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# Criminal Law--Administrative Law and the Right to Trial by Jury

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protection guaranteed by the Constitution should not be limited lest our judicial machinery should become overburdened.

Moreover, the dissent points out that if the Court must limit *Mapp* prospectively, it should at least allow *Mapp* to be applied retrospectively in cases where the offense was committed after the *Mapp* offense, but the conviction was made final before *Mapp* was decided. Linkletter's offense was committed after the *Mapp* offense, but his conviction was made final before *Mapp*. Is the conviction of Linkletter impregnable to collateral attack because his trial and appeal were pushed along at a faster pace than *Mapp*'s? If the Ohio courts had proceeded with the same speed as the Louisiana courts, Linkletter's case would not have been decided before the decision in *Mapp*; consequently, Linkletter would have received direct relief after *Mapp* was decided.

The *Linkletter* decision represents the first time the Supreme Court has limited its decision prospectively in a criminal case involving constitutional rights. This raises the question of whether the Court will limit its decisions prospectively in the future, where constitutional issues similar to the one in *Mapp* are involved. In trying to determine how the Court will decide in these areas, one should be cautious when relying on precedent. The cases before *Linkletter* indicated a retrospective application might be given *Mapp*; however, the Court distinguished these precedents and limited the rule in *Mapp* prospectively. Consequently, no generalization should be drawn in regard to retrospectivity in criminal cases not yet adjudicated by the Supreme Court.

*Menis Elbert Ketchum, II*

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**Criminal Law—Administrative Law and the Right to  
Trial by Jury**

*Ds* were indicted for evasion of taxes owed for the years 1944, 1945, and 1946. The taxes were duly assessed by the commissioner in 1955. The indictment charged *Ds* with wilfully attempting to evade and defeat the payment of income taxes. In the criminal prosecution, the jury was instructed that the assessments were valid as a matter of law because the validity of an administrative order cannot be passed upon by a jury. Held, reversed. In a criminal prosecution of one charged with the commission of a

felony, *Ds* have an absolute right to a jury determination upon all essential elements of the offense. *United States v. England*, 347 F.2d 425 (7th cir. 1965).

Administrative law and its effect on the right to trial by jury as guaranteed by the sixth amendment of the Constitution present a novel and perplexing problem. In a criminal prosecution for the violation of an administrative order, is the accused guaranteed the right to have the validity of the order passed upon by the jury?

The Supreme Court faced this question in a case which arose under the 1940 Selective Training and Service Act. In *Falbo v. United States*, 320 U.S. 549 (1944), *D* was criminally prosecuted for wilful failure to obey a local draft board order to report for assignment to work of national importance. *D* claimed that he had been improperly classified as a conscientious objector rather than a minister. The Court held that the validity of an administrative order could not be questioned in a criminal proceeding until the administrative process had been completed. Any review then would be by the court and not by a jury. The Court also indicated that if Congress had provided an exclusive method of judicial review, a collateral attack on the administrative order would not be permitted in a criminal proceeding.

Two months later the Court faced the problem in *Yakus v. United States*, 321 U.S. 414 (1944). *Ps* were butchers who violated an Office of Price Administration price ceiling. They did not avail themselves of the review procedure established by the Office of Price Administration Act. They were not allowed to challenge the validity of the order as a defense to a criminal proceeding. The Court held that *D* had no constitutional right to have the validity of a price regulation submitted to the jury when he had adequate means to test the validity of the regulation in the Emergency Court of Appeals.

The issue was raised again in 1946 and 1947 in two similar cases. In *Estep v. United States*, 327 U.S. 114 (1946), and in *Cox v. United States*, 332 U.S. 442 (1947), the validity of a local draft board order was questioned. *Ps* wanted the jury to pass upon the validity of the classifications by the board. The Court held in *Estep* that the validity of an administrative order could be reviewed in a criminal proceeding. However, this was limited to judicial review by the court, and the jury had no right to pass

upon it. In both of the cases, the Court held that the constitutional right to jury trial does not include the right to have a jury pass on the facts underlying the validity of an administrative order.

A similar result was reached in the case of *United States v. Heikkiner*, 240 F.2d 94 (7th cir. 1957). Here, *D* was charged with the violation of a deportation order. In the criminal prosecution for violation of this order, *D* contended that he was being deprived of his liberty in violation of due process and the right to trial by jury under the sixth amendment. *D* wanted the issue of the validity of the order to be ruled upon by the jury. The court followed the decisions in the *Estep* case and the *Cox* case, holding that although *D* was entitled to attack the validity of the deportation order by having the issue submitted to the trial judge and the reviewing courts, he had no constitutional right to have the jury pass upon the validity of the order.

Several years prior to the *Heikkiner* case, there was evidence of a shift in position of several of the Supreme Court Justices on the issue involved in the present case. Delivering the majority opinion in *United States v. Spector*, 343 U.S. 169 (1952), Justice Douglas stated that the issue of "splitting the elements" of a criminal offense between an administrative agency and a trial court or jury was far from being settled federal practice. Although the question was not in issue in the case, he stated that there would be time to consider whether the validity of a deportation order could be ruled upon either by the jury or by the court.

The court's holding in the principal case appears to represent a complete reversal of the position taken in previous cases. Thus, all essential elements of a crime must be determined by the jury. This means that the jury is not to accept any essential element as being established merely because such element previously was passed upon by an administrative agency. Administrative proceedings are often informal. Guilt does not have to be shown beyond a reasonable doubt, but only by a preponderance of the evidence. *Almqvist v. Shenandoah Nurseries*, 218 Iowa 724, 354 N.W. 35 (1934). However, the protection offered by the sixth amendment is attenuated by allowing an administrative agency to rule on an essential element of a crime.

Perhaps, the decision in the instant case will eliminate this practice. If so, the court has taken a significant step towards allow-

ing an administrative order to be passed upon by a jury where such order constitutes an essential element of a crime. The constitutional guarantees of a jury determination of all the essential elements of a crime are thus preserved.

*William Jack Stevens*

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### Criminal Law—Kidnapping

The *Ds* entered the complainants' car and forced them to drive twenty-seven blocks. During the trip the *Ds* robbed the complainants. The *Ds* were convicted of kidnapping, robbery, and criminal possession of a pistol. The New York Court of Appeals reversed the kidnapping conviction. A majority of the judges reasoned that because kidnapping is a very serious crime with harsh punishment and the offense committed was essentially robbery, the kidnapping statute should not be applied. The court reached this conclusion after admitting that the language of the kidnapping statute might literally apply. *People v. Levy*, 15 N.Y.2d 159, 204 N.E.2d 842 (1965).

Before 1932 kidnapping was considered a less serious crime than it is today. In thirty states the penalty for kidnapping was less than life imprisonment. 26 J. AM. INST. CRIM. L.&C. 762 (1936). In 1932 a rash of kidnappings culminated in the abduction and murder of Charles Lindbergh, Jr., and to meet the threat of the sudden outbreak of kidnapping legislatures in most states changed their statutes or enacted new ones. West Virginia followed a typical pattern. In 1933 the West Virginia legislature decided to impose the death penalty for the crime of false imprisonment to extort ransom. W. VA. CODE ch. 61, art. 2, § 14a (Michie 1961); Comment, 67 W. VA. L. REV. 156 (1965).

Kidnapping statutes have changed little from their 1930 form. They all contemplate the unlawful restraint of the victim. However, they may be divided into three different groups as to the element of the defendant's purpose. A majority of the state acts make punishable as kidnapping an unlawful restraint only when the defendant's purpose was to extort ransom. Other acts are broader in that the defendant's purpose may have been either to extort ransom or to rob. ARIZ. REV. STAT. art. 25, § 13-492 (1965); CAL. PENAL CODE § 209; NEV. REV. STAT. tit. 13, ch. 20.320 (1963);