The Burger Court Opinion Writing Database

United States v. Martin Linen Supply Co.

430 U.S. 564 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 27, 1976

RE: 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

I join your proposed per curiam.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1977

Re: 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

Enclosed is my dissent in this case. I propose to add as a footnote, cited at the end of my first full paragraph, the following:

> 1/ Fong Foo v. United States, 369 U.S. 141 (1962) on which the Court relies so heavily, is not in point. There the district judge directed a verdict while the original trial was still in progress. Unlike the case before us, the jury there was still properly empaneled, and had not yet even begun to deliberate. Where the district judge interrupts the trial process, important rights of the defendant may be jeopardized. The opportunity to try the case is frustrated so that the possibility of an acquittal from the originally empaneled jury is lost. No such rights are implicated where, as here, the original trial has ended when the jury cannot agree; at that point the defendant is already subject to a second trial. Thus, the timing of the district court's order is not, as the Court suggests, an irrelevant technicality. A mid-trial judgment of acquittal interrupts the trial process at a time when the defendant is constitutionally entitled to have it proceed to verdict.

Regards,

Mr. Justice Brennan

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 29 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* MARTIN LINEN SUPPLY COMPANY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-120. Decided March —, 1977

MR. CHIEF JUSTICE BURGER, dissenting.

The order of acquittal in favor of respondents was entered by the District Judge after a mistrial had been declared due to jury deadlock. Once the jury was dismissed, respondents ceased to be in jeopardy in that proceeding; they could no longer be convicted except after undergoing a new trial. For a century and a half it has been accepted that a defendant may properly be reprosecuted after the declaration of such a mistrial, *United States* v. *Perez*, 9 Wheat. 579 (1824). Therefore the District Judge's ruling here was made "prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." *United States* v. *Sanford*, 45 U. S. L. W. 3278, 3279 (Oct. 12, 1976).

The present case cannot be distinguished from *Sanford* in constitutionally material respects. It is true that the District Judge here phrased his order as an acquittal rather than as a dismissal, and that the order was entered pursuant to a timely Rule 29 (c) motion. However, such mechanical niceties are not dispositive of whether retrial would expose respondents to double jeopardy; our Fifth Amendment inquiry should focus on the substance, not the form of the proceedings below. In ruling on a motion for acquittal the District Judge must pass on the sufficiency, *not* on the weight, of the Government's case, *United States* v. *Isaaks*, 516 F. 2d 409, 410 (CA5), cert. denied, 423 U. S. 936 (1975), *United States* v. *Wotten*, 503 F. 2d 65, 66 (CA4 1974); "the applicable standard is whether [the District Judge as a trier of fact] *could*, not whether he *would*, find the accused guilty on the Govern-

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–120

United States, Petitioner, *v.* Martin Linen Supply Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

The order of acquittal in favor of respondents was entered by the District Judge after a mistrial had been declared due to jury deadlock. Once the jury was dismissed, respondents ceased to be in jeopardy in that proceeding; they could no longer be convicted except after undergoing a new trial. For a century and a half it has been accepted that a defendant may properly be reprosecuted after the declaration of such a mistrial, *United States* v. *Perez*, 9 Wheat. 579 (1824). Therefore the District Judge's ruling here was made "prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." *United States* v. *Sanford*, 45 U. S. L. W. 3278, 3279 (Oct. 12, 1976).*

**Fong Foo* v. *United States*, 369 U. S. 141 (1962), on which the Court relies so heavily, is not in point. There the District Judge directed a verdict while the original trial was still in progress. Unlike the case before us, the jury there was still properly empaneled, and had not yet even begun to deliberate. Where the District Judge interrupts the trial process, important rights of the defendant may be jeopardized. The opportunity to try the case is frustrated so that the possibility of an acquittal from the originally empaneled jury is lost. No such rights are implicated where, as here, the original trial has ended when the jury cannot agree; at that point the defendant is already subject to a second trial. Thus, the timing of the District Court's order is not, as the Court suggests, an irrelevant technicality. A mid-trial judgment of acquittal interrupts the trial process at a time when the defendant is constitutionally entitled to have it proceed to verdict.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 27, 1976

RE: No. 76-120 United States v. Martin Linen Supply

Dear Bill:

The case I mentioned in my memorandum this morning involving Judge Wyzanski is Fong Foo v. United States, 369 U.S. 141. I am indebted to Potter for the citation. I was wrong that Felix wrote the opinion. It was a Per Curiam written by Potter.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

WHR
I agree much
[illegible]

October 27, 1976

RE: No. 76-120 United States v. Martin Linen Supply Co.

Dear Bill:

I could not more thoroughly agree with Potter. I am just amazed at your suggested disposition which implies that Rule 29(c) is to be completely ignored. I would have supposed there was no question of the validity of that rule giving effect to a judgment of acquittal, however erroneous, as establishing the double jeopardy bar.

I remember vividly when Charlie Wyzanski in my early years here directed a verdict of acquittal that all of us thought was outrageous. Nevertheless we held in an opinion that Felix wrote that double jeopardy prevented a retrial. I have forgotten the name of the case but will try to dig it up before conference on Friday. In other words, the situation in this case is as different from Sanford as day from night. Sanford was a dismissal and here we have a judgment of acquittal.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

✓ 1

T: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Marshall
Mr. Blackmun
Mr. Powell
Mr. Rehnquist
Mr. Stevens

3/22/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–120

United States, Petitioner, *v.* Martin Linen Supply Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A "hopelessly deadlocked" jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations in the District Court for the Western District of Texas.[1] Rule 29 (c) of the Federal Rules of Criminal Procedure provides that in such case "a motion for judgment of acquittal may be made . . . within seven days after the jury is discharged [and] . . . the court may enter judgment of acquittal . . . ."[2] Timely motions for

[1] The criminal contempt proceeding was filed in 1971 and charged respondents, two commonly owned linen supply companies, and their president, William B. Troy, with violation of a consent decree entered in 1969 as the final judgment in an antitrust suit. The petitions were originally dismissed by the District Court but the dismissal was reversed by the Court of Appeals, 485 F. 2d 1143 (1973). The Government filed a supplemental criminal contempt petition on which trial was had in February 1975. On February 21, 1975, the jury was discharged after returning the not-guilty verdict as to Troy and announcing that it was "hopelessly deadlocked" as to respondent corporations. Six days later, on February 27, 1975, respondents filed their motions for judgments of acquittal under Rule 29 (c). On April 24, 1975, the District Court granted the motions and entered judgments of acquittal.

[2] Rule 29 (a) (b) and (c) provide:

"Motion for Judgment of Acquittal

"(a) Motion before Submission to Jury. Motions for directed verdict

P8

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 3/23/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–120

United States, Petitioner, *v.* Martin Linen Supply Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A "hopelessly deadlocked" jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations in the District Court for the Western District of Texas.[1] Rule 29 (c) of the Federal Rules of Criminal Procedure provides that in such case "a motion for judgment of acquittal may be made . . . within seven days after the jury is discharged [and] . . . the court may enter judgment of acquittal . . . ."[2] Timely motions for

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[2] Rule 29 (a) (b) and (c) provide:

"Motion for Judgment of Acquittal

"(a) Motion before Submission to Jury. Motions for directed verdict

P3

3/31/77

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–120

United States, Petitioner, *v.* Martin Linen Supply Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A "hopelessly deadlocked" jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations in the District Court for the Western District of Texas.[1] Rule 29 (c) of the Federal Rules of Criminal Procedure provides that in such case "a motion for judgment of acquittal may be made . . . within seven days after the jury is discharged [and] . . . the court may enter judgment of acquittal . . . ."[2] Timely motions for

[1] The criminal contempt proceeding was filed in 1971 and charged respondents, two-commonly owned linen supply companies, and their president, William B. Troy, with violation of a consent decree entered in 1969 as the final judgment in an antitrust suit. The petitions were originally dismissed by the District Court but the dismissal was reversed by the Court of Appeals, 485 F. 2d 1143 (1973). The Government filed a supplemental criminal contempt petition on which trial was had in February 1975. On February 21, 1975, the jury was discharged after returning the not-guilty verdict as to Troy and announcing that it was "hopelessly deadlocked" as to respondent corporations. Six days later, on February 27, 1975, respondents filed their motions for judgments of acquittal under Rule 29 (c). On April 24, 1975, the District Court granted the motions and entered judgments of acquittal.

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"Motion for Judgment of Acquittal

"(a) Motion before Submission to Jury. Motions for directed verdict

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 13, 1977

MEMORANDUM TO THE CONFERENCE

RE: Case Held for No. 76-120 United States v. Martin Linen Supply

No. 76-471 New York v. Consolazio

Respondent was brought to trial on an indictment charging 44 counts of grand larceny in the second degree and 13 counts of grand larceny in the third degree. Respondent was convicted of 6 counts while 9 counts were dismissed with petitioner's consent. The controversy concerns 41 counts that were dismissed at the close of the prosecution's case pursuant to defendant's motion under N.Y. CPL Sec. 290.10, which provides that at the conclusion "of the People's case or at the conclusion of all the evidence, the court may . . . issue a 'trial order of dismissal,' dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense." New York interprets this ruling as identical to a "directed acquittal", People v. Sabella, 35 N.Y. 2d 158, 164 (1974),

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 27, 1976

76-120 - U. S. v. Martin Linen Supply Co.

Dear Bill,

I do not agree that this case is governed by the Per Curiam in U. S. v. Sanford, and I do not agree that, Sanford aside, the judgment in this case should be reversed. The crucial difference, I think, between this case and Sanford is that here there was a judgment of acquittal.

Accordingly, I would deny certiorari in this case. If a majority of the Court subscribe to the Per Curiam you have circulated, I shall write a brief dissent.

Sincerely yours,

P.S.
P.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 31, 1977

Re: No. 76-120, United States v.
Martin Linen Supply Co.

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.
1.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 25, 1977

Re: No. 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 27, 1976

Re: No. 76-120, United States v. Martin Linen Supply Co.

Dear Bill:

I agree with Potter Stewart on this one.

Sincerely,

TM.

T. M.

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 24, 1977

Re: No. 76-120, United States v. Martin Linen Supply Co.

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
STICE HARRY A. BLACKMUN

October 27, 1976

Re: No. 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

I go along with your proposed per curiam.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 29, 1977

Re: No. 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

October 27, 1976

76-120 U. S. v. Martin Linen Supply Company, et al.

Dear Bill:

I agree with your Per Curiam.

Sincerely,

This would require signed or sent... lat

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 28, 1977

No. 76-120 United States v. Martin Linen Supply

Dear Bill:

Please join me.

Sincerely,

L

Mr. Justice Brennan

lfp/ss

cc: The Conference

V

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 26, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 76-120 - United States v. Martin Linen Supply Co., et al.

This case is in a somewhat anomalous position; the vote at Conference was to "hold" it pending disposition of United States v. Sanford, No. 75-1867, decided October 12, 1976. Since Sanford was not an argued case, and was disposed of by a per curiam summary reversal, the posture of this case may be a little different than that of a traditional "hold" for an argued case.

I think that the line of reasoning which was adopted in Sanford, supra, controls this case. While ordinarily a "grant, vacate, and remand for reconsideration in the light of" Sanford might be an adequate disposition, the Court of Appeals for the Fifth Circuit in this case dealt in its opinion with the Sanford fact situation. Though it did not have the "benefit" of our opinion in Sanford, it was aware of the factual background of that case and distinguished it from this one in its opinion. While it is conceivable that our opinion in Sanford might persuade the Court of Appeals that this case is not distinguishable, the fact that that court has already relied on the factual distinction between the two cases suggests to me that it would probably choose to do so again.

I have accordingly prepared the attached per curiam summary reversal, based on United States v. Sanford, supra, and Serfass v. United States, 420 U.S. 377 (1975). If the per curiam can muster the appropriate number of votes, that should dispose of this case. I would presume that those who disagree with the per curiam here would vote to deny certiorari, and if their view prevails that would likewise dispose of the case. Or there may be those who disagree with me as to the desirability of a "grant, vacate, and remand".

Sincerely,

WEM

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: OCT 25 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* MARTIN LINEN SUPPLY COMPANY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76–120. Decided November —, 1976

PER CURIAM.

Respondent corporations were charged with violating provisions of an antitrust consent decree. After a three day criminal contempt trial, the jury informed the District Court that it was unable to agree upon a verdict with respect to respondents.[1] The court excused the jurors and declared a mistrial. After dismissing the jury, the trial judge indicated that he would entertain a motion for a directed verdict of acquittal as to respondents. Pursuant to Fed. Rule Crim. Proc. 29 (c),[2] and within the seven day time frame specified therein, respondents made a motion for a judgment of acquittal. Approximately two months later, the District Court granted the motion, and entered a judgment of acquittal, which provided, in pertinent part:

> "It is accordingly ADJUDGED that respondent, MARTIN LINEN SUPPLY COMPANY, is not guilty

---

[1] The jury returned a verdict of not guilty with respect to an individual defendant, whose case is not presently before this Court.

[2] Rule 29 (c) provides:

"(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 27, 1976

Re: No. 76-120 - United States v. Martin Linen Supply

Dear Bill:

The vehemence, if I may call it that, of your and Potter's response to my circulation in this case leads me to reply on at least one point. We cited Fong Foo, 369 U.S. 141, in United States v. Jenkins, and I am fully in accord with the holding of the former case. The principal distinction between Fong Foo and the present case is that in Fong Foo there was no hung jury; the jury had neither returned a verdict, nor been dismissed by the trial court after it had announced its inability to reach a verdict. If Sanford is right, as I am convinced it is and as a majority of the Court certainly agreed, the mistrial following a hung jury terminates the jeopardy in which the defendant has been placed, and a subsequent order for judgment of acquittal by the trial judge is simply a ruling on the legal sufficiency of the government's evidence at a time when the government is entitled to subject the defendant to a second trial.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 23, 1977

Re: No. 76-120 - United States v. Martin Linen Supply

Dear Bill:

Please show me as taking no part in the consideration or decision of this case.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 27, 1976

Re: 76-120 - United States v. Martin Linen Supply Co.

Dear Bill:

My views are the same as Potter's.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 24, 1977

Re: 76-120 - United States v. Martin Linen Supply

Dear Bill:

While I was on the Court of Appeals I had occasion to study the subject of appeals by the government in criminal cases in some depth. At that time I came to the conclusion that the 1970 Amendment only authorized appeals of dismissals as distinguished from acquittals. In the category of dismissals, I agree that Congress expressly intended to authorize every appeal not foreclosed by the Double Jeopardy Clause; however, I believe the legislative history demonstrates that Congress never even contemplated the possibility that an acquittal could be appealed. I am therefore presently inclined to write briefly to explain that as a statutory matter, I do not think the government may appeal in this case.

I think the matter may be of some importance if the Court should ever come to the conclusion that the Double Jeopardy Clause does not apply to corporations. For, in that event, if the statute allows appeals from acquittals, and if a jury should acquit both corporate and individual defendants in a given case, the government could appeal as to the corporate defendant but not as to the individual. It seems quite unlikely that Congress intended that result.

I merely write to explain my delay in responding to your opinion for I have no doubt whatsoever that you have correctly analyzed the constitutional issue.

Respectfully,

John

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAR 31 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–120

United States, Petitioner, *v.* Martin Linen Supply Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1977]

MR. JUSTICE STEVENS, concurring in the judgment.

There is no statutory authority for a government appeal from a judgment of acquittal in a criminal case. The plain language of 18 U. S. C. § 3731, together with its unambiguous legislative history, makes it perfectly clear that Congress did not authorize—and did not intend to authorize—appeals from acquittals.[1]

[1] The contrary dictum in *United States* v. *Wilson*, 420 U. S. 332, 336–339; *United States* v. *Jenkins*, 420 U. S. 358, 363–364; *Serfass* v. *United States*, 420 U. S. 376, 383–387, is not controlling for these reasons: First, the statutory issue was not in dispute in any of those cases. Two of the defendants expressly conceded the applicability of the statute in their cases, Brief for Respondent in *United States* v. *Wilson*, No. 73–1395, p. 2; Brief for Respondent in *United States* v. *Jenkins*, No. 73–1513, p. 10. The third defendant simply failed to address the statutory issue, see Brief for Petitioner in *Serfass* v. *United States*, No. 73–1424, probably because his case involved a pretrial dismissal of the indictment. Hence, the Court was unaided by an adversary presentation of the issue. Moreover, re-examination of the language used in the decisions would not undermine their holdings. The two cases in which the Court upheld the government appeal clearly did not involve acquittals on the merits. (*Serfass* was a pretrial dismissal; *Wilson* was a dismissal on speedy trial grounds.) The third case, *Jenkins*, arguably involved an acquittal, but the Court held on constitutional grounds that the appeal was barred.

Second, as I indicate in the text, *infra*, it is perfectly clear that the dictum is incorrect. In view of our special responsibility for supervising the proper functioning of the federal criminal justice system, we should