St. John's Law Review

Volume 47, December 1972, Number 2 Article 5

Retroactivity of O'Callahan v. Parker (United States ex rel. Flemings v. Chafee)

St. John's Law Review

CONSTITUTIONAL LAW

RETROACTIVITY OF O'CALLAHAN V. PARKER

United States ex rel. *Flemings v. Chafee*

Since *O'Callahan v. Parker*[1] was decided by the Supreme Court, military personnel prosecuted for crimes that are not "service connected"[2] have been entitled to trials in civilian courts and the constitutional safeguards that attend such proceedings. A question that the Court has yet to answer is whether *O'Callahan* should also be applied retroactively.[3]

---

1 395 U.S. 258 (1969).

2 *Id.* at 272. O'Callahan was convicted of an attempted rape of a young Hawaiian girl while on evening pass. Certiorari was limited to the question

> 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 a grand jury and trial by a petit jury in a civilian court?

Id. at 822 (1969). The Court noted that the Constitution had given Congress the power to "make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14. The Court also noted that the fifth amendment specifically exempts military cases from the requirement of indictment by grand jury and, by inference, from the right to trial by petit jury. Justice Douglas, who wrote the majority opinion, described these rights as the "constitutional stakes in the present litigation" (395 U.S. at 261-62) and made a lengthy comparison of the two court systems, criticizing such aspects of military tribunals as the lack of provisions for life tenure and salary protection for judges, the replacement of the jury by a panel of officers empowered to act by a two-thirds vote, the possibility of command influence over the outcome of trials, and different rules of evidence and procedure. *Id.* at 263-66.

The opinion concluded that

> [d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "the least possible power adequate to the end proposed."

395 U.S. at 265, *quoting* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

The Court described the military trial as "marked by the age-old manifest destiny of retributive justice" (395 U.S. at 266) and held that a crime must be service related in order to create court-martial jurisdiction.

3 The Supreme Court was faced with this issue in Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971), but did not reach it since it found that the crime in question was service-connected. However the case is significant in that the Court defined "service connected" in terms of 12 factors that would deprive a military court-martial of jurisdiction to hear a case:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.

The Second Circuit, in *United States* ex rel. *Flemings v. Chafee*,[4] held that a retroactive application is required since the rationale for *O'Callahan* was that military tribunals lacked subject matter jurisdiction over such offenses.[5] Furthermore, the court stated that, even without the jurisdictional rationale, it would have reached the same result by applying the standards presently used to determine whether new constitutional rules of criminal procedure should be applied retroactively.[6]

Since 1916, when Congress provided for military trials for civilian offenses committed by those in the armed services,[7] an incalculable number of cases have been tried under the assumption that the court-martial had proper personal and subject matter jurisdiction.[8] A retroactive application of *O'Callahan* would place the validity of a great number of these military convictions in doubt.[9] The administrative as well as pecuniary problems raised thereby are probably the foremost concern of those who would deny retroactive application.[10]

---

10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

401 U.S. at 365.

4 458 F.2d 544 (2d Cir. 1972), *cert. granted*, 407 U.S. 919 (1972).

5 *Id.* at 556. In *O'Callahan* the government contended that the test of whether a defendant is subject to a court-martial is one of status, that is, "whether the accused in the court-martial proceeding can be regarded as falling within the term 'land and naval Forces.'" 395 U.S. at 267, *citing* Kinsella v. Singleton, 361 U.S. 234, 241 (1960). Mr. Justice Douglas answered the contention by stating that military "status" is a necessary jurisdictional predicate but "it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." 395 U.S. at 267.

6 458 F.2d at 552. The court stated that such a conclusion was not necessary to the holding, but that it felt obligated to reach this issue since other courts have held *O'Callahan* to be prospective on this basis.

7 Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 664.

8 *See* Mercer v. Dillon, 19 U.S.C.M.A. 264, 267-68, 41 C.M.R. 264, 267-68 (1970).

9 *Id. But see* Blumenfeld, *Retroactivity After O'Callahan: An Analytical and Statistical Approach*, 60 GEO. L.J. 551, 578-80 (1972), where the author produces statistics tending to refute this viewpoint.

10 *See* Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970);

> The practical effect of voiding earlier convictions will often be to grant immunity from prosecution as a result of State statutes of limitations having run, witnesses having been scattered and memories having been taxed beyond permissible limits.
>
> . . .
>
> A reliable estimate of the number of court-martial convictions that could be overturned by retroactive application of *O'Callahan* is nearly impossible to secure. For one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial . . . . The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed and consideration of retroactive entitlement to pay, retired pay, pensions, compensation and other veterans' benefits.

Id. at 267; 41 C.M.R. at 267-68. This analysis is cited by the Fifth Circuit in Gosa v. Mayden, 450 F.2d 753 at 766 (5th Cir. 1971), and the Tenth Circuit in Schlomann v. Moseley, 457 F.2d 1223 at 1230 (10th Cir. 1972). Similar reasoning underlies the decisions in Thompson v. Parker, 308 F. Supp. 904 (M.D. Pa. 1970), *appeal dismissed*, No. 18,868

The doctrine of prospective application of newly declared constitutional principles is of relatively recent vintage. Until *Linkletter v. Walker*,[11] the Supreme Court had uniformly applied new constitutional rules to all cases.[12] Since *Linkletter*, the Court, in a series of cases, has elaborated on the criteria for determining whether a decision is to apply prospectively or retroactively.[13] However, the Court has also

---

(3d Cir. Apr. 24, 1970); Bell v. Clark, 308 F. Supp. 384 (E.D. Va. 1970) (dictum); and Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970) (dictum). *See also* Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian Offenses": An Analysis of* O'Callahan v. Parker, 54 MINN. L. REV. 1 (1969); Note, *The Sword and Nice Subtleties of Constitutional Law*, 3 LOYOLA U.L. REV. 188 (1970); 2 TEX. TECH. L. REV. 106 (1970); 44 TULANE L. REV. 417 (1970); 21 S.C.L. REV. 781 (1969).

11 381 U.S. 618 (1965). *Linkletter* refused retroactive application to Mapp v. Ohio, 367 U.S. 643 (1961), which held that, because of the operation of the fourth amendment through the fourteenth, states were required to exclude evidence obtained by means of illegal searches and seizures. The *Linkletter* Court concluded that the Constitution neither prohibited nor required retrospective effect and formulated the following criteria:

> In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*.
>
> . . .
>
> All that we might decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it.

381 U.S. at 636, 639-40.

12 458 F.2d at 549, *citing Linkletter*. In Eskridge v. Washington Prison Board, 357 U.S. 214 (1958), the Court held that the indigent defendant's right to a free transcript on appeal of his conviction was fundamental to the ascertainment of the truth. *Eskridge* granted retroactive application of Griffin v. Illinois, 351 U.S. 12 (1956). In Pickelsimer v. Wainright, 375 U.S. 2 (1963), the Court applied the rule of Gideon v. Wainwright, 372 U.S. 335 (1963), to pre-Gideon convictions, thereby giving it full retroactivity. In Daegele v. Kansas, 375 U.S. 1 (1963), the Court gave the Douglas v. California, 372 U.S. 353 (1963), rule concerning the right of the indigent defendant to counsel on appeal, retrospective application. In *Gideon* and Jackson v. Denno, 378 U.S. 368 (1964) (voluntaries of confession), the appeals were before the Court on writs of habeas corpus. The Second Circuit notes that "[t]o our knowledge, the Supreme Court always has applied new rules announced in habeas corpus cases retroactively." 458 F.2d 556, *citing* both *Gideon* and *Jackson*. Since O'Callahan's appeal was also on a writ of habeas corpus, a strong argument could be made that *O'Callahan* is retroactive by virtue of that fact alone. *But see* note 40 *infra*.

13 In Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966), the Court refused retroactivity to Griffin v. California, 380 U.S. 609 (1965). That case had denied to the states the right to comment on a defendant's failure to testify in a criminal action. The opinion distinguished *Tehan* from cases involving denial of counsel (which were given full retroactive effect) by pointing out that the denial of counsel presented a "clear danger of convicting the innocent." 382 U.S. at 416.

After *Tehan* came Johnson v. New Jersey, 384 U.S. 719 (1966), in which the Court refused retroactive application to Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966). The cases dealt with statements and confessions made by defendants in cases where they were without counsel and had not been advised of their right to counsel. The Court stated:

> We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved . . . We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved . . .

indicated that there is no rigid constitutional rule requiring either application.[14] Furthermore, these standards have been strictly limited

---

Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.

384 U.S. at 728-29.

Following *Johnson* came Stovall v. Denno, 388 U.S. 293 (1967). *Stovall* refused retroactivity to United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), which dealt with validity of pretrial identification procedures in the absence of counsel. In giving the reliance and effect portions of the equation more weight in this instance, the Court restated the criteria for determining retroactivity:

(a) the purpose to be served by the new standards,
(b) the extent of the 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.

In DeStefano v. Woods, 392 U.S. 631 (1968), the Court went a step further in explaining the *Linkletter* criteria. *DeStefano* refused retroactive application to Duncan v. Louisiana, 391 U.S. 145 (1968), and to Bloom v. Illinois, 391 U.S. 194 (1968), which dealt, respectively, with jury trials in serious criminal cases and serious criminal contempt cases. The Court concluded:

> [I]n the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, "We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."

392 U.S. at 633-34.

Subsequently, in Williams v. United States and Elkanich v. United States, 401 U.S. 646 (1971), the Court refused retroactivity to Chimel v. California, 395 U.S. 752 (1969). *Chimel* dealt with the scope of permissible searches incident to arrest. The Court stated:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.
>
> It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials.

401 U.S. at 653.

The cases of Mackey v. United States, 401 U.S. 667 (1971), and United States v. United States Coin and Currency, 401 U.S. 715 (1971), treated the prior decisions of the Court in Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968). In *Mackey*, the Court refused to apply *Marchetti* and *Grosso* retroactively since the use of the wagering tax forms by the prosecutor produced no threat to the reliability of the fact-finding process involved. In the *United States Coin* case, on the other hand, the Court granted retroactive effect to the *Marchetti* and *Grosso* decisions as they related to the defendant. The case involved a forfeiture action brought by the government after defendant's arrest for failure to register as a gambler and failure to pay a statutory gambling tax. The Court held that the defendant could invoke *Marchetti* and *Grosso* retroactively since the only purpose of the forfeiture statutes was to penalize persons significantly involved in crime and "that the conduct being penalized is constitutionally immune from punishment." 401 U.S. at 724.

In the most recent case dealing with retroactivity, Adams v. Illinois, 405 U.S. 278 (1972), the Court limited Coleman v. Alabama, 399 U.S. 1 (1970) (accused entitled to coun-

to cases promulgating new constitutional rules of criminal procedure.[15]

The logic behind retroactive application of laws in general is derived from the Blackstonian theory that courts do not make new laws but merely discover old ones.[16] That is, the promulgation of a new law is not a new law at all but merely a correct statement of what the law has always been. This theory seems most clearly applicable to constitutional law questions since it must be presumed that citizens have been entitled to the full enjoyment of rights created by that document since the date of its adoption.

However, the *Linkletter* Court, after discussing the inroads of Austinian views in American jurisprudence,[17] concluded that there is

---

sel at preliminary hearing), to prospective application. *Adams* cited *Gilbert, supra,* and held:

> [S]imilarly the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the factfinding process as to require the weighing of the probabilities of such infection against the elements of prior justified reliance and the impact of retroactivity upon the administration of criminal justice.

405 U.S. at 281.

[14] Williams v. United States, 401 U.S. 646, 651 (1971).

[15] 458 F.2d at 549. *See* note 13 *supra.*

[16] The duty of a court, according to Blackstone, is not to "pronounce a new law, but to maintain and expound the old one." 1 BLACKSTONE COMMENTARIES 69 (15th ed. 1809). Following this postulate, Blackstone declared the necessity of retroactive application of overruling decisions:

> [T]hese judicial decisions are the principle and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined.

Id. at 68-71.

This conceptualization was not entirely novel in English law; *See* 1 M. HALE, HISTORY OF THE COMMON LAW 141 (5th ed. 1794). The Supreme Court followed this theory in Norton v. Shelby County, 118 U.S. 425 (1886), holding that unconstitutional action "is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 442. *See* Shulman, *Retroactive Legislation,* 13 ENCYC. SOC. SCI. 355-56 (1934). *See generally* Note, *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 YALE L.J. 907 (1962).

[17] The positivistic jurisprudential philosophy of John Austin (1790-1859) broke with the traditional Blackstonian approach.

> Austin maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law.

Linkletter v. Walker, 381 U.S. 618, 623-24 (1965).

Austin rejected the fiction that judges merely find the law and thus must give retroactive application to overrule decisions. *See* G. CAMPBELL, ANALYSIS OF AUSTIN'S JURISPRUDENCE 127 (1877). This commentator has characterized the Blackstonian position as "absurd." *Id.* at 186.

Dissatisfaction with the Blackstonian theory emerged in the opinion of Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 371 (1910). He stated that "a change

no constitutional or philosophical impediment "to the use of the same rule in the constitutional area where the exigencies of the situation require such application."[18] The Court later revealed that the "exigencies of the situation" depend upon the purpose of the new rule, the reliance of officials on the old rule, and the burden to be imposed upon the administration of justice by retroactive application of the new rule.[19]

The Second Circuit in *Flemings* makes it clear that these guidelines are irrelevant to *O'Callahan* which is based upon the lack of subject matter jurisdiction. However, some courts have argued that, while *O'Callahan* appears to refer to subject matter jurisdiction, in essence, the decision merely establishes a serviceman's rights to a jury trial and indictment by grand jury when accused of a non-service connected crime.[20] This construction is then supported by a citation to *De Stefano v. Woods*,[21] where the Supreme Court refused to retroactively apply the right to jury trials for serious offenses.

But the Second Circuit made clear the flaw in this analysis of *O'Callahan*:

> In construing the decision, it is important to note that the Court did not in any sense "reform" court-martial procedures or suggest that current procedures are inadequate in trials for offenses which are service connected. Nor did the Court suggest that courts-martial constitutionally could assume jurisdiction over offenses which are

---

of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law." Mr. Justice Cardozo firmly emplanted the Austinian approach in the philosophy of the Court in Great N. Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65 (1932). The state had the option to treat a later decision as "new" law and thus apply it prospectively rather than adhere to the "ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration . . ." This technique of prospective application of overruling decisions came to be known, appropriately enough, as "sunbursting."

18 381 U.S. at 628.

19 *Id.* at 636. *See also* Stovall v. Denno, 388 U.S. 293, 297 (1967).

20 *See* Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970), which agreed with the view that "[*O'Callahan*] did not rule on the existence of subject-matter jurisdiction, that it limited the *exercise* of such jurisdiction and that this limitation is functional only." 19 U.S.C.M.A. at 265, *citing* United States v. King, ACM 20361, 40 C.M.R. 1030, 1035 (1969). In Schlomman v. Moseley, 457 F.2d 1223, 1227 (10th Cir. 1972), the court admitted the jurisdictional nature of the *O'Callahan* decision but held that this did not dispense with the duty to decide if the court should, in the interest of justice, make the rule prospective. Gosa v. Mayden, 450 F.2d 753, 758 (5th Cir. 1971) agreed that the *O'Callahan* rationale dealt with adjudicatory power but held that retroactive application was not automatically required for that reason. The Court of Appeals for the Fifth Circuit saw *O'Callahan* as creating newly adjudicated constitutional rights and found for prospectivity after an application of the purpose, reliance, effect test. *Id.* at 763-67. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967), discussed *supra* note 13; Linkletter v. Walker, 381 U.S. 618, 636, 639-40 (1965), discussed *supra* note 11.

21 392 U.S. 631 (1968).

not service connected if they provided the protective benefits of a grand jury indictment and trial by jury.[22]

Although *O'Callahan* specified its intent to protect the right to a jury trial and the right to indictment by grand jury,[23] it is clear that the difference between civilian and military courts goes far beyond these two privileges.[24] As Mr. Justice Douglas stated in the majority opinion, "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."[25] To read *O'Callahan* as merely stating new definitions of constitutionally protected rights is to ignore all but one line of the opinion.[26] Yet this view has been adopted by several courts.[27]

However, no circuit court of appeals has chosen to ignore the jurisdictional issue. Nevertheless, in *Gosa v. Mayden*[28] and *Schlomann v. Moseley*,[29] the Fifth and Tenth Circuits, respectively, found that *O'Callahan* should be applied prospectively. *Gosa* recognized that the judicial declaration of the unconstitutionality of a federal law granting subject matter jurisdiction is unique. However, the court also reasoned that, although judgments of courts without jurisdiction are void, it does not inevitably follow that such a declaration demands retroactive effect.[30] The court then went on to state that the jurisdic-

22 458 F.2d at 550 (2d Cir. 1972).

23 395 U.S. at 273.

> We have concluded that the crime to be under military jurisdiction must be service connected, lest 'cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.

Id. 272-73.

24 *Id.* at 263-66. Mr. Justice Douglas, citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17-18 (1955), pointed out that the Constitution does not provide for life tenure for judges of military trials. Judges are appointed by military commanders and may be removed at will. Salaries are also not protected. A court-martial is tried, not by a jury, but by a panel of officers who can act by two-thirds vote. At the time O'Callahan was convicted, a court-martial was presided over by a law officer who could be a direct subordinate to the officer who convened the court-martial. Access to process for obtaining evidence and witnesses for the defense is to a significant extent dependent upon the approval of the prosecution. Mr. Justice Douglas also noted the ever present danger of command influence over a proceeding by an officer who convenes the court-martial, selects its members and counsel and often has command authority over its members. *See generally Symposium — Military Law*, 10 AM. CRIM. L. REV. 1-162 (1971); Sherman, *The Civilization of Military Law*, 22 MAINE L. REV. 3, 87-97 (1970); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240 (1968).

25 395 U.S. at 265.

26 *See id.* at 272-73; note 23 *supra.*

27 *See* note 20 *supra.*

28 450 F.2d 753 (5th Cir. 1971).

29 457 F.2d 1223 (10th Cir. 1972).

30 This, of course, is logically unsound. But there is no logical way to reach the conclusion the *Gosa* court wished to reach.

tional aspect of the *O'Callahan* holding is only secondary, resulting from "a new adjudication of a constitutional right."[31] The *O'Callahan* decision is, therefore, analogous to *Bloom v. Illinois*[32] "or any other new or altered adjudication that changes the fundamental rights of those accused of crime."[33]

The Tenth Circuit, in *Schlomann*, took a different approach than the Fifth Circuit although it, too, recognized the jurisdictional nature of *O'Callahan*. However, the court ruled that, since *O'Callahan* was "a clear break with the past," it was bound to inquire whether the interests of justice mandate that the decision be applied only prospectively.[34] The court argued basically as follows: *O'Callahan* concerns constitutional rights and criminal cases of this type have been applied prospectively; *O'Callahan* also concerns jurisdiction and civil cases of this type have been applied prospectively.[35] However, the court did not draw its conclusion from this analysis. Rather, it proceeded to note that the Supreme Court has held that "retroactivity does not turn on the value of the constitutional guarantee involved."[36] The court then concluded "that retroactivity likewise does not turn on whether a jurisdictional ruling is involved."[37]

Logically, *O'Callahan* should be applied retroactively. If this is not abundantly clear from the simple concepts involved,[38] the opinions of the Fifth and Tenth Circuits demonstrate that no sound Euclidian argument can be made without introducing new concepts.[39] Even then, logical argument still impels the adoption of the retroactive application of *O'Callahan*. Indeed, *O'Callahan* itself *is* retroactive in that it was promulgated on a petition for habeas corpus.[40]

---

31 450 F.2d at 758.

32 391 U.S. 194 (1968).

33 450 F.2d at 759.

34 457 F.2d at 1227.

35 This analysis brings into clear focus the uniqueness of *O'Callahan*. It concerns criminal, constitutional and jurisdictional elements.

36 457 F.2d at 1228.

37 *Id.*

38 *I.e.*, judgments without jurisdiction are void.

39 *See* note 30 and accompanying text *supra*.

40 But this fact does not necessarily mandate retroactivity. In deciding a case that frees the defendant at bar and applies to those tried after the decision but not those tried at the same time as the defendant whose case is chosen as the Constitutional vehicle, the Court has the following attitude: the fate of the individual defendant is not relevant — his freedom is a mere consequence of the Constitutional prohibition against advisory opinions. That is, the Supreme Court cannot proclaim new Constitutional standards except when it is "deciding cases" and could not, therefore, have announced, prior to deciding the "vehicle" case, a principle that would have saved others tried before the appeal reached it. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 301 (1967); *see also* Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963) (Harlan, J., dissenting).

Nevertheless, logic should not be followed if it leads to impractical results. The burdensome impact of a retroactive application upon the administration of justice may be sufficient in itself to mandate prospective application. In this case, the burden may be an intolerable waste of time and resources. As the Second Circuit notes, "[n]ot only will discharge records have to be changed, but questions of retroactive pay and veterans benefits will be involved."[41]

In short, the question is whether there is a probability that innocent defendants have been unconstitutionally deprived of their rights.[42] That is, does the preference of a civilian forum over a military one go to the "integrity of the truth-finding process?"[43] If not, the classifi-

---

41 458 F.2d at 555.

42 It is not unreasonable to speculate that the military forum is inherently incapable of providing the same safeguards against arbitrary law enforcement as does its civilian counterpart. The most serious difficulty with the military tribunal is that officers drawn from the ranks of the units on post are detailed by the commander to perform the duty of court-martial officer. *See* 10 U.S.C. § 825 (1968). The same commander who appoints the court-martial officer also rates his general job performance in his Officer Efficiency Report (OER). *See* Army Reg. 623-105 (1972). A favorable efficiency report is paramount in the determination of the officer's promotion potential. *See* Army Reg. 624-100, § 17 (1972).

Despite strict statutory and regulatory authority (10 U.S.C. § 837 (1970); Army Reg. 623-105, § 1-3 (g), (f) (1972)), there exists no practical method to insure that a commander's unfavorable rating on an OER will not be based on a performance inimical to the commander's personal interests while serving as a court-martial officer.

This problem was compounded in the past by the fact that, in summary courts-martial, the accused had no right to legal counsel. In light of Argersinger v. Hamlin, 407 U.S. 25 (1972), this difficulty has been alleviated. *See* Daigle v. Warner, — F. Supp. — (D. Hawaii 1972) (legal counsel required for summary courts-martial).

43 *See* note 13 *supra*. The Court has always applied new rules retroactively where the purpose of the new rule goes to the integrity of the truth determining process and would therefore cast doubt upon the conviction of anyone tried under the old rule. In Johnson v. New Jersey, 384 U.S. 719, 728-29 (1966), the Court stated:

> Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial.

In the following cases, the Court found that the integrity of the truth determining process has been violated: United States v. United States Coin and Currency, 401 U.S. 715 (1971) (forfeiture decree based on unconstitutional federal statute requiring gamblers to register and pay tax); North Carolina v. Pearce, 395 U.S. 711 (1969) (guarantee against double jeopardy applicable to the states); Berger v. California, 393 U.S. 314 (1969) (state must make good faith effort to secure a personal appearance by out of state witness before it can use his testimony); Arsenault v. Massachusetts, 393 U.S. 5 (1968) (right to counsel extends to preliminary hearings where defendant enters a plea and such plea is placed in evidence at a later trial); McConnell v. Rhay, 393 U.S. 2 (1968) (right to counsel for probation proceedings or proceedings for imposition of deferred sentence); Roberts v. Russell, 392 U.S. 293 (1968) (new rule with regard to joint trial confessions); Witherspoon v. Illinois, 391 U.S. 510 (1968) (improper exclusion of jurors because of their objection to capital punishment); Smith v. Crouse, 378 U.S. 584 (1964) (right of indigent to counsel on appeal); McNerlin v. Denno, 378 U.S. 575 (1964) (exclusionary rule against coerced confessions); Gideon v. Wainwright, 372 U.S. 335 (1963) (right of indigent to counsel); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958) (indigent entitled to

cation of *O'Callahan* as "a clear break with the past" requiring consideration of the merits of retroactivity[44] is the preferred road despite its academic deficiencies. In this way, it can be applied prospectively and yet distinguished from the immutable rule that judgments without jurisdiction are void.

SOVEREIGN IMMUNITY OF FEDERAL AGENTS

Bivens v. Six Unknown Named Agents

The Supreme Court in the case of *Bivens v. Six Unknown Named Agents*,[45] took an historic step by recognizing an aggrieved citizen's federal common law right to sue "federal officers" who violate fourth amendment prohibitions.[46] However, the Court left open the question of sovereign immunity and remanded the case to the Second Circuit for a ruling on that issue.

The doctrine of sovereign immunity is essentially a creature of judicial origin.[47] Immunity from civil liability was first extended to members of the judiciary.[48] Later, this protection was also afforded to

---

free transcript on appeal). *Contra*, Dobbyn, *Prospective Limitation of Constitutional Decisions in Criminal Cases*, 36 MO. L. REV. 301, 304, (1971) (Dobbyn refutes the idea that the Court has genuinely relied on the integrity of the fact-finding process and espouses the view that the Court has applied new rules prospectively in cases where there has been an uncalled for usurpation of legislative power). *See generally* Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 97-101 (1965); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

44 *See* text accompanying note 34 *supra*.

45 403 U.S. 388 (1971).

46 The Court relied heavily on the principle announced in Bell v. Hood, 327 U.S. 678 at 684 (1946): ". . . [W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (*quoted in* 403 U.S. at 396).

47 The Constitution establishes a privilege which is limited to members of Congress and which, during the periods when that body is in session, shields the members from arrest while they are in the conduct of their duties. The provision is intended to insure free speech and debate in the Congress. U.S. CONST. art. II, § 6. It is interesting to note that the Supreme Court first came to grips with the doctrine of sovereign immunity in a suit against a state. In Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1792), the Court held that the state of Georgia was not a sovereign within the meaning of the doctrine and was not, therefore, immune. This case subsequently led to the adoption of the eleventh amendment. However, it was not until 1834 that the Court said, by way of dictum in United States v. Clarke, 33 U.S. (8 Pet.) 436, that the national government, when appearing as a party to a suit, is entitled to invoke this doctrine. Twelve years later, the doctrine became more firmly settled as a principle of American jurisprudence in United States v. McLemore, 45 U.S. (4 How.) 286 (1846). Finally, in 1868, the Supreme Court stated that, "[I]t is a familiar doctrine of common law that a sovereign cannot be sued in his own court without his consent." The Siren, 74 U.S. (7 Wall.) 152, 154.

48 Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). Speaking for the majority, Mr. Justice Field said, "[i]t is a general principle of the highest importance to the proper administration of justice, that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal conse-