The status of the American serviceman has improved considerably since the era when Chief Justice Chase, concurring in *Ex parte Milligan*, asserted that none of the guarantees of the Bill of Rights applied to military personnel. Due to the adoption of the Uniform Code of Military Justice in 1951, and the consequent establishment of civilian review by the United States Court of Military Appeals [hereinafter U.S.C.M.A.], military accused now enjoy sufficient constitutional safeguards to lead some respected observers to compare military trials favorably with civilian criminal trials. Despite these improvements the Supreme Court stated in *O'Callahan v. Parker* that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law" when a serviceman stands trial for a crime which has no "service-connection." Prior to this decision military jurisdiction was thought to encompass anyone having "status" as a member of the "land and naval forces." Justice Douglas, writing the majority opinion, brushed away years of precedent with a single stroke in deciding that "[status] is merely the beginning of the inquiry, not its end." The result of this decision is that status alone, without evidence of an


\*5395 U.S. 258 (1969). The facts of *O'Callahan* are uncomplicated. O'Callahan, while off duty and out of uniform, assaulted and attempted to rape a girl in a Honolulu hotel in 1956. After conviction by court-martial, affirmation by the Board of Review and the U.S.C.M.A., the denial of writ of habeas corpus by a United States District Court and the United States Court of Appeals for the Third Circuit, the Supreme Court granted certiorari in 1968 and rendered its decision in June, 1969.

\*6Id. at 265.

\*7Id. at 272. Mr. Justice Douglas cited several factors which distinguished O'Callahan's offense as being non-service-connected: (1) he was properly absent from base; (2) there existed no connection between military duty and the crime; (3) the crime took place off the military post; (4) the victim performed no military duties; (5) the situs was not an armed camp under military control; (6) it was a peacetime offense within the territorial United States and civil courts were open; and (7) the offense involved no military authority or property. *Id.* at 273-74.

\*8See Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

\*9395 U.S. at 267.
additional connection between the offense committed and the military service, can no longer subject a member of the armed forces to a court-martial which lacks certain procedural protections thought fundamental in American civilian courts.\textsuperscript{11} The Court specifically cited the denials of an indictment by a grand jury and trial by jury as principal reasons for curtailing military jurisdiction over offenders such as Sgt. O'Callahan.\textsuperscript{12} Five other features of military justice were also mentioned as being detrimental to the accused in a court-martial proceeding: \textsuperscript{13} The presiding officer is a military law officer and not an independent judge protected by tenure and undiminshable salary; \textsuperscript{14} different rules of evidence prevail in a military trial; there is a possibility of excessive command influence over members of the board and counsel for each side; Article 134\textsuperscript{15} does not satisfy standards of vagueness developed by civilian courts; and "a military trial is marked by the age old manifest destiny of retributive justice."\textsuperscript{16} The importance assigned these elements in the final determination of the case is unclear, as is much else in the majority opinion. The only certainty is the limitation of court-martial jurisdiction to those crimes which involve the "special needs of the military."\textsuperscript{17} In a biting dissent, Justice Harlan underscored these deficiencies when he accused the majority of leaving the law in a "demoralizing state of uncertainty."\textsuperscript{18} Numerous commentators have echoed these sentiments\textsuperscript{19} while the courts have struggled to delineate the ramifications of this far-reaching decision.\textsuperscript{20} 

\textsuperscript{11} The Fifth Amendment specifically exempts "cases arising in the land or naval forces" from indictment by grand jury. The Sixth Amendment right of trial by jury is at least impliedly excepted. \textit{See Ex parte Quirin}, 317 U.S. 1, 40-41 (1942).

\textsuperscript{12} 395 U.S. at 261-64.

\textsuperscript{13} \textit{Id.} at 264-66.

\textsuperscript{14} Apparently the Court was unimpressed with the Military Justice Act of 1968, 10 U.S.C. § 826, providing for an independent judiciary, free from the influence of local commanders, for general courts-martial.


\textsuperscript{16} 395 U.S. at 266.

\textsuperscript{17} \textit{Id.} at 265.


Aside from retroactivity, the most important question remaining concerns the applicability of *O'Callahan v. Parker* outside the territorial United States. At the present time, the United States has over 500,000 military personnel stationed in ninety-nine foreign countries (excluding the contingent in Vietnam). Three types of agreements govern criminal jurisdiction over our military forces stationed in foreign countries during peacetime: first, “Status of Forces Agreements,” (SOFA’s), in effect where large contingents of our forces are stationed; second, “Mission Agreements,” used only where small groups are located; and third, “Mutual Defense Assistance Agreements,” employed where military assistance advisory groups operate. (The Status of Forces Agreement will be discussed in more depth below. For the present, suffice it to say that through these agreements the military retains jurisdiction over the majority of these personnel).

An extension of the *O'Callahan* rationale, would restrict the jurisdiction of American military courts-martial in foreign territories, thereby extending jurisdiction over American servicemen by foreign tribunals. This would immediately affect the administration of American military justice and the conduct of foreign relations in those foreign territories where American servicemen and women are stationed. This Note will survey the judicial impact of *O'Callahan v. Parker*, examine the existing jurisdictional procedure in foreign territories under the Status of Forces Agreements (SOFA’s), and weigh the arguments for and against the judicial extension and application of *O'Callahan v. Parker*.

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service-connection and some clear trends are developing: e.g., when the offense is committed on post, when the victim is a serviceman, when the military status is abused while committing the offense, and when the offense affects the health, morale, and fitness of other members of the armed forces. See Wurtzel, *supra* note 19 and cases cited therein.

21Based on the criteria enunciated by the Supreme Court in Stovall v. Denno, 388 U.S. 293 (1967), it is anticipated that the Court will rule prospectively. The criteria for deciding retroactivity of a new rule are: “(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” 388 U.S. at 297. The Court has held in De Stefano v. Woods, 392 U.S. 631 (1968), that the right to trial by jury granted defendants before state courts in Duncan v. Louisiana, 391 U.S. 145 (1968), was to be given prospective application. However, two federal district courts recently ruled that *O'Callahan v. Parker* will not be given retroactive effect. Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970); Gosa v. Mayden, 305 F. Supp. 1186 (N.D. Fla. 1969).


23American military personnel in Vietnam would assumingly not be subject to the benefits of *O Callahan v. Parker*. The Court indicated three locations in which the military would have had jurisdiction over O'Callahan: (1) an armed camp under military control, (2) at some of our far-flung outposts, and (3) in the occupied zone of a foreign country. 395 U.S. at 273-74. The U.S.C.M.A. held in United States v. Goldman, 18 U.S.C.M.A. 389, 40 C.M.R. 101, on petition for reconsideration, 18 U.S.C.M.A. 516, 40 C.M.R. 228 (1969), that *O'Callahan v. Parker* would not apply in Vietnam; however one judge in a dissenting opinion thought the soldier should be sent home for trial in light of *O'Callahan v. Parker*.

extraterritorially. First, a review of the developments since O'Callahan places these issues in proper perspective.

THE AFTERMATH OF O'CALLAHAN V. PARKER

More than three years have elapsed since the O'Callahan decision. During this period the Supreme Court has deferred from establishing more definite guidelines for other courts to follow in employing O'Callahan outside the territorial United States. As of this date, courts have exhibited reluctance to extend the "service-connection" test to any situation outside the territorial United States.

In November 1969, the Court of Military Appeals first rejected application of the "service-connection" test to restrict courts-martial jurisdiction overseas, when court-martial convictions were sustained for "non-service-connected" crimes in both the Philippines and Germany. In United States v. Keaton the United States Court of Military Appeals, relying on Justice Douglas' reference to the benefits of an alternative civilian tribunal in O'Callahan, argued as follows:

If, under the Constitution, a serviceman who commits a nonservice-connected offense abroad is entitled to the benefits of indictment and trial by jury, how can these benefits be afforded him? Constitutional protections of this nature are available only through the civil courts of the United States and only military courts are authorized to function within the Republic of the Philippines. Since there are no Article III courts established in the Philippines, the only alternative would seem to be to return the accused to the United States for trial...

We do not believe that the Supreme Court, in O'Callahan, intended such a result... It seems clear that foreign trial by court-martial of all offenses under the Code committed abroad, including those which could be tried by Article III courts if committed in this country, is a valid exercise of constitutional authority.

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25 See text accompanying note 39 infra.
26 However O'Callahan was cited in two instances where courts-martial of civilians in Vietnam were invalidated. In Latney v. Ignatus, 416 F.2d 821 (D.C. Cir. 1969), it was held that a merchant seaman, charged with murder, serving on board a chartered Navy oil tanker in Vietnam could not be tried by court-martial. The Court of Military Appeals decided in United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), that a civilian employee in Vietnam could not be tried under Article 2(10) of the U.C.M.J. providing for jurisdiction over persons accompanying the armed forces in time of war, since the words "in time of war" mean a war formally declared by Congress.
30 Id. at 67, 41 C.M.R. at 67. Nonetheless, this argument is relegated to the realm of dicta, and weakened substantially by the court's own admission that it was unnecessary to decide this matter.
The few civilian courts having the opportunity to express an opinion on the question have followed the above reasoning in reaching the same result. Reviewing a court-martial conviction arising in a factual situation almost identical to *O'Callahan*, (except that it involved an offense against a German national in Germany,) the Eastern District Court of Virginia in *Bell v. Clark* decided that “[u]nlike *O'Callahan*, the doors of civilian courts were, for all practical reasons, closed” and since “alternatives do not exist... defendant has not had any constitutional rights taken from him.” The court interpreted “the *O'Callahan* application to be restricted to non-service connected crimes committed by servicemen at a place where jurisdiction by civil courts guaranteeing the application of constitutional rights is available.”

As of this date, the highest court to rule on the issue is the Court of Claims. In *Gallagher v. United States* that court decided that a court-martial has jurisdiction to try a soldier charged with assault and robbery of a civilian in Germany while off-post, off-duty, out of uniform, and during peacetime, since jurisdictional limitations announced in *O'Callahan v. Parker* do not apply to offenses committed in foreign countries. This suit involved an attempt by Gallagher to recover back-pay lost as a result of conviction by court-martial which he alleged lacked jurisdiction and denied him effective counsel. The court apparently accepted the United States argument that all offenses committed by American servicemen stationed abroad are “service-connected” since any offense against the laws of the foreign state affect the good relations between the United States and the foreign population. The court stated “that the alleged crime here was committed in Germany, a foreign sovereign country, a distinction so significant that *O'Callahan* loses all authority.” The subsequent petition for writ of certiorari by Gallagher gave the Supreme Court its first opportunity to define the extraterritorial scope of *O'Callahan*. However, on October 13, 1970, the Court denied review without opinion.

*Relford v. Commandant* challenged a court-martial conviction for rape on a military post within the United States. The court, narrowly construing
O'Callahan, ruled it inapplicable because of the on-base location of the offensive act. Extraterritoriality was not a factor in the decision.

**CURRENT PROCEDURE UNDER STATUS OF FORCES AGREEMENTS**

Exclusive jurisdiction of a sovereign nation over visiting forces is an accepted principle of international law. The authoritative statement of this principle by an American court is contained in Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon*:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.

> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The Permanent Court of International Justice left no doubt that it regarded the Chief Justice's opinion as a valid rule of international law by ruling in the celebrated *Lotus* case that "[r]estrictions upon the independence of States cannot . . . be presumed." The American Judge [Moore] further stated in the same opinion that international law not only accepted

> the principle of the exclusive jurisdiction of a State over its own territory, [but also that there is an] equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as

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45*Id.* at 116, 136 (1812).

The *Schooner Exchange* case has been misconstrued as supporting the proposition that there is an immunity under international law for visiting troops. Chief Justice Marshall stated that, under the customs and conditions then prevailing, there was implied consent that an armed vessel of a foreign sovereign would be immune from the jurisdiction of the local courts. But he went on to state:

> [W]ithout doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. *Id.* at 146.

*Coleman v. Tennessee*, 97 U.S. 509 (1878), and *Dow v. Johnson*, 100 U.S. 158 (1879), involving the status of soldiers who were members of a belligerent occupation force, contain overly broad language but do not affect the holding or reasoning of *Schooner Exchange*. For an explanatory discussion of this error in interpretation see Re, *supra* note 41, at 362-73.


47*Id.* at 18.
his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.\(^4\)

From an analysis of the various bilateral arrangements it is obvious "that although a certain immunity exists for foreign friendly visiting forces, the extent of the immunity is strictly a matter of agreement."\(^{47}\)

Due to increased international emphasis on these principles of exclusive jurisdiction after World War II, the United States felt obliged to seek agreements with foreign nations wherein American servicemen were stationed. These agreements provided for an allocation of jurisdiction over U.S. servicemen between the U.S. and those nations.\(^{48}\) It was upon this basis that the NATO Status of Forces Agreement\(^{49}\) was negotiated in 1951. The NATO SOFA is not an executive agreement, but rather a solemn treaty, signed at London on June 19, 1951, and ratified by the Senate of the United States on July 15, 1953, by a vote of 72-12.\(^{50}\) Subsequently, Status of Forces Agreements, modeled after NATO SOFA but having only the legality of executive agreements, were enacted between the United States and every country in which a substantial number of American troops were stationed\(^{51}\) with the notable exceptions of Vietnam and Thailand. The SOFA's are reciprocal and are concerned only with the stationing of troops in foreign jurisdictions during peacetime. Although the SOFA's contain a wide variety of provisions, only those portions concerned with criminal jurisdiction and trials are relevant to this discussion.

Article VII\(^52\) of NATO SOFA allocates jurisdiction over crimes committed by members of the visiting force between the state sending the force and the state receiving the force. Each state retains exclusive jurisdiction over criminal offenses punishable by its own law, but not punishable according to the other's law.\(^{53}\) If an offense violates the law of both states, concurrent jurisdiction

\(^{4}\)Id. \textit{at} 92.

\(^{5}\)Re, \textit{supra} note 41, \textit{at} 392.

\(^{47}\)See 99 Cong. Rec. 8756-70 (1953).

\(^{48}\)Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (effective Aug. 23, 1953) [hereinafter referred to as NATO SOFA]. The Agreement is in effect between the United States and every other member of NATO except Ireland.


\(^{53}\)Each SOFA contains a provision essentially identical to art. VII.

\(^{53}\)NATO SOFA art. VII, para. 2:
exists. The sending state maintains primary jurisdiction over offenses solely against the person or property of another member of the force or civilian component of that state or of a dependent, and offenses arising out of any act or omission done in the performance of official duty. In the case of any other offense, the receiving state has the primary right to exercise jurisdiction. In many cases, this primary right will not be exercised due to a waiver provision contained in the agreement. If the authorities of the state having only a secondary right deem it important to exercise jurisdiction over the crime, the other state is expected to give sympathetic consideration to a request that it waive its primary jurisdiction. The remainder of Article VII provides for cooperation between the sending and receiving states in investigation and arrest, prohibition against two trials for the same crime, and procedural safeguards for the defendant on trial.

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 of offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of the Article a security offence against a State shall include:
   (i) treason against the State;
   (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

NATO SOFA art. VII, para. 3:

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

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to:
   (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;
   (ii) offenses arising out of any act or omission done in the performance of official duty.

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

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

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—
When the United States signed the NATO SOFA in 1953, several members of the Senate expressed alarm. Despite testimony by the Department of State and the Attorney General that the treaty created greater rights and protections for American servicemen than they would otherwise possess, the Senate insisted on additional safeguards not contained in the Agreement. Before ratifying the Agreement, the Senate adopted a statement proposed by the Foreign Relations Committee with an amendment added on the Senate floor to accompany the NATO SOFA. The Senate Resolution provided that: (1) the criminal jurisdiction provisions of Art. VII did not constitute a precedent for future agreements; (2) where an American serviceman is to be tried by a foreign tribunal, the commanding officer of the American Armed Forces in that country would examine its laws with respect to the safeguards contained in the U.S. Constitution; (3) if, in the commanding officer's opinion, the defendant is in danger of denial of any constitutional rights, the commanding officer should request that the foreign state waive jurisdiction, and if the request is denied, the Department of State should press the request through diplomatic channels; and (4) a representative of the United States is to attend all trials of American servicemen under the treaty and report any failure to provide the defendant with the procedural safeguards to which he is entitled.

The responsibility for implementing the Resolution resides in the Department of Defense. Considerable effort has gone into insuring the American serviceman a fair trial in foreign courts. Country Law Studies are made and maintained for each country in which regularly stationed forces are subject to the criminal jurisdiction of foreign authorities. These studies are under constant review so as to update the Judge Advocates General of any changes in the

(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 the rules of the court permit, to have such a representative present at his trial.


foreign law. The trial observer for each trial of a serviceman is in virtually every instance a lawyer. Interpreters are provided for the trial observer and the accused. Local counsel, if desired by the accused, is furnished in accordance with a 1956 Congressional Act.

The combination of these factors plus "the highly developed system of jurisprudence that prevails in the NATO countries" has insured servicemen a fair trial in Europe. The same procedure has also resulted in equitable trials in other areas where SOFA's are in effect. Though the Department of Defense has expressed satisfaction with foreign criminal jurisdiction, "it has been the policy of Congress that trial under United States law is the preferred alternative to trial in foreign courts." In view of this preference, the military requests that the foreign state waive jurisdiction in virtually all cases where concurrent jurisdiction exists. The waiver rate under the NATO SOFA is 94 percent; the rate in all countries where SOFA's are in effect is 90 percent; but in non-SOFA countries the rate is only 14 percent. From December 1, 1969, to November 30, 1970, 34,837 military cases subject to foreign jurisdiction were reported. Of this total, 19,228 were cases over which the military exercised concurrent jurisdiction. Waivers were obtained in 16,389 or 85 percent of these cases.

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64See U.S. DEP'T OF ARMY PAMPHLET No. 27-161-1, 1 INTERNATIONAL LAW 129 (1964).
66See id.
68Counsel before foreign judicial tribunals and administrative agencies; court costs and bail. (a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice. So far as practicable, these regulations shall be uniform for all armed forces.
(b) The person on whose behalf a payment is made under this section is not liable to reimburse the United States for that payment, unless he is responsible for forfeiture of bail provided under subsection (a).
69See, supra note 61, at 360.
70See id.
71See Levy, The NATO SOFA: Legal Safeguards for American Servicemen, 44 A.B.A.J. 322, 326 (1958); Williams, supra note 65, at 43.
74Brief for United States, supra note 22, at 27.
75Williams, supra note 65, at 7; U.S. DEP'T OF ARMY PAMPHLET No. 27-161-1, supra note 64, at 129.
77Id.
78Id.
79Id. at 11.
On the other hand, foreign authorities retained jurisdiction in 18,036 cases. Foreign tribunals had exclusive jurisdiction over 15,609 of these cases, leaving 2,839 concurrent jurisdiction cases which were not waived. Of the total retained, 16,161 finally resulted in trial before a foreign judiciary. Some 97 percent, or 15,658 of the convictions resulted in only a fine or reprimand. Only 135 cases actually ended in unsuspended confinement. This constituted a very slight decrease from the previous reporting period when only 158 cases resulted in unsuspended confinement. During this period the vast majority of reported crimes were of the petty offense variety. Traffic offenses (25,341), simple assault (1,749) and disorderly conduct (4,308) accounted for 90 percent of total offenses subject to foreign jurisdiction. Serious offenses totaled over 2,998. Of this figure, foreign authorities retained jurisdiction in only 666 cases.

It is evident from these statistics that the military has succeeded in limiting trials of servicemen by foreign tribunals. Traffic offenses, over which the U.C.M.J. has no application, constitute the bulk of offenses tried by foreign courts. It is also obvious that servicemen tried in foreign courts have been treated rather leniently. Of the 135 cases resulting in confinement that were retained by foreign authorities during this period, only 11 resulted in a sentence of five years or more while 65 of the sentences imposed confinement of less than one year. This is particularly impressive since foreign authorities normally refuse waiver of jurisdiction only in the event that the crime has created a public outrage and demand for local prosecution.

The first year under the Korean SOFA provides an example of this leniency. Korean justice is often regarded as the most suspect of the countries where SOFA's are in effect. However, a check of the first four cases under the SOFA does not bear this out. In the first case tried under the Korean SOFA, an Air Force sergeant was fined $190.00 after a conviction for arson and assault. Next, a lieutenant, who sold three diamond rings on the black market and then proceeded to fire tear gas bombs at Korean investigators while resisting arrest, received a suspended sentence. In the third instance two soldiers who committed attempted rape on a Korean girl were given relatively light sentences of one and a half to two years and two and a half to three years. The fourth defendant was fined only $110.00 for negligent homicide. This experi-

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77Id. at 6.
78Id. at 7.
79Id.
80Id.
81Id.
82Id.
83Id.
84Id. Included under serious offenses are the following: murder, rape, manslaughter, arson, robbery-larceny, burglary, forgery, and aggravated assault.
85Id.
86Id. at 11.
ence would suggest that soldiers often fare better under foreign tribunals than under courts-martial. The inference is further confirmed by the fact that the most recent reports reveal that, of 52 final results of exercise of Korean jurisdiction, only one unsuspended sentence to confinement was imposed, with five suspended confinements and 46 fines or reprimands making up the balance. Of course, isolated instances have provoked criticisms of foreign justice and SOFA's. The first such case to arise was United States ex rel. Keefe v. Dulles. Mrs. Keefe, the wife of a serviceman imprisoned in France for robbery, brought suit against the Secretaries of State, Defense and Army to obtain the release of her husband on the grounds that his constitutional rights had been denied. The court denied relief since no unconstitutional irregularities had been reported by the trial observer.

The second controversy arose in Wilson v. Girard, where an Army private sought to prevent Japanese authorities from trying him for the murder of a Japanese woman. There existed a strong possibility that the killing took place while the soldier was on duty, but Japan claimed jurisdiction over the case. The Supreme Court upheld the authority of the United States to waive jurisdiction, and, in effect, upheld the constitutionality of SOFA's. The latest dispute occurred in Korea in 1967 in the case of Smallwood v. Clifton. A soldier stationed in Korea sought to enjoin American authorities from releasing him to Korean authorities to stand trial for murder. According to newspaper reports, hearsay testimony and prejudicial evidence were admitted at the trial. The American court refused to hear the case because Korea had primary jurisdiction over alleged offenses of its criminal laws. If a fair trial had been denied, this refusal could have raised a serious question about the adequacy of the Korean SOFA. However, any confrontation was precluded due to dismissal of the case by a Korean appeals court because of "reasonable doubt" on the evidence.

Apparently, all parties are satisfied with the SOFA's. They have adversely affected neither the operation of the military, nor the morale of the troops. Foreign tribunals are providing adequate protection of defendants' rights.

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91Id. at 393.
93Id. at 529; accord, Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), cert. denied, 93 S. Ct. 197 (1972).
94"We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative branches." Id. at 530.
98See Note, Due Process Challenge, supra note 87, at 1107.
100Id. But note exceptions for the Philippines and Turkey where there is a division of opinion among Army, Navy and Air Force commanders.
In attempting to gauge the ultimate scope of *O'Callahan*, basic inquiry begins with Justice Douglas' opinion. However, due to the vagueness referred to earlier, this approach leads to confusion. If the Court only meant to guarantee servicemen the right to trial by jury and indictment by grand jury, no basis for foreign applicability exists, since neither of these rights is available outside the territorial United States. However, this limitation on the ruling is highly doubtful for two reasons. First, indictment by grand jury is not guaranteed in all state courts wherein military defendants would be tried as an alternative to court-martial. Second, the Court seemed more concerned with other matters when it "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." The main thrust of the decision seems to favor limiting court-martial jurisdiction to the "special needs" of the military. These "special needs" could be strictly limited to the criteria which Justice Douglas specifically listed as constituting a "service-connection." However, "such an approach would as a practical matter emasculate *O'Callahan,*" because any offense committed other than during peacetime, any offense committed outside the territorial limits of the United States, or any offense committed on a military post would require court-martial jurisdiction, the opposite result intended by the holding in *O'Callahan.* Consequently, because the scope of the extraterritorial application of *O'Callahan* cannot easily be determined from the majority opinion, additional factors must be considered to determine that scope.

The basic arguments against foreign applicability of *O'Callahan* are that: (1) foreign trials would violate constitutional rights at least as much as, if not more than, court-martial; (2) all crimes committed abroad are service-connected and should be tried by court-martial; (3) a jurisdictional gap could be created due to possible reluctance by foreign tribunals to prosecute; and (4) appellate and collateral review are not available. Each of these is a persuasive argument which requires close examination to test its validity.

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101 395 U.S. at 274.
102 *Id.* at 273. One criterion used to show lack of service-connection was that the offenses were committed within our territorial limits, not in the occupied zone of a foreign country. *Id.*
104 See Gallagher v. United States, 423 F.2d 1371, 1374 (Ct. Cl.), cert. denied, 400 U.S. 849 (1970); see also 99 Cong. Rec. 8732 (1953) (remarks of Senator McCarran); 99 Cong. Rec. 4659 (1953) (remarks of Senator Bricker); Justice Clark's dissent in Reid v. Covert, 354 U.S. 1, 89 (1957), wherein he states "it is clear that trial before an American court-martial...is preferable to leaving American servicemen and their dependants to the widely varying standards of justice in foreign courts throughout the world"; Brief for United States, *supra* note 22, at 31.
107 Brief for United States, *supra* note 22, at 33; see also Note, *Due Process Challenge*, *supra* note 87.
1. Violation of Constitutional Rights

The view that only courts of the United States are capable of conducting a fair trial is rather provincial to say the least. Since the creation of the SOFA's, many studies have been conducted on the adequacy of foreign tribunals. None have reported any lack of fairness in foreign justice. It has been argued that recent Supreme Court decisions, incorporating virtually all procedural requirements of the Bill of Rights into the concept of a fair trial in state courts, have made the protection under foreign tribunals no longer adequate. However, military trial observers judging foreign trials with this fact in mind have not found such tribunals lacking. Additionally, the Department of Defense has stressed that the reason for the waiver provision "is not predicated on the fact that there is a danger the accused will not receive the safeguards assessed him under the U.S. Constitution." Even if certain guarantees are lacking, it is doubtful that a court-martial provides better protection. Conceding that court-martial are not as inadequate as depicted by Justice Douglas, such factors as command influence and emphasis on discipline in the military arguably may make courts-martial inferior to an independent foreign civilian tribunal.

In the final analysis an entirely different consideration makes the constitutional rights argument untenable. American service personnel are daily subjected to trials under the local law of foreign jurisdiction. A gross disparity would result if the Supreme Court were to hold that the O'Callahan limitation of court-martial jurisdiction could not be extended extraterritorially because foreign courts fail to protect an American serviceman defendant's constitutional rights, yet leave these same defendants subject to the jurisdiction of foreign courts under the SOFA's, which the Supreme Court has already upheld as constitutional. There would then be two standards of constitutionality, with servicemen in the United States enjoying the higher standard. Furthermore, such a holding would be totally inconsistent with our international treaties and agreements.

2. Encompassing Service-Connection

The service-connection argument was made in Gallagher v. United States where the Government asserted that "[m]embers of the military forces stationed abroad in time of peace, whether on duty or off duty, are part of a military contingent for which the United States is responsible to the host state,

108 See J. Snee & K. Pye, Status of Forces Agreement: Criminal Jurisdiction (1957); Baldwin, supra note 70; Levie, supra note 69; Ning, supra note 70; Re, supra note 41; Schwenk, Criminal Procedure in NATO Countries Under SOFA, 35 N.C.L. REV. 358 (1957); Williams, supra note 65.

109 See Note, Military Jurisdiction, supra note 19, at 1039.

110 Army Reg. No. 27-50, at 2 (June 28, 1967); U.S. DEP'T OF ARMY PAMPHLET No. 27-161-1, supra note 64, at 129; Levie, supra note 69, at 323.


and all offenses committed abroad are 'service-connected.' Two considerations undermine this contention. First, if all crimes committed overseas are "service-connected" because they "reflect adversely on the stature and prestige of the United States," the idea of exclusive jurisdiction of a sovereign power is meaningless. Under Article 134 of the U.C.M.J. any conduct bringing discredit on the armed forces is subject to military punishment, thus, making every offense one of concurrent jurisdiction. Few foreign powers would accept such a position.

Second, the effect of such an argument is to broaden court-martial jurisdiction, a result contrary to the intent of O'Callahan and previous Supreme Court rulings. The entire line of civilian court-martial cases beginning with Toth v. Quarles, continuing through Reid v. Covert, and climaxing in O'Callahan was bottomed on the idea of limiting military jurisdiction. As Justice Black stated in Toth, "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." To decide now that some broad concept of service-connection dictates the application of military justice to all offenses committed abroad would reverse the well-expressed trend of the past fifteen years.

3. Jurisdictional Gap

The third argument is an old favorite of opponents of prior Supreme Court decisions regarding the military-civilian dichotomy. Since the Court abolished court-martial jurisdiction over civilians and dependents in a series of decisions dating from 1957 to 1960, concern has been expressed over the possibility of a jurisdictional gap existing in foreign countries. While no significant problem has resulted with regard to effective criminal jurisdiction over major offenses, such a gap has arisen over petty offenses and for some crimes committed by American citizens against other American citizens. This is due essentially to the disinclination of some host governments to prosecute. Several recommendations have been put forward to close the gap. These include appointing

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113 Brief for United States, supra note 22, at 9.
114 Id. at 15.
118 350 U.S. at 22.
120 See Ehrenhaft, supra note 106.
121 Id. at 279.
122 Id. at 276.
United States Magistrates to sit abroad and amending the United States Code to subject these civilians to trial by United States district courts. None of these suggestions has been accepted.

The possibility of a jurisdictional gap resulting from foreign application of *O'Callahan* is distinct. It is not hard to understand the reluctance of foreign courts to crowd their calendars with the numerous "non-service-connected" minor offenses committed by American servicemen. This possibility of failure to prosecute would probably hold true only for minor non-victim offenses and offenses committed against other American citizens. It remains highly unlikely that a foreign government would refuse to act against a serviceman who had committed a crime against a national citizen or national property. However, alternative measures are available to alleviate this problem without limiting *O'Callahan* to the territorial United States.

The best suggested alternative is the exclusion of petty offenses from the rationale of *O'Callahan*. A petty offense is defined as any misdemeanor for which the penalty does not exceed imprisonment for six months or a fine of not more than $500.00 or both. The Supreme Court has previously refused to grant jury trials for a crime having a maximum sentence of under six months. This limitation would thus fit the trial by jury language used in *O'Callahan*. The U.C.M.J. already provides for separate trials for petty offenses by special and summary courts-martial which are limited to the adjudication of offenses carrying a maximum sentence of six months or less. Under the petty offense limitation these limited courts would continue to hear all minor offenses, thus precluding any additional burden on foreign tribunals. In fact, the Court of Military Appeals has already placed a petty offense limitation on *O'Callahan*. In *United States v. Sharkey*, the court allowed the court-martial conviction of a petty offense to stand since the accused lost no rights which *O'Callahan* sought to guarantee. Therefore, the petty offense limitation would be consistent with both previous Supreme Court rulings and the U.C.M.J. More importantly, it should also prove amenable to foreign authorities.

Neither should the prosecution of serious crimes create unreasonable problems because of the extension of *O'Callahan*. As previously noted, over the past reporting periods foreign authorities waived jurisdiction in 2,332 serious crimes. These are all crimes which the foreign country has an interest in prohibiting and would most likely bring to trial. The small number would not cause a burden on foreign courts and should create no problem of reluctance to

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123*Id.* at 286-300.
124*Id.* at 281.
125Nelson & Westbrook, supra note 4, at 34-39.
prosecute by foreign authorities. The increase in criminal trials would be mini-
mal and it is highly doubtful that any foreign country would balk at trying a
soldier for a serious crime against one of its own citizens. The other difficulty
in the civilian area, crimes by Americans against Americans, would also prove
much less crucial from a military standpoint. If the crime were committed by
a serviceman against another serviceman, dependent, or civilian employee, the
necessary "service-connection" would be in evidence to bring it under court-
martial jurisdiction and not necessitate foreign trial. For these reasons, the
extension of *O'Callahan* would create no apparent jurisdictional gap.

### 4. Federal Habeas Corpus And Collateral Review

The final argument against extraterritorial extension of *O'Callahan* is the
absence of American civilian review over foreign court decisions. If an Ameri-
can serviceman subjected to procedural infirmities rising to the level of denial
of due process were proscribed from raising this issue of constitutional depriva-
tion by collateral attack, quite a controversy would arise. The probability of
such a situation is rare; however, the possibility, as was almost evidenced in
*Smallwood v. Clifton,* is sufficient to require close scrutiny.

One ready answer to the proposition that the lack of review over foreign
court decisions should restrict the principle of *O'Callahan* is that this circum-
stance already exists under the SOFA's. Since soldiers serving abroad are daily
exposed to this slight possibility of injustice under agreements previously deter-
mined to be constitutionally valid, it is obviously inconsistent to limit
*O'Callahan* due to that consideration alone. Another factor making this argu-
ment suspect is the lack of clarification regarding the degree to which soldiers,
stationed at home or abroad, can avail themselves of civilian redress of military
judgments. A thorough examination of this problem is beyond the scope of this
Note; however, a short summary is necessary to put the argument in proper
perspective.

The finality clause of the U.C.M.J. states that military criminal proceedings
shall be "final and conclusive" and "binding upon all departments, courts,
agencies, and officers of the United States." Despite these ominous words
it was early made clear that this did not suspend the rights of a military prisoner
to challenge the jurisdiction of a military court on habeas corpus. The scope
of what constitutional issues may be raised in habeas corpus has, however,
 enjoyed less specificity. In *Gusik v. Schilder* and *Hiatt v. Brown* the
Supreme Court limited the habeas corpus petition to an attack on jurisdiction
and nothing more. The grounds for review were considerably broadened in

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180 **GA. J. INT’L & COMP. L.** [Vol. 3: 164]
Burns v. Wilson\textsuperscript{138} when Chief Justice Vinson established the "fully and fairly" test for review of military judgments.\textsuperscript{137} This rather broad position was somewhat tempered by his additional assertion that

the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is \textit{sui generis}; it must be so, because of the peculiar relationship between the civil and military law.\textsuperscript{138}

The extent to which the "fully and fairly" test may result in a serviceman being denied a constitutional protection which would be available to a civilian defendant has never been determined by the Court.\textsuperscript{139} It has been said that in following \textit{Burns}, "a court may simply and summarily dismiss a petition upon the ground that the military did not refuse to consider its allegations or it may, with equal ease or upon the same authority, stress the requirement that military considerations shall have been full and fair."\textsuperscript{140}

While several lower courts have taken a \textit{Johnson v. Zerbst}\textsuperscript{141} position and applied the same standards to military prisoners as civilian prisoners in accepting habeas corpus petitions,\textsuperscript{142} other courts have been much more reluctant to

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\item \textsuperscript{138}346 U.S. 137 (1953), \textit{rehearing denied}, 346 U.S. 844 (1953).
\item \textsuperscript{137}Id. at 142.
\item \textsuperscript{139}The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted . . . . But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.
\item \textsuperscript{138}Id. at 139-40.
\item \textsuperscript{139}See, e.g., \textit{Reid v. Covert}, 354 U.S. 1 (1957).
\item \textsuperscript{140}Bishop, \textit{Civilian Judges and Military Justice}, \textit{61} \textit{COLUM. L. REV.} 40, 59 (1961).
\item \textsuperscript{141}304 U.S. 458 (1938). This case established the fiction that a state tribunal might meet all of the traditional requirements of jurisdiction at the beginning of a trial, yet lose jurisdiction during the course of the proceedings for failure to afford the accused due process of law. \textit{Id.} at 468.
\item \textsuperscript{142}See, e.g., \textit{Parisi v. Davidson}, 405 U.S. 34 (1972), wherein a member of the armed forces who claimed to be a conscientious objector, having exhausted his administrative remedies, was awaiting court-martial. He applied to the Federal District Court for habeas corpus. His petition was deferred pending the results of the court-martial proceedings and the Court of Appeals affirmed. The Supreme Court reversed and Justice Douglas, concurring in the result, stated that he need go no further than to exhaust his administrative remedies for overruling the decision that he was not a conscientious objector. If there is a statutory or constitutional reason why he should not obey the order of the Army, that agency is overreaching when it punishes him for his refusal. The Army has a separate discipline of its own and obviously it fills a special need. But matters of the mind and spirit, rooted in the First Amendment, are not in the keeping of the military . . . . When the military steps over those bounds, it leaves the area of its expertise and forsakes its domain. \textit{Id.} at 54-55.
\item \textit{See also} \textit{Gibbs v. Blackwell}, 354 F.2d 469 (5th Cir. 1965); \textit{Fischer v. Ruffner}, 277 F.2d 756 (5th
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go beyond a narrow reading of Burns v. Wilson. The same split of authority exists with other forms of collateral relief available to servicemen. The Court of Claims has consistently allowed review of constitutional claims other than lack of jurisdiction in suits for back-pay. Actions for declaratory relief and injunctions to have military convictions and sentences declared void have been entertained and granted by certain federal courts, based on a broad review of the military trial for constitutional error. This view, however, has not been adopted in some circuits and the issue has not been litigated in others.

Collateral remedies available to servicemen have no doubt expanded over the past decade. It must also be said that soldiers convicted by courts-martial stand a better chance for habeas corpus review than do those convicted by foreign courts. However, the degree to which they stand in a superior position is indeterminable. Neither enjoy the same opportunity for vindication of constitutional rights as do civilians. This is a matter that needs resolution before it can seriously be considered a valid reason for denying application of O'Callahan in foreign countries.

CONCLUSION

On first consideration there appears adequate justification for limiting the O'Callahan decision to the territorial United States. The specific reliance on the denial of indictment by grand jury and lack of trial by jury as reasons for requiring a civilian trial for "non-service-connected" offenses have led many judges and observers to deny the extension of this holding overseas. Concentration on those provisions has obscured what is probably the overriding consideration in the decision—the intent to restrict court-martial jurisdiction to those crimes in which the military has a special interest. Foreign applicability of O'Callahan certainly is not inconsistent with that rationale.

However, as this Note points out, the refusal to grant such an extension...
produces an anomaly with our international treaties and agreements. Since the Court had previously decided in *Wilson v. Girard* that American servicemen's constitutional rights are not violated through subjection to foreign jurisdiction, it is less than reasonable to refuse foreign application of *O'Callahan* on grounds that this would cause a deprivation of liberty. A further anomaly is created if we refuse to extend the *O'Callahan* rationale to offenses occurring overseas. It is incongruous to say that a court-martial could assert jurisdiction over a soldier for an alleged offense committed *outside* the United States but would be powerless to act if the same offense were alleged *within* the United States.

As a practical matter, this extension would not unduly burden either our foreign military forces or the foreign courts. In view of the decision of the Court of Military Appeals to limit the scope of *O'Callahan* to serious offenses, most crimes would still fall within the jurisdiction of the military. Those serious offenses which would necessitate a civilian trial are relatively few. Therefore, it is doubtful that foreign authorities would raise objections to a slight increase in criminal trials.

Additional protection for the rights of the soldier might take the form of allowing him to choose between trial by court-martial and trial by the foreign tribunal. This would still depend upon obtaining a waiver. Such an approach is not necessarily recommended, but could provide additional protection for the defendant if thought necessary. This choice of tribunals should make the extension of *O'Callahan* overseas agreeable to even the most provincial mind and insure a greater consistency in our total body of law. The search for consistency should be of primary concern in determining the ultimate scope of the *O'Callahan* principle. *O'Callahan* must be given international application, or an alternative to the SOFA's must be devised.

*Ernest V. Harris*

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