In the

# Supreme Court of the United States



JAMES ROY GOSA,

Petitioner,

vs. No. 71-6314

J. A. MAYDEN, Warden,

Respondent.

Washington, D. C.
December 4, 1972

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Washington, D. C.
Monday, December 4, 1972

The above-entitled matter came on for argument at 10:57 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN R. SAALFIELD, ESQ., 400 Southeast First Bank Building, P. O. Box 447, Jacksonville, Florida 32201; for the Petitioner.

ERWIN N. GRISWOLD, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Respondent.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-6314, Gosa against Mayden.

Mr. Saalfield, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN R. SAALFIELD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SAALFIELD: Mr. Chief Justice, and may it please the Court:

The case that we are now to hear involves a similar issue as that which you have just heard. This is a companion case to the Flemings case. However, I would like to emphasize a factual distinction which I think important.

In the case of Gosa v. Mayden, in both the lower courts they found retroactivity or at least the impact of the O'Callahan v. Parker decision not to apply. The court-martial sentence imposed upon Mr. Gosa, therefore, was upheld. But let me emphasize that the Gosa factual situation is almost identical to that in O'Callahan. And in O'Callahan as well as Gosa we had a member of the United States military who was off duty with permission of his superior officers and off post in civilian clothing. Under this context and while in such status each of the defendants in the lower court committed the offense of rape for which they were subsequently tried in the court-martial.

These offenses, I emphasize, were committed while each of the defendants were off duty and while the nation was not in a wartime status. This is important, I believe, in distinction with the Flemings case. But in continuing I hope to remain as succinct as possible to avoid cumulative as well as repetitious argument which was ably presented by counsel Meltsner for Flemings.

However, I contend initially that the court-martial which tried Mr. Gosa had no jurisdiction within which to impose any sentence whatsoever on the charge of rape. I would indicate that the constitutional construction as well as application of those provisions leave the Court with no alternative but to restrictively apply the jurisdiction of the court-martial in those instances.

Q Mr. Saalfield, is there any indication in the record here as to why Mr. Gosa was not tried in the state courts of Wyoming for this offense? We have been told in the course of the earlier argument in the briefs that the general policy of the military was, in situations like this, to waive any potential court-martial jurisdiction and have the person tried in the state courts.

MR. SAALFIELD: Yes, sir. Mr. Gosa in fact was held by civilian authorities for approximately one month after he was arrested for the offense of rape, after which time he was turned over to the military. He was not tried

by civilian authorities for the reason that no complaining witness was found by those authorities.

Q Oh, that is right. The complaining witness was in a little trouble herself on shop lifting or something. Is that not what the record shows?

MR. SAALFIELD: The record did indicate that.

Q I remember that now. I read the briefs a couple weeks ago.

MR. SAALFIELD: Yes, sir.

It is our contention--and no one knows better than this Court the basis for the decision in O'Callahan, but obviously as the content of the decision indicated, under those circumstances O'Callahan was not in the status and his crime did not involve service connection. Therefore, the Court decided that there was no jurisdiction by which the court-martial could try him for the crime which was alleged.

Q The petitioner was handed over?

MR. SAALFIELD: Yes, he was, sir.

Q Is he still in prison?

MR. SAALFIELD: He recently was released, I think approximately four or five months ago. He has served his sentence. At any rate, the majority of this Court in the O'Callahan decision went to great lengths to contrast the court-martial procedural system with the system of trial by

jury of one's peers, which is representative in the civil judicial process. It is not necessary or appropriate for me at this time to reiterate and emphasize the distinctions which this Court arrived at. But, rather, I point out that the Court in the O'Callahan decision recognized the vital fundamental importance of the Fifth and Sixth Amendments which impose and guarantee to individuals certain liberties. It is these liberties which we are now concerned.

We contend, therefore, that the O'Callahan decision which was jurisdictional indicated that the court-martial was without jurisdiction under the facts of that case to impose any sentence whatsoever on the person being court-martialed. The court-martial, in effect, was without power, was without authority, and was without competence by which to adjudicate on such a matter. And, therefore, the court-martial had no jurisdiction. We contend, therefore, that the judgment of the lower courts in this case, the Gosa case, is null and void without any force and effect because of this jurisdictional question, and that the rules of retroactivity or prospectivity which have been promulgated and created by necessity by this Court in cases in the past are of no applicability, because every time these rules of prospectivity or retroactivity have been applied, none of the cases have gone to the jurisdictional question or the power of the court in the first instance to adjudicate the case before it. And

precisely this is the matter with which we are now concerned.

The lower courts, both the district and the court of appeal, recognized, I think, from a fair reading of their decisions, that O'Callahan was a jurisdictional decision. However, each of these courts applied the so-called Stovall or Linkletter three-pronged test which counsel has argued before the Court in the prior case. I at this time am not going into the test, but suffice it to say that the test involves the purpose, reliance, and effect of a particular decision of a court.

Again, I would like to emphasize that in each and every instance where these tests have been applied before, it has involved procedural questions primarily in the area of criminal law, and I would emphasize that we are not now concerned with whether the court in fact had the power to try the case because in the case before us now, the court-martial in Gosa did not have that power. Therefore, we do not need to concern ourselves with this retroactivity problem.

There are no cases or any decisions which have applied the test of retroactivity where a jurisdictional question of the court is involved as we are talking of it in this case. Traditionally the rule of retroactivity is applicable where where a court lacks the jurisdiction to adjudicate in the first place. This is emphasized by

Judge Godbold in dissenting opinion in the appeal decision below.

Even conceding that the test of retroactivity should be applied, I would argue that under the circumstances the test favors retroactivity rather than prospectivity, and the reason for this argument is, one, if we look to the purpose of the test itself, we find that it is to instill and insure the guarantee of the Fifth and Sixth Amendments, which is the right to trial by jury, presentment of a grand jury indictment.

The Government contends, however, that if this is the purpose, that there is no impairment whatsoever in the truth-finding process, and therefore there is no need to retroactively apply the decision of O'Callahan.

However, I think the Government's argument ignores the O'Callahan majority decision, which went to great length to point out the shortcomings of the court-martial system as it was known in 1969. And the historical argument suggested in the O'Callahan decision indicated a limitation on jurisdictional expansion must be levied on the court-martial system.

Furthermore, the Government argues and cites the case of DeStefano and cases similar to it, Bloom v. Illinois. These cases involve the question of right to trial by jury for certain serious crimes. However, I would emphasize in

these cases in the first instance the defendants did have the opportunity to be tried by a civil judge, and a distinction can thereby be drawn between that situation and where a defendant is being tried by a court-martial. And, of course, the differences are well contrasted in the O'Callahan decision.

But I would contend that the purpose is not necessarily protection of the Fifth and Sixth Amendments. But even further I would say the purpose is to make certain that the jurisdiction of the court-martial system as we know it today in the military is delineated in a definitive way so that the Fifth and Sixth Amendment rights cannot be impinged. And by doing so we can thereby only say this is a jurisdictional question. Therefore, being jurisdictional I argue we have no choice. This Court must impose the effect of the decision retroactively.

The Government further contends that reliance has been very heavily weighed upon by the military with regard to court-martial jurisdiction. Military policy, however, I would say, historically favors civilian authorities trying those who are involved with offenses which are committed off the base. And a memo of understanding, in fact, in 1955--a memo of understanding between the Department of Justice and the Department of Defense--in those situations, although jurisdiction is concurrent, emphasized the policy of the

military to turn over cases which involve serious crimes off the base committed by military personnel to the Department of Justice for prosecution.

Q As you indicate by the use of the word, this was a matter of policy and choice on the part of the military, was it not?

MR. SAALFIELD: Yes, it was. And my reason for mentioning that, Your Honor, was to emphasize that the Government recognized that this was probably the proper form and that this reliance factor is not so great as the Government might urge.

Q Is it not true that they did not want to have the burden of all these trials?

MR. SAALFIELD: That may be true. I do not know.

Q Mr. Saalfield, the memo that you have just referred to sounds like it is termed as though it dealt with possible federal civilian prosecutions. Was there a similar understanding between the Department of Defense and potential state prosecutors?

MR. SAALFIELD: I do not know, Your Honor.

Lastly in the three-pronged test is the effect of the O'Callahan decision being applied retroactively. The Government strongly urges an extreme administrative burden would be imposed on the military system should this decision be applied retroactively. However, I think in the first

place, if the Government is going to so argue, that they have the burden to convincingly show to the Court that this in fact would be the case. To the contrary, however, I believe that the Government has done no more than to speculatively mention that this will be an extreme administrative burden but has not shown any statistics or figures to support their contention. And, to the contrary, I would urge the Court to recognize the Law Review article by Mr. Blumenfeld which has been cited previously by counsel which rebuts most all the contentions of the Government with regard to any administrative inconvenience or extreme burden should retroactivity be imposed.

In conclusion, with regard to this three-pronged test, I think we are involved, as we are in many decisions with a balancing of certain values. What are the values which are at stake here? On the side of the petitioner we are talking of individual rights instilled in the Fifth and Sixth Amendments. On the other side, the Government is interested with the or concerned with the administrative burden on the military should retroactivity be the situation. I do not think that the administration or the burden on the administration of the military should in any way come near weighing the importance of what the individual rights of the petitioner are that are involved, the Fifth and Sixth Amendment are fundamental. No matter what the financial cost,

repercussions or otherwise, the value I think clearly points to the individual. Also we are concerned with the power or the right not to be tried by a court-martial in non-service connected crimes. Conversely, on the other side, we have the power of the court-martial itself and the breakdown, if you will, or the possible breakdown in military discipline. I do not believe in the facts of O'Callahan and Gosa, which I contend are identical except that O'Callahan was in Hawaii and Gosa was in the District of Wyoming or the State of Wyoming, that there will be any effect if this Court recognizes or limits the jurisdiction of the court on military discipline because of the fact that this is a non-service connected offense.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Saalfield.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRISWOLD: May it please the Court:

This case began by a writ of habeas corpus, but it appears that the defendant has now been released. Should habeas corpus be used as a sort of declaratory judgment that the prior confinement was illegal?

Q May I ask, Mr. Solicitor, was he still confined when the petitioner filed here?

MR. GRISWOLD: Yes, he was confined.

Q Have we not decided in that circumstance that we may still decide the case?

MR. GRISWOLD: I am not sure, Mr. Justice.

Q I thought we had a term or two ago.

MR. GRISWOLD: I would be happy if the Court has jurisdiction of this case because I would hate to have this question of retroactivity have to be argued a third time before the Court.

Q I do not recall the name of it, but I am rather confident we did decide that.

MR. GRISWOLD: He may be on some sort of probation, but that does not appear.

Q No, the test, as I recall the case, the test we applied was whether he was confined when the petition was filed here.

MR. GRISWOLD: He was confined when the petition was filed; there is no doubt about that. If the case is properly before the Court, it does seem to present the issue of retroactivity which was discussed in the previous argument. The offense here was, as the district court said, rape which occurred while he was off base, off duty, dressed in civilian attire, and with the woman involved a civilian. The offense occurred in peace time after the Uniform Code of Military Justice was in effect in the State of Wyoming. It

is thus very close in its facts to O'Callahan. Indeed, the Government stipulated in the court below, and I fully agree here, that the charge was not service-connected. And thus the question is whether O'Callahan is to be applied retroactively to a conviction which became final some two years before O'Callahan was decided. The reasons against retroactively applying O'Callahan have been canvassed thoroughly in the Flemings argument and need not be generally repeated here. I would point out, though, the language of the district court in this case below who said that, at page 31 of the Appendix, "In spite of the fact that the Supreme Court in O'Callahan talks in terms of a lack of jurisdiction on the part of military courts-martial, the basic rules in Linkletter, Tehan, Stovall, and DeStefano against Woods should apply in this case."

And I would call particular attention to the excellent opinion of Judge Clark below in which, among other things, he refers on page 43 and 44 of the Appendix to O'Callahan as "a decision which undoes congressional action in a context where the act involved has a half century background of at least tacit judicial approval."

There is considerable reference in the briefs, and there has been reference in the argument here, to the suggestion that the practical consequences of a retroactive decision would not be very great. It is said that there are

plenty of administrative personnel and they board for the correction of records who could do the paper work, and this could all be worked out. Of course, it is not as simple as that. When the records are corrected, various consequences would follow. Back pay; if a dishonorable discharge is canceled, then not merely veterans' benefits become available but past veterans' benefits would become available. Pensions for dependents and survivors would turn on it.

I do not put it solely on financial grounds, even though that would be a large and fortuitous windfall if retroactivity was applied across the board with statutes of limitations having run so that further prosecution could not be had in any event. I would like to suggest that though this Court can and in some cases certainly should change the rules for the future, it not only ought not but it cannot rewrite history. And things which happened before the rules were changed, in cases where essential justice is not involved should not lead to a complete redoing and re--not evaluation, because re-evaluation is impossible in these cases to a complete rewriting of history. And so we would say that in this case the judgment below, based on the excellent opinion of Judge Clark, should be affirmed.

Q I gather you are not making the argument you made in the Flemings case, that this is service-connected?

MR. GRISWOLD: No, Mr. Justice, I said that it was

stipulated below and we agreed that this is not service-connected.

Q I am addressing myself particularly to the argument you made in Flemings, that because that was an incident that occurred during a declared war, that in and of itself, you suggested, would make it service-connected.

MR. GRISWOLD: We are not contending that this was during wartime in 1966.

Q You limit your argument then only to the time of declared war?

MR. GRISWOLD: In this case, we limit the argument to a time of declared war. We have stipulated that this offense was not service-connected.

MR. CHIEF JUSTICE BURGER: Mr. Saalfield?

MR. SAALFIELD: I have no rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General and Mr. Saalfield. The case is submitted.

[Whereupon, at 11:21 o'clock a.m. the case was submitted.]

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