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FIFTH AMENDMENT—DOUBLE JEOPARDY

United States v. Wilson, 420 U.S. 332 (1975)
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Title III of the Omnibus Crime Control Act of 1970[1] amends the Criminal Appeals Act, allowing the Government to appeal all decisions terminating a prosecution in favor of a defendant where not barred by the constitutional provision against double jeopardy.[2] In three recent cases, *United States v. Wilson*,[3] *United States v. Jenkins*,[4] and *Serfass v. United States*,[5] the Supreme Court has indicated the extent to which Government appeals are permissible under the newly amended act. All involved the dismissal of an indictment, but at varying stages of the prosecution.

Prior to 1907 no writ of error[6] was available to the Government from a decision terminating a criminal prosecution.[7] The original Criminal Appeals Act[8] provided for Government appeal from a decision sustaining a plea in bar[9] when the defendent had not been placed in jeopardy, and from a dismissal resulting from the insufficiency of the indictment to charge an offense or from the invalidity of the statute upon which the indictment was based. In 1928 the act was changed to substitute right of appeal for writ of error.[10] In 1942 the Government's appeal rights were expanded to include arrest of judgments.[11] In 1948 the act was reworded to correspond to the language of the Federal Rules of Criminal Procedure.[12] Although the 1948 version of the Criminal Appeals Act seemed to greatly expand Government appeal rights,[13] the courts held otherwise.[14] The act was further amended in 1968 to allow an appeal of some pretrial motions to suppress property.[15]

In urging the passage of the 1971 bill amending the Criminal Appeals Act, the Senate Judiciary Committee discussed two growing tendencies in the area of federal criminal law which increasingly were thwarting a prosecutor's case.[16] First, discovery rights were being expanded, and courts were tending more often to dismiss cases in which discovery orders were not fully complied with.[17] Second, an increasing number of criminal actions were requiring court review of administrative records. Some courts of appeals had, prior to the enactment of the 1971 bill, treated pretrial dismissals based on information contained in administrative files as outside the scope

[1] 18 U.S.C. § 3731 (1970) provides in part:
> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. . . .

[2] "... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

[3] 420 U.S. 332 (1975).

[4] 420 U.S. 358 (1975).

[5] 420 U.S. 377 (1975).

[6] The writ of error, equivalent to the right of appeal, was abolished in 1928. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54.

[7] The Supreme Court in United States v. Sanges, 144 U.S. 310 (1892), held that any Government appeal rights in criminal proceedings must arise from express statutory provision. The judgment of the Court was based on the common law.

[8] Act of March 2, 1907, ch. 2564, 34 Stat. 1246.

[9] A plea in bar is generally described as a defense which is capable of determination without the trial of the general issue. United States v. Sisson, 399 U.S. 267, 301 (1970). The Supreme Court has divided on the question of the extent of the category, leaving the meaning of the plea in bar in American law uncertain. *See* United States v. Mersky, 361 U.S. 431 (1960).

[10] *See* note 6 *supra*.

[11] Act of May 9, 1942, ch. 295, 56 Stat. 271.

[12] Act of June 25, 1948, ch. 235, § 3731, 62 Stat. 844.

[13] 62 Stat. 844 provided in part:
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances: From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. . . .

[14] In United States v. Apex Distrib. Co., 270 F.2d 747 (9th Cir. 1959), the court held that the legislative history of the amendments to the Criminal Appeals Act indicated that Congress had not intended to expand the scope of Government appeals, but simply to substitute more modern terminology.

[15] Act of June 19, 1968, Pub. L. No. 90-351, § 1301, 82 Stat. 237.

[16] S. REP. NO. 1296, 91st Cong., 2d Sess. 5-6 (1970).

[17] *See* United States v. Apex Distrib. Co., 270 F.2d 747 (9th Cir. 1959).

of Government appeals.[18] The 1971 amendment gained additional impetus by a 1970 Supreme Court decision expressing dissatisfaction with the Criminal Appeals Act as it stood then. The Court termed it a "failure."[19]

The Senate Committee on the Judiciary enumerated five principal purposes of the amendment.[20] First, the amendment is intended to abolish the archaic terminology of the Criminal Appeals Act. Second, Government appeal of any decision favorable to the defendant, except an acquittal, is endorsed. Third, the amendment provides for limited appeals of suppression orders. Fourth, most Government appeals are to be taken to the courts of appeals, rather than to the Supreme Court. Fifth, a liberal construction of the Criminal Appeals Act is requested.

Of principal interest to this case note is the second purpose of the amendment, providing for Government appeal of any decision terminating a prosecution, except an acquittal. The text of the Senate report makes it clear that the bill allows all Government appeals not barred by the Constitution. The Senate committee expressed its view that only appeals from acquittals are barred by the fifth amendment, a true acquittal being a decision "based upon the insufficiency of the evidence to prove an element of the offense."[21]

In three decisions, the Supreme Court has begun redefining the extent of Government appeals allowable since the new amendment. The Court held in *United States v. Wilson*[22] that the amended act now permits a Government appeal to be made from a trial judge's post-verdict ruling in favor of a defendant. In *United States v. Jenkins*[23] the Court held that the Government could not appeal a dismissal of an indictment where jeopardy had attached, if a second trial would be necessary to resolve questions of fact. In *Serfass v. United States*[24] the Court ruled that a dismissal of an indictment occurring before jeopardy attached is appealable.

The defendant in *Wilson*, indicted for illegal conversion of union funds, made a pretrial motion to dismiss the indictment claiming that the delay between the offense and his indictment had prejudiced his right to a fair trial.[25] During the trial it was brought out that the only two men who could have testified about the circumstances under which Wilson received the union funds were unavailable for testimony. After the jury returned a verdict of guilty, the district court granted Wilson's pretrial motion and dismissed the indictment.

The Government appealed the post-verdict ruling under the newly enacted 18 U.S.C. § 3731, which had not yet been interpreted by the Supreme Court. The Court of Appeals for the Third Circuit dismissed the Government appeal.[26] In so doing the court was strongly influenced by a Supreme Court decision, *United States v. Sisson*,[27] decided under the 1968 version of the Criminal Appeals Act. *Sisson* involved an appeal by the Government from an arrest of judgment granted the defendant, following a jury verdict of guilty. The Court found that the trial judge had not actually rendered an arrest of judgment, *i.e.*, refusal to enter conviction because of an error on the face of the record, but had determined that Sisson's sincerity in opposing the Vietnam War was a valid affirmative defense. Since the trial court's decision was "made on the basis of evidence adduced at trial,"[28] it operated as an acquittal of the defendant. Under the 1968 version of the Criminal Appeals Act, the Government could not appeal an acquittal, whether rendered by judge or jury.

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy and thereby violating the Constitution... [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."[29]

[18] *See* United States v. Ponto, 454 F.2d 657 (7th Cir. 1971); United States v. Findley, 439 F.2d 970 (1st Cir. 1971). Both cases involved prosecution for failure to submit to induction. Upon review of the defendants' draft files, both trial judges dismissed the indictments. Upon appeal, the courts of appeals dismissed for lack of jurisdiction, holding that the lower courts had made pretrial rulings on the merits which could not be reviewed without violating the double jeopardy clause.

[19] Clarity is to be desired in any statute.... When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act proved a most unruly child that has not improved with age.
United States v. Sisson, 399 U.S. 267, 307 (1970).

[20] S. REP. No. 1296, 91st Cong., 2d Sess. 18 (1970).

[21] *Id.* at 11.

[22] 420 U.S. 332 (1975).

[23] 420 U.S. 358 (1975).

[24] 420 U.S. 377 (1975).

[25] United States v. Marion, 404 U.S. 307 (1971), held that the due process clause of the Constitution may mandate a dismissal of a criminal proceeding for delay in bringing an indictment against a defendant who can show prejudice to his case resulting therefrom.

[26] United States v. Wilson, 492 F.2d 1345 (3d Cir. 1973).

[27] 399 U.S. 267 (1970).

[28] *Id.* at 288.

[29] *Id.* at 289–90, *quoting* United States v. Ball, 163 U.S. 662, 671 (1896).

The Third Circuit concluded that *Sisson* barred the Government appeal in *Wilson*. The court found that the district court, in granting a dismissal for Wilson, had considered evidence brought out at trial. The dismissal, therefore, acted as an acquittal for double jeopardy purposes. The court did not question the proposition that an acquittal could not be reviewed without violating the Constitution.

Jenkins concerned a prosecution for the defendant's failure to report for induction. After a bench trial, the district court dismissed the indictment, finding that at the time of the offense the defendant's local draft board had failed, as required by law, to postpone the defendant's induction until his conscientious objector claim was determined. On appeal, the Court of Appeals for the Second Circuit dismissed the Government appeal for lack of jurisdiction.[30] The Second Circuit, also relying on *Sisson*, employed the same reasoning as the Third Circuit had in *Wilson*: the fact that the district court had considered evidence adduced at trial in reaching its conclusion barred an appeal.

Serfass was also a draft case. The district court granted defendant's pretrial motion to dismiss, finding that the defendant had established a prima facie claim of conscientious objector status which his local draft board had ambiguously rejected, thereby prejudicing his right to later review. Upon appeal the Third Circuit held that, while a Government appeal could not have been allowed under the 1968 version of the Criminal Appeals Act, it was permitted by the 1971 amendment.[31]

The Supreme Court allowed the Government to appeal in *Wilson* and *Serfass*, but denied the appeal in *Jenkins*. In determining the outcome of the appeals brought in the three cases, the Supreme Court was forced, for the first time, to determine the precise meaning of the double jeopardy clause in the fifth amendment of the Constitution. In each of the cases, the Court considered that previous decisions determining appealability of lower court orders terminating prosecution had been strictly limited to interpretation of common law or statutory restrictions on the right of Government appeal.[32] However, the Court noted that Congress, in passing the 1971 amendment to the Criminal Appeals Act, expressed its intention that all Government appeals constitutionally permissable should be allowed. Thus, previous cases holding to the contrary were not controlling.

[30] 490 F.2d 868 (2d Cir. 1973).

[31] 492 F.2d 388 (3d Cir. 1974).

[32] *See* notes 45-47 and accompanying text *infra*.

First, turning to the historical basis for the prohibition against double jeopardy, the Court traced the principle back to three common-law pleas: *autrefois acquit, autrefois convict,* and pardon. These pleas were available upon retrial to a defendant who had previously been acquitted, convicted, or pardoned of the same offense as charged. Although the English common law limited Government appeals of criminal prosecutions to certain situations, former jeopardy was pleadable only at a second prosecution.

The drafters of the Bill of Rights seemed to have had a similar notion of the concept of double jeopardy. James Madison's original proposal for the fifth amendment included a provision that "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense."[33] That proposal was rejected, apparently because some Congressmen feared that the passage would be read to bar a convicted defendant from appealing the verdict.[34] Instead, "jeopardy," a term familiar to students of Blackstone, was employed.[35] In reviewing the historical development of the double jeopardy provision, the Court found no mention by the members of the First Congress that it would bar Government appeals; there were only references to the prohibition of second trials for the same offense.

From the historical analysis of double jeopardy, the Court determined that the function of the clause is two-fold; it protects individuals from multiple prosecutions and from multiple punishments. Thus, if an order terminating a prosecution can be settled on appeal without resorting to a second trial, the

[33] United States v. Wilson, 420 U.S. 332, 341 (1975), *citing* 1 ANNALS OF CONG. 434 (1789) [1789-1824].

[34] Mr. Benson thought the committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says no person shall be tried more than once for the same offence. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former constitution, that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment; for which reason he would move to amend it by striking out the words "one trial or."

2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1111 (1971).

[35] Blackstone used the term "jeopardy" in connection with the right of an accused to make four special pleas in bar: *autrefois acquit, autrefois attaint, autrefois convict,* and pardon. Blackstone called the jeopardy concept a "universal maxim of the common law of England." 4 W. BLACKSTONE, COMMENTARIES* 335.

Court will allow a Government appeal to be heard.[36] In *Wilson* the trial court's decision granting a dismissal occurred after the jury found the defendant guilty. The Court allowed an appeal to be brought via the newly amended Criminal Appeals Act, since a second trial would not be needed to finalize proceedings. If the court of appeals finds in favor of the Government on remand, Wilson's guilty verdict will be reinstated.

The trial court's dismissal in *Jenkins,* on the other hand, was rendered following a bench trial. Although the district court filed findings of fact and conclusions of law, the Court was unable to determine if the lower court had resolved all factual issues against the defendant. The Court concluded that a second trial would be necessary should a Government appeal of the case succeed. Since the double jeopardy protection of the Constitution prohibits second trials, *Jenkins* was dismissed for lack of jurisdiction.

Serfass involved a pretrial dismissal, appealable under the old versions of the Criminal Appeals Act if found to constitute a plea in bar.[37] The Court found that, although the district court had relied on factual material found in the defendant's draft file in dismissing the case, an appeal could be brought since jeopardy had not yet attached.

The Court found additional support for its interpretation of the Constitutional restriction in prior case law. The Government has been permitted to appeal one type of post-jeopardy decision favorable to a defendant, an arrest of judgment, since the 1907 Criminal Appeals Act. An appellate court reversal of an arrest of judgment acts to reinstate the jury verdict, thereby not subjecting the defendant to a second trial. Moreover an appellate court's reversal of a defendant's conviction is subject to further appeal initiated by the Government.[38] Thus, the attachment of jeopardy is not dispositive of the question of a Government appeal, but merely begins the inquiry into double jeopardy considerations. The Court analogized a post-verdict ruling of law to an appellate court reversal of conviction. Both involve rulings in the defendant's favor after a jury has found him guilty. The Court could see no sense in allowing an appellate court reversal to be reviewed further, but not a post-verdict ruling.

The majority opinion in *Wilson* stated unequivocally that a Government appeal would lie from a post-verdict acquittal. The Court was faced with a multitude of prior decisions holding that no appeal lies from an acquittal. The Court distinguished *United States v. Ball*[39] and *Kepner v. United States*[40] from *Wilson* on the ground that they were attempted reprosecutions of defendants previously acquitted by triers of fact. According to the Court, appeals in the two cases violated the Constitution because a second trial of the defendants would have been necessitated by appeal. According to the Court in *Wilson, United States v. Sisson,*[41] which held that a post-verdict

[36] Such a position was taken by Judge Learned Hand in United States v. Zisblatt, 172 F.2d 740 (2d Cir.), *appeal dismissed on Government's motion,* 336 U.S. 934 (1949). Zisblatt, after receiving a guilty verdict from the jury, had his case dismissed by the trial judge, on the grounds that the statute of limitations barred the indictment. Hand concluded that since an appeal of the dismissal would not involve a new trial before a second jury, the double jeopardy provision of the Constitution would not be violated by the appeal.

> So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.

Id. at 743.

[37] *See* United States v. Jorn, 400 U.S. 470 (1971).

[38] The Government's right to appeal the reversal of a criminal defendant's conviction has been based on the theory that a defendant waives his double jeopardy protection by appealing his conviction. Once waived, the clause will not shield him from further review. *See* Green v. United States, 355 U.S. 184 (1957). The notion of waiving one's constitutional rights has been criticized. *See* Kepner v. United States, 195 U.S. 100, 135 (1904) (Holmes, J., dissenting). The result obtained in *Wilson* could be explained by this principle. A defendant requesting a post-verdict decision of law favorable to himself may be viewed as having waived his objections to further judicial review.

[39] 163 U.S. 662 (1896). Ball had been acquitted by jury of a murder charge. When the indictment upon which he was tried was found defective, he was reprosecuted and convicted. The Supreme Court reversed upon appeal. Contrary to the practice of the English common law, a verdict upon a defective indictment was held to be voidable only by a convicted defendant, not by the Government following an acquittal.

> The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him in jeopardy, and thereby violating the Constitution.

Id. at 671.

[40] 195 U.S. 100 (1904). Kepner had been charged with and acquitted of embezzlement of funds by a court sitting on bench in the Philippine Islands. An appeals court then reversed his acquittal. The Supreme Court discharged the prisoner.

> The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again on the merits, even in an appellate court is to put him a second time in jeopardy for the same offense.

Id. at 133. It is unclear from the text of *Kepner* whether the Court reversed on the basis of preserving the verdict of the first trier of fact, or whether the Court held appellate review of an acquittal would itself violate the Constitution.

[41] 399 U.S. 267 (1970).

decision favorable to the defendant could not be reviewed if the decision was based on evidence adduced at trial, dealt only with the 1968 version of the Criminal Appeals Act and was, therefore, also distinguishable.

Justices Douglas and Brennan filed a dissenting opinion in *Wilson* and a concurrence in *Jenkins*. They urged that the Court follow the *Sisson* standard in determining appealability of post-verdict decisions favorable to the defendant. The issue of a speedy trial in *Wilson* was "part and parcel of the process of weighing the Government's evidentiary case against respondent."[42] The dissenting justices objected to an appellate court review of evidentiary aspects of a criminal case. *Wilson* does represent an expansive departure from the category of lower court material which an appeals court may review upon the Government's request. For example, if a trial judge grants a post-verdict acquittal for insufficiency of the evidence,[43] a Government appeal will necessitate review of all the evidence produced at trial. However, courts of appeals have regularly reviewed records of criminal proceedings for sufficiency of evidence following appeals by convicted defendants. That the Government should also have that privilege is not catastrophic.

Wilson, *Jenkins*, and *Serfass* provide clear-cut, definitive rules on the appealability of decisions terminating a prosecution in the defendant's favor. In the past the circumstances under which a case might have been appealed or retried remained unclear. The Court, in deciding these double jeopardy cases, considered two questions. First, has jeopardy "attached," *i.e.*, has the jury been empaneled in a jury trial,[44] or has the court begun to hear evidence in a bench trial?[45] If jeopardy has not attached, an appeal may be brought.[46] If jeopardy has attached, a second inquiry is necessary: can an appeal be settled against the defendant without subjecting him to a second trial? If it cannot, the double jeopardy provision of the Constitution prohibits the appeal.

[42] United States v. Wilson, 420 U.S. 332, 357 (1975) (Douglas, J., dissenting).

[43] FED. R. CRIM. P. 29.

[44] *See* Downum v. United States, 372 U.S. 734 (1963).

[45] *See* Wade v. Hunter, 336 U.S. 684, 688 (1949).

[46] Jeopardy does not attach in the English common law until a verdict of acquittal or conviction has been reached. J. SIGLER, DOUBLE JEOPARDY 15 (1969). The Court's analysis of the mandate of the double jeopardy clause departed from the common law requirements on this point. Applying the English standard for double jeopardy attachment, the decision in *Jenkins* is clearly wrong; a defendant who has not received a final verdict has not been put in jeopardy and can be retried in the English courts.

In deciding *Wilson*, *Jenkins*, and *Serfass*, the Court relied heavily on the common law and the debates of the First Congress in illuminating the fifth amendment provision against double jeopardy. Other constitutional guarantees presented in the Bill of Rights have not undergone such historical treatment. The protection against unreasonable searches and seizures, right against self-incrimination, right to counsel, etc., afforded the criminal defendant today are much more extensive than the drafters of such amendments would have envisioned.[47] The Court's determination of the requirements of some constitutional privileges seems to vary with prevailing opinions as to what is fair to defendants, given current practices of law enforcement.[48] Indeed, prior

[47] The expansion of certain individual guarantees contained in the Bill of Rights has met considerable criticism. Justice Black, dissenting in Berger v. New York, 388 U.S. 41 (1967), decried the Court's application of the exclusionary rule to evidence obtained through unreasonable wiretapping on two bases: first, that the plain language of the fourth amendment and its legislative history indicate no intention to exclude unreasonably obtained evidence; second, that the fourth amendment clearly is aimed at unreasonable searches and seizure of tangible items, rather than the spoken word. Justice Black viewed the Court's decision as judicial usurption of legislative power. *Id.* at 70 (Black, J., dissenting).

Justice White criticized the Court's holding in Escobedo v. Illinois, 378 U.S. 478 (1964), that the refusal by police to provide an accused with counsel during interrogation was a violation of his sixth amendment rights, as an overly-broad interpretation of the amendment not justified by public policy interests. The Justice fantasized that the Court's new approach in interpreting sixth amendment rights would lead eventually to a requirement that counsel be present before a potential defendant even commits a crime, since the offense, itself, involves possibilities of self-incrimination. *Id.* at 497 (White, J., dissenting).

The privilege against self-incrimination has also undergone an expansive change. The fifth amendment provides that no one "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The protection has been interpreted to apply to production of documents, police interrogation situations, and statutes with registration and reporting requirements, going beyond the obvious intentions of the framers of the Constitution. H. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

[48] The Court in Miranda v. Arizona, 384 U.S. 436 (1966), placed considerable emphasis on the current tactics of law enforcement officials to justify the Court's conclusion that the so-called *Miranda* warnings were constitutionally mandated. One must wonder what would happen to the requirement of warning should the tactics change. Justice White, dissenting in *Miranda*, did not object to the expansion of the fifth amendment guarantee against self-incrimination on historical grounds, but on the basis of the wisdom of the holding.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the

cases dealing with the double jeopardy clause have advocated flexibility in determining its application.[49] In laying down the specific requirements of the double jeopardy clause, the Court makes binding on the states[50] specific rules of criminal procedure.[51]

In any event, to base the requirements of the clause upon the common law of England or the debates of the First Congress is speculative, at best. The double jeopardy principle, "Nemo debet vis bexari pro una et eadem causa," was a mere maxim of the common law which was only sporadically followed.[52] Reliance upon the debates of the First Congress, in particular upon omissions of topics in the debates, to determine the meaning of the constitutional provision is questionable. Whether the First Congress made a distinction between appeals and second trials, for the purposes of the fifth amendment, cannot be determined by the debates. Since the common law limited appeals in criminal cases to very specific instances, the founding fathers may not have even considered the issue of appealability of decisions not requiring a second trial.[53]

The essence of the Court's analysis of the double jeopardy principle is its determination that the main interest of the constitutional clause is to protect defendants from overly zealous prosecutors. The prohibition against second trials guarantees that a prosecutor will not be tempted to try to convince a second trier of fact of a defendant's guilt, after having failed with a first. The double jeopardy clause discourages prosecutors and judges from causing mistrials should the Government's case be going poorly. An appeal of a decision of law rendered after a guilty verdict, however, involves no opportunity for such prosecutorial or judicial abuse. In a previous decision, *Green v. United States*,[54] the Court pointed to a more extensive list of interests in the double jeopardy provision:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[55]

Certain of these considerations are not affected by the decision in *Wilson*, allowing appeal of post-verdict rulings favorable to a defendant. An appeal can cause a defendant added anxiety and expense as surely as a second trial can. A defendant who has been acquitted by a trial judge has as much interest in the finality of lower court proceedings as does the defendant who has been acquitted by a jury. Hence, the Court sometimes eschews its own rationale in reaching its recent decisions.

> Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment . . . what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court has historically done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of the governmental powers. (footnotes omitted)

Id. at 531 (White, J., dissenting).

[49] *See* Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684, 690 (1949).

[50] The fifth amendment provision against double jeopardy has been held applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784 (1969).

[51] The Supreme Court's insistence upon converting the Bill of Rights into a uniform code of criminal procedure has been considered by Judge Friendly. The Court has increasingly applied stringent procedural requirements on the states concerning their pretrial and trial practices of dealing with criminal defendants. Friendly concluded that, not only was the Court's supervision of state criminal procedure in conflict with the clear intentions of the framers of the Constitution, but it was also unwise to so interfere for two major reasons. First, the specific requirements of the Bill of Rights varied with the composition of the Court, causing the states needless confusion as to the mandates of the Constitution. Second, forcing the states to adhere to procedural rules discourages experimentation with alternative methods of arriving at the truth in trial. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[52] J. SIGLER, DOUBLE JEOPARDY 4–21 (1969).

[53] A Maryland proposal for the Bill of Rights had provided "that there can be no appeal from matter of fact, or second trial after acquittal." B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 732 (1971). Why this proposal was not adopted cannot be determined from the scanty records of the Bill of Rights debates.

A more open approach to the resolution of double jeopardy restrictions in *Wilson* would have placed greater emphasis on what is fair to both society and the accused in a criminal proceeding. In United States v. Tateo, 377 U.S. 463 (1964), the Court followed such a bent in deciding the applicability of the double jeopardy provision to a defendant whose first trial had resulted in a mistrial.

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial.

Id. at 466.

[54] 355 U.S. 184 (1957).

[55] *Id.* at 187–88.

While *Wilson, Jenkins,* and *Serfass* provide definitive rules on the appealability of decisions terminating a prosecution in the defendant's favor, it is questionable whether such clear-cut rules can be formulated for other areas of criminal law which concern double jeopardy considerations. For example, double jeopardy cases decided by the Supreme Court which involve defendants receiving mistrials appear to be haphazardly decided. Although the Court still adheres to the principle cited in *United States v. Perez,*[56] that a retrial will be permitted whenever "manifest necessity" forces a trial judge to declare a mistrial, recent Court decisions involving mistrials have not always followed that formula.[57] Instead, the Court has advocated a policy of flexibility in determining whether retrial should be allowed.[58]

A probable effect of the decisions in *Wilson, Jenkins,* and *Serfass* will be a new emphasis on the point in proceedings at which a decision terminating prosecution is rendered. Since the Court has held that the fifth amendment is not violated by appeal of any decision rendered before jeopardy has attached, defense counsel should be encouraged to delay some motions to dismiss until jeopardy has attached.[59] A ruling of law terminating a prosecution after jeopardy has attached, yet before resolution of a factual questions, cannot be appealed, as a second trial would be necessary should the appeal succeed. Thus, defense counsel should seek a favorable ruling of law before a verdict is reached. In *Jenkins* Justice Rehnquist suggests that the case might have been appealable had the district court more carefully entered its complete findings of fact and law.[60] If the record clearly shows that a court has resolved all questions of fact against the defendant, but has ruled in his favor on a legal ground, a Government appeal is permissible. The Government should be encouraged by this statement to request in future criminal proceedings that a district court sitting on bench enter its finding of fact and law when ruling for the defendant. Determining whether an appeal may be brought from a decision of law on the basis of the stage of proceeding in which it was rendered may seem to smack of technicality. A defendant who has been subjected to a criminal trial through the jury verdict, before having a decision in his favor, may be exposed to an appeal. The defendant whose ruling comes mid-trial is not. However, it must also be remembered that the defendant whose dismissal comes after a jury verdict has had his chance to convince the trier of fact of his innocence and has failed.

The Criminal Appeals Act, as amended, is a response to a growing number of procedural hurdles which a prosecution must clear in order to obtain a conviction. Specifically, the expanded use of discovery orders and suppression hearings has frustrated federal prosecutors, in particular when the orders were not subject to appeal. Easing of the long-standing Court policy of discouraging Government appeals in criminal cases[61] may have the desirable effect of restriking a balance that is still tilted in the criminal defendant's favor.[62]

[56] 22 U.S. (9 Wheat.) 579 (1824). *Perez* involved the retrial of a defendant whose first trial resulted in a hung jury.

[57] Four recent Court decisions reflect shifting standards toward allowing retrial of defendants receiving mistrials. In Gori v. United States, 367 U.S. 364, 369 (1961), a retrial was allowed of a defendant who obtained an unrequested mistrial from a trial judge, where the decision was "in the sole interest of the defendant." The Court did not reach the question of the manifest necessity of the lower court ruling. Instead, it seemed most concerned with the determination of which party benefited most from the mistrial. In Downum v. United States, 372 U.S. 734 (1963), the Court refused to allow retrial of a defendant whose mistrial was caused by the unavailability of a key witness to the prosecution. Although there was no evidence of prosecutorial abuse in *Downum,* the Court saw the potential for abuse in allowing prosecutors to obtain a mistrial on the basis of the unpreparedness of the Government's case. In United States v. Jorn, 400 U.S. 470 (1971), the Court prohibited retrial of a defendant whose mistrial was granted by a trial judge concerned that witnesses for the prosecution consult their own attorneys before testifying. Here the Court found that the trial judge had abused his discretion. *Jorn* emphasized preservation of the first jury whenever possible. The fact situation of Illinois v. Somerville, 410 U.S. 458 (1973), was similar to that of *Downum,* with disparate results. After having empaneled a jury, the prosecutor discovered that the indictment upon which defendant was charged was incurably defective. A mistrial was declared. The defendant was found guilty at retrial, despite his plea of double jeopardy. The Supreme Court allowed retrial of *Somerville,* finding that the state's interest in conducting an error-free prosecution outweighed the interest of the defendant in proceeding to verdict with his first jury.

[58] *See* note 49 and accompanying text *supra.*

[59] The First Circuit, refusing to hear an appeal of a pretrial dismissal in United States v. Findley, 439 F.2d 970 (1st Cir. 1971), expressed fear that emphasis on the stage in the proceeding at which dismissal occurred would lead to inefficiency of the legal system. The court felt that smart counsel would wait to present a defense on the merits until jeopardy had attached, thereby defeating the purpose of the pretrial motion, to speed the disposition of criminal proceedings.

[60] 420 U.S. 358, 367 (1975).

[61] "[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored." Carroll v. United States, 354 U.S. 394, 400 (1957).

[62] Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100 (1904) expressed his opinion: "At the present

The Supreme Court, in response to the newly amended Criminal Appeals Act, has taken a definitive stance on the application of the constitutional prohibition against double jeopardy to Government appeal of decisions terminating a criminal prosecution in the defendant's favor. Once jeopardy has attached, the Constitution bars appeal of those decisions which would require a second trial to finalize proceedings. Although not firmly rooted in the judicial history of the fifth amendment, the Court's position has merit. The Government, at last, has a standard by which to appraise whether an appeal may be taken. The intention of the Ninety-First Congress to equalize the balance between protection of the criminal defendant and the interests of justice, within the limitations imposed by the fifth amendment, has been facilitated.

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time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." *Id.* at 134 (Holmes, J., dissenting). Many would probably agree that his statement is applicable today.