra* note 23, at 507.

125. See Girard, *supra* note 23, at 507-08, and cites contained therein.

126. *Id.* See also *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *United States v. Bowman*, 260 U.S. 94 (1922).

127. Girard, *supra* note 23, at 509-10.

tion only in cases involving the gravest or most serious offenses.¹²⁸ However, in areas of concurrent jurisdiction, it appears that as the gravity of the offense increases, the likelihood that the host country would take jurisdiction also increases. Nevertheless, in the area of exclusive American jurisdiction, the host country's willingness to prosecute is irrelevant, and consequently trial in a domestic federal court remains a viable alternative. It seems, therefore, that trial in domestic federal courts may be a feasible and effective, even if intricate, device for disposing of some of the more serious offenses.¹²⁹ However, because it has been held by the Supreme Court that the "legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States,"¹³⁰ the vesting of domestic federal courts with power to hear such cases would require the augmentation of the United States' criminal law codes to include crimes committed by citizens in foreign lands.

C. *United States Magistrates' Courts and the Petty-Offense Exception*

Since minor or petty offenses seem to be separable from more serious crimes in terms both of practical variations and of differences in the procedural safeguards required in the prosecution of each,¹³¹ a plan has been advanced providing for the separate treatment of petty offenses committed abroad by United States servicemen; those offenses would be tried in special United States Magistrates' Courts.¹³²

At the outset, however, the establishment of commissioner's courts sitting abroad seems to be an unacceptable method of escaping the predicament of *O'Callahan*. The basic problem, similar to that discussed with regard to establishing ordinary federal courts sitting abroad,¹³³ is one of gaining acceptance by the host country. But perhaps more important, because the proposed magistrates' courts

128. Ehrenhaft, *supra* note 45, at 281.

129. See Girard, *supra* note 23, at 509, where, in connection with an examination of the feasibility of domestic federal courts as alternative fora, the author concluded: "I believe the cost, delay, and disruptive effect on military operations of trial in the United States has been greatly exaggerated."

130. *Blackmer v. United States*, 284 U.S. 421, 437 (1932). See also Girard, *supra* note 23, at 507.

131. See 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 371 (1969); Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959); Nelson & Westbrook, *supra* note 5, at 34; *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 149 (1968).

132. 28 U.S.C. §§ 631-39 (Supp. IV, 1965-1968). See Ehrenhaft, *supra* note 45, at 285.

133. See text accompanying note 121 *supra*.

would handle only petty offenses, they would not constitutionally be required to provide for grand jury indictment and jury trial.¹³⁴ Accordingly, they seem to be subject to an inability to provide the accused serviceman with the benefits denied him in the military tribunals. In this respect, the objection to these proposed magistrates' courts comes perilously near to the objection voiced against foreign courts.¹³⁵ Even though the severity of removing the serviceman from the grasp of the military is lessened considerably by the fact that he does not thereby become subject to the importunities of foreign trial and confinement, the underlying anomaly persists. As in the case of foreign civilian courts, the serviceman would be removed from one court that lacks requisite constitutional safeguards and placed in another, yet more unfamiliar, tribunal which lacks the same safeguards.

Moreover, it is possible that *O'Callahan* will be interpreted to allow a petty-offense exception for the military disposition of minor offenses, thereby obviating the need for an American civil tribunal, such as the magistrates' court, to handle such offenses. In this regard, it has been suggested by at least two commentators that petty offenses should be exempted from examination under the "service-connected" test formulated in *O'Callahan*.¹³⁶ Indeed, the Court of Military Appeals, consistent with its approach to foreign alternatives, has specifically recognized such an exception, holding that the reach of military jurisdiction "encompasses the trial of those petty offenses, for which, in civil life, the accused would not be entitled to the constitutional protections of grand-jury indictment and jury trial."¹³⁷ Since the defendant in a case involving petty offense would not enjoy increased procedural safeguards in a civilian tribunal, it seems inconsistent to deny military jurisdiction for failure to provide those safeguards. Therefore, since the court-martial is apparently an acceptable forum for dealing with petty offenses,¹³⁸ the inducement for the establishment of specialized tribunals to deal with petty offenses is further allayed. Under the petty-offense exception, the military undoubtedly would continue to refer petty offenses to its own courts-martial, and the magistrates' courts would not handle enough cases to justify their existence.

134. See note 131 *supra*.

135. See text accompanying notes 74-79 *supra*.

136. Nelson & Westbrook, *supra* note 5, at 34-39.

137. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 28, 41 C.M.R. 26 (1969).

138. Petty offenders customarily are tried by the military authorities in summary and special courts-martial. See Nelson & Westbrook, *supra* note 5, at 36-37. Administrative sanctions for minor offenses also are authorized by UCMJ art. 15, 10 U.S.C. § 815 (1964), as amended, (Supp. IV, 1965-1968). These sanctions include the nonjudicial deprivation of privileges and the imposition of certain restrictions. They are offered to the offender as a voluntary alternative to court-martial.

D. *Feasibility of American Courts as Alternative Fora*

Of all the American tribunals which are possible alternatives to military courts, only the federal court sitting in the United States is an acceptable alternative. While the use of such courts to handle crimes committed overseas gives rise to numerous difficulties, it has been seriously advanced as an efficacious system for dealing with some very serious offenses.¹³⁹ The implementation of such a scheme, however, requires specific legislative action, and the instigation of such action is replete with further obstacles. At best, therefore, this alternative is a future solution which must await specific action to effect its implementation.

The feasibility of the other suggested American tribunals is severely limited. The establishment of American courts abroad is generally considered to be impracticable. To the extent that magistrates' courts sitting abroad could otherwise be made feasible, their utility is prohibitively limited, since they would be effective only in the area of petty offenses, where it is seriously doubtful that military jurisdiction need be, or can be, restricted at all. Thus, it seems that American courts are not currently available to remove the need of the military to prosecute offenders in its own court system.

VII. CONCLUSION

In formulating a final determination as to the applicability of *O'Callahan v. Parker* to crimes committed by servicemen while stationed abroad, one must come to a conclusion as to the overriding purpose of the Court in restricting military jurisdiction. If the aim of *O'Callahan* was to preserve the individual constitutional guarantees of the accused serviceman, then the approach of the Court of Military Appeals in absolutely requiring a constitutionally acceptable alternative court before denying military jurisdiction seems appropriate.¹⁴⁰ If, however, *O'Callahan* is seen as an effort to define the range of offensive conduct which may be governed by "Rules for the Government and Regulation of the land and naval Forces,"¹⁴¹ then the underlying purpose can be seen as the restriction of military power for the mere sake of limiting the span of its jurisdictional comprehension, and the *Girard* attitude of indifference toward alternative procedures appears to be more nearly correct.

This delineation of motives, however, may prove to be too simplistic, for neither interpretation seems to pay proper deference to

139. See notes 124-30 *supra* and accompanying text.

140. See text accompanying notes 58-60 *supra*.

141. This is the approach suggested at the text accompanying note 64 *supra*. See also Everett, *supra* note 9, at 893.

the Court's unarticulated rationale in *O'Callahan*. Indeed, the Court appears to have adopted a middle ground. Obviously, the Court was motivated by a simple desire to restrict military jurisdiction. But this distrust of military authority was tempered by a concern for the constitutional rights of the individual serviceman. The "service-connected" test, then, is the verbalization of the method which the Court employed to prevent an overextension of the grasp of the military in situations in which the objections raised by the fundamental procedural infirmities of the court-martial outweigh the special needs of the military to preserve discipline. The approach of the Court of Military Appeals places too much significance on these procedural infirmities by elevating them to the level of primary concern and absolutely requiring a procedurally superior alternative tribunal before restricting military jurisdiction; while the contrasting approach—that is, that comparative procedures are irrelevant—is equally inappropriate because it fails to accord recognition to the practical implications of relegating accused servicemen to tribunals that are as imperfect as are military courts themselves.

Initially, an examination of available alternative tribunals suggests that foreign civilian courts provide an acceptable basis for restricting court-martial jurisdiction, since the military's special needs arguably will be fulfilled by any court which metes out punishment for the offenses in question. However, the extraterritorial situs of the crime reintroduces the practical relevance of comparative procedures, since, absent the feasibility of handling the case in an American court, the military courts and foreign civilian courts present, at best, equally objectionable choices. In light of the complicating factors thus introduced by the intricacies of international relationships, there seems to be little practical justification for the restriction of military jurisdiction for its own sake when no corresponding benefit is conferred upon the individual serviceman. Furthermore, when there is a corresponding detriment suffered by the serviceman as a result of being placed in an unfamiliar tribunal with no possibility of review in American courts, the restriction of military jurisdiction is not only unjustified but unconscionable as well.

Thus, it appears that the Court's basis for decision in *O'Callahan* was a simple desire to restrict military authority, tempered by the practical concerns for the resulting effects on the accused serviceman. Weighing the basic arguments for the protection of the serviceman's fundamental rights against the minimal advantages to be gained by limiting military jurisdiction, it is submitted that the objections discussed above should operate to make the *O'Callahan* doctrine inapplicable to offenses committed by servicemen abroad.