

1972

Criminal Law - Subject-Matter Jurisdiction - Retroactivity

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Recommended Citation

Thomas C. Black, *Criminal Law - Subject-Matter Jurisdiction - Retroactivity*, 10 Duq. L. Rev. 495 (1972).
Available at: <https://dsc.duq.edu/dlr/vol10/iss3/10>

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Recent Decisions

ways for a court to achieve the same protection without doing violence to the separation of powers doctrine. In *Judges for the Third Judicial Circuit v. County of Wayne*,²⁷ the Michigan Supreme Court expressed the two ways: (1) a court can prepare and submit a budget and argue before the executive and legislative branches that the funds are essential for its proper functioning; and (2) if the court has failed after using the first method it may contractually bind the legislature by incurring a debt for a practical necessity.²⁸

The approach in *Carroll*, while stressing the separation of powers doctrine by giving the judiciary the absolute power to establish and order the payment of a budget, has destroyed the doctrine of checks and balances. Now, seven judges have control over their finances which is an exclusive legislative function. The judiciary from this decision has the absolute freedom which potentially enables them to destroy the republican form of government. There is no one to determine whether the supreme court has acted arbitrarily in its appropriation. Thus, *Carroll* establishes a dangerous precedent, for even though the money forced to be appropriated may work to the advantage of the people at this time, it leaves the door open for the judiciary to achieve a superior position in our government.²⁹

Joy Flowers Conti

CRIMINAL LAW—SUBJECT-MATTER JURISDICTION—RETROACTIVITY—The Federal District Court for the Eastern District of New York has held that *O'Callahan v. Parker*, a decision concerning subject-matter jurisdiction, must be applied retroactively.

Flemings v. Chafee, 330 F. Supp. 193 (E.D. N.Y. 1971).

In 1944 Flemings was a Navy serviceman stationed in New Jersey. He was lawfully absent from the installation, when he stole a car in Trenton, and drove it to central Pennsylvania where he was apprehended by Pennsylvania State Police. Flemings was turned over to military author-

27. 172 N.W.2d 436 (Mich. 1969).

28. *Id.* at 440.

29. President Washington warned of this development in talking of the doctrine of checks and balances when he said, "[L]et there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." 12 G. WASHINGTON, WRITINGS SELECTED FROM THE ORIGINAL MANUSCRIPTS WITH A LIFE OF THE AUTHOR BY JERUND SPARKS, 382-398 (1848).

ities at the Brooklyn Navy Yard where he was convicted of auto theft and sentenced by a court-martial to three years confinement and a dishonorable discharge.

In 1970 Flemings brought the present action to compel the correction of his military records, alleging that under *O'Callahan v. Parker*¹ his crime was not "service connected." Flemings claimed a court without subject-matter jurisdiction over the offense alleged could not affect the status of a person before it. Any judgment the court made concerning that subject was void. Flemings further contended that since his crime was not "service connected" the court martial of 1944 had no jurisdiction over the subject-matter of his offense; therefore, its judgment was invalid and his dishonorable discharge must be corrected.² The district court accepted Flemings' contentions, and rejected the government's claim that even if Flemings' offense was not "service connected," *O'Callahan* should not be applied retroactively.³

The problem of application of new rules of law has been traditionally governed by the Blackstonian theory that all new rules of law are applied retroactively.⁴ The United States Supreme Court has developed an exception to the normal rule of retroactivity. Prospective application of a new decision has been implemented in the areas of constitutional and criminal law. This exceptional application, however, has been used only when particular factors have been present. In *Linkletter v. Walker*,⁵ the Court held there was no constitutional guarantee to either retroactive or prospective application of new constitutional criminal decisions.⁶ Following *Linkletter*, the Court decided in *Stovall v. Denno*,⁷ that there was a three-pronged test to determine the application given to a new constitutional decision. This test was based on consideration of 1) the purpose to be served by the new rule, 2) the reliance by the law enforcement agencies on the old rule, and 3) the burden on the ad-

1. 395 U.S. 258 (1969). *O'Callahan* held that "cases arising in the land and naval forces" were exempted from the fifth amendment necessity of prosecution by indictment, and inferentially from the sixth amendment right to a jury trial. If a case did not come within the exemption the defendant was entitled to all his constitutional rights. The *O'Callahan* test to determine when cases arise in the land or naval forces was a multiple-factor approach including considerations of status of defendant, type of offense, place of offense, and time of offense. The practical effect of *O'Callahan* was to deny military courts-martial the power to try cases that did not meet the *O'Callahan* test of "service connection."

2. *Flemings v. Chaffee*, 330 F. Supp. 193, 195 (E.D. N.Y. 1971).

3. *Id.* at 193.

4. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"* 51 MARQ. L. REV. 254 (1968).

5. 381 U.S. 618 (1965).

6. *Id.* at 629.

7. 388 U.S. 293 (1967).

ministration of justice if the new rule were applied retroactively.⁸ The result of these two decisions was to give the judicial branch some flexibility and discretion in applying retroactively or prospectively new constitutional decisions. This discretionary approach was adopted to alleviate the problem of instability faced by the judicial system in applying the traditional rule of retroactivity to new constitutional decisions in the area of criminal law.⁹

Since *Linkletter*, the majority of the Court's decisions on retroactivity in criminal cases have dealt with constitutional procedural rules.¹⁰ The Court has never applied *Linkletter* and *Stovall* directly to a case involving subject-matter jurisdiction.¹¹ Since *Flemings* dealt with subject-matter jurisdiction the district court felt it was not bound by *Linkletter* and *Stovall*. Therefore, the court, relying on *United States v. United States Coin and Currency*,¹² applied to *Flemings* the traditional rule that all new decisions receive retroactive application.

United States Coin and Currency applied retroactively *Marchetti v. United States*¹³ and *Grosso v. United States*.¹⁴ These cases taken together say certain activity that had been statutorily prohibited was constitutionally immune from punishment. In effect, the Court in *United States Coin and Currency* decided that Congress had no jurisdiction over the subject-matter of the activity in question. The crime allegedly committed by the petitioner was the failure to fill out certain Internal Revenue forms. These forms were held to be self-incriminating, and therefore any prosecution for not filling them out was a violation of the fifth amendment. In both *United States Coin and Currency* and *Flemings* the courts were asked to retroactively apply a new constitutional rule which dealt with subject-matter jurisdiction. *United States Coin and Currency* applied the new rule retroactively. The court in *Flemings* justified its traditional application of retroactivity on the rationale of *United States Coin and Currency*.

8. *Id.* at 297.

9. *Williams v. United States*, 401 U.S. 646, 676 (1971) (Justice Harlan dissenting). Justice Harlan mentioned the different rationales used to support the doctrine of prospectivity used by the Court in recent decisions. The rationale accepted today, is that the doctrine affords more stability to the judicial process because the new rule of *Linkletter* does not apply an automatic retroactive effect to new decisions. The essence of the old rule is that all new decisions are given retrospective application. See *In re Lake Champlain Pulp and Paper Corporation*, 20 F.2d 425 (N.D. N.Y. 1927).

10. *Flemings v. Chafee*, 330 F. Supp. 193, 195 (E.D. N.Y. 1971). See *Mackey v. United States*, 401 U.S. 667 (1971); *Williams v. United States*, 401 U.S. 646 (1971).

11. 330 F. Supp. at 201.

12. 401 U.S. 715 (1971).

13. 390 U.S. 39 (1968).

14. 390 U.S. 62 (1968).

It is suggested that the reasoning in *United States Coin and Currency* does not support the application in *Flemings* of the traditional rule of retroactivity. The Court in *United States Coin and Currency* said, in deciding the application of the *Marchetti* and *Grosso* rule:

Unlike some of our earlier retroactive decisions we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact-finding process at trial. . . . Rather *Marchetti* and *Grosso* dealt with the kind of activity that cannot be constitutionally punished in the first instance.¹⁵

This distinction made by the Court is between cases involving constitutional procedural rules and those involving subject-matter jurisdiction. Since Congress lacked criminal jurisdiction over the subject-matter of the alleged offenses in *Marchetti* and *Grosso* that activity could not be punished.

In *United States Coin and Currency* the Court did not talk about the traditional rule of retroactivity. Instead, the Court analyzed the problem in terms of the *Stovall* test. The passage quoted from *United States Coin and Currency* is the language used in *Stovall* to determine the purpose of the new rule.¹⁶ The majority said the government would have to accept the "relatively insignificant inconvenience involved in defending any lawsuits that may be anticipated" from the retroactive application of the *Marchetti* rule.¹⁷ The Court was speaking within the confines of the reliance and burden considerations of *Stovall*. Justice Brennan in his concurring opinion quoted *Williams v. United States*:¹⁸ "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."¹⁹ In effect the Court applied the *Stovall* test in *United States Coin and Currency*. The *Flemings* court was incorrect in its observation that *Linkletter* and *Stovall* had not been applied to questions of subject-matter jurisdiction. The court in *Flemings* relied on *United States Coin and Currency* to apply the traditional rule of retroactivity, but that was the case in which the Supreme Court impliedly extended the *Stovall* test to areas of subject-matter jurisdiction.

15. 401 U.S. at 723.

16. See 388 U.S. at 298.

17. 401 U.S. at 723.

18. 401 U.S. 646 (1971).

19. 401 U.S. at 725.

The problem remains whether or not to apply *O'Callahan* retroactively under the *Stovall* test. The first consideration is the purpose to be served by the *O'Callahan* decision. Other courts have decided that the purpose of the *O'Callahan* decision was to extend to military servicemen the constitutional right to a trial by jury²⁰ in cases not "arising in the land and naval forces." These courts have specifically rejected the approach taken by the court in *Flemings*, that the purpose of *O'Callahan* was to deny courts-martial subject-matter jurisdiction over certain types of crimes. Once *O'Callahan* is read as an extension of the jury trial right, the authority for prospective application is *DeStefano v. Woods*.²¹ That case held that the denial of a jury trial had not adversely affected the fact-finding process at trial, since a judge could not be said to be unfair. Therefore, the right was applied prospectively. The courts which read *O'Callahan* as a decision of constitutional law used *DeStefano* as authority to apply *O'Callahan* prospectively.

It is submitted that even if the purpose of *O'Callahan*, as the court in *Flemings* saw it, was to deny courts-martial subject-matter jurisdiction over certain crimes, this purpose would not be served by retroactive application. Although the rules applied retroactively in *United States Coin and Currency* and *Flemings* both dealt with subject-matter jurisdiction, the two cases can be distinguished. The purpose of the *Marchetti* rule was to prevent punishment of an activity which for constitutional reasons could not be considered a crime. In the *O'Callahan* decision there was no question whether a crime had been committed. Only the court which would hear the case was in question. Therefore, *United States Coin and Currency* is not controlling as to the retroactive application of *O'Callahan*.

If the rule in *O'Callahan* would enhance the truth-determining process at trial,²² retroactive application would be justified. The court in *O'Callahan* commented extensively upon the differences between military and civilian court systems.²³ Only if these differences are intimately related to the process of determining truth can defendants convicted before 1969 be afforded relief by retroactive application of *O'Callahan*.

20. *Thompson v. Parker*, 308 F. Supp. 904 (M.D. Pa. 1970); *Gosa v. Mayden*, 305 F. Supp. 1186 (N.D. Fla. 1969); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970).

21. 392 U.S. 631 (1968).

22. *Williams v. United States*, 401 U.S. 646 (1971).

23. 395 U.S. at 264. The essential difference between the two systems is that courts-martial are part of a system of military discipline. This leaves the court-martial open to the criticism that it practices retributive justice.

A 1944 court-martial, however, cannot be said to be inherently incapable of determining the truth about an auto theft. It is submitted there is no characteristic of a court-martial which so works against the integrity of the truth-determining process that a 1969 decision should be used to overturn a 1944 court-martial conviction.

The second and third inquiries relevant to the retroactive application of *O'Callahan* are the reliance by the military on pre-*O'Callahan* rules and the burden on the administration of military justice. These factors must be given special attention due to the statutes and cases existing before *O'Callahan* was decided. In 1944 the Articles of War²⁴ were the statutory implementation of Congress' constitutional power to regulate the military. These Articles gave courts-martial jurisdiction over ordinary crimes, even in peacetime. Article 12 gave power to a general court-martial to try "any person subject to military law in any crime or offense made punishable by these articles. . . ." ²⁵ Robbery, burglary, and larceny were crimes punishable by a court-martial, under Article 93.²⁶ According to the case law existing in 1944, the principle of which was first decided in 1886,²⁷ the only judicial test for determining court-martial jurisdiction was the status of the offender.²⁸ The reliance by military authorities upon these laws and decisions was present in almost every case before a court-martial. To determine how many cases would be re-opened by a retroactive application of *O'Callahan* would be speculation. The burden upon the administration of military justice would be awesome. The result of weighing the considerations announced in *Stovall* leads to the conclusion that *O'Callahan* should have been applied prospectively in *Flemings*. If the New York District Court had correctly interpreted *United States Coin and Currency* it would have correctly applied *O'Callahan*.

Thomas C. Black

24. Act of Aug. 29, 1916, Ch. 418, § 1342, 39 Stat. 650-70 (1916).

25. *Id.* at 652.

26. *Id.* at 664.

27. *Smith v. Whitney*, 116 U.S. 167 (1886).

28. *Ex parte Quirin*, 317 U.S. 1 (1942).