In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

V.

MARTIN LINEN SUPPLY COMPANY AND TEXAS SANITARY TOWEL SUPPLY CORPORATION,

RESPONDENTS.

No. 76-120

Washington, D. C.
February 23, 1977

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

ER

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 76-120
MARTIN LINEN SUPPLY COMPANY and TEXAS SANITARY TOWEL SUPPLY CORPORATION, Respondents.	:	

Washington, D. C.

Wednesday, February 23, 1977

The above-entitled matter came on for argument at 10:11 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

J. BURLESON SMITH, ESQ., Cox, Smith, Smith, Hale & Guenther Incorporated, Esqs., 500 National Bank of Commerce Bldg., San Antonio, Texas 78205, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in 76-120, United States against Martin Linen Supply Company. May I say to counsel in this case and the other cases scheduled for today, Mr. Justice Rehnquist is unavoidably absent due to illness but reserves the right to participation, consideration, and decision of these cases on the basis of the entire record, including the tape recording of the oral argument.

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

ORAL ARGUMENT OF FRANK H. EASTERBROOK

ON BEHALF OF THE PETITIONER

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court: The question presented by this case is whether the double jeopardy clause precludes the Government from appealing an order terminating the prosecution but entered after a mistrial had been declared because the jury was unable to agree upon a verdict.

This case began when the United States filed a civil antitrust complaint against respondents, their president, and a third linen supply corporation. The parties soon agreed upon a consent decree, and the consent decree was entered in the summer of 1969.

In 1971, the United States filed petitions charging

respondents and their president with civil and criminal contempt of that consent decree. The petitions allege that respondents threatened other linen supply firms with retaliation if they engaged in competition. The petitions also allege that respondents made good their threats.

The district court entered an order holding that the allegations did not sufficiently charge a violation of the consent decree. The United States appealed and the court of appeals reversed. It held that although respondents are entitled to engage in vigorous competition, they are not entitled to do so on a selective or retaliatory basis or to make threats to competitors. In other words, the court of appeals held competition must be directed to consumers and that threats of reprisals directed to competitors were inconsistent with the consent decree.

On remand in the district court, a jury trial was held on the criminal contempt charges. The Government introduced testimony from a former employee of respondents and from respondents' competitors demonstrating that respondents threatened officers of competitors with retaliation if they persisted in competing. If a competitor did not desist, respondents mounted a competitor-specific sales campaign, that is, instead of soliciting all potential users of linen supply services, they directed their sales efforts towards making low-price offers to the customers of the

particular offending competitor. They also made threats to competitors in the hope that these threats and the retaliatory sales campaigns taken together would stave off competition by making it more costly.

At the end of trial the jury returned a verdict of not guilty with respect to respondents' president, Mr. Troy, who had not been linked personally with any of the threats. The jury announced that it was hopelessly deadlocked with respect to respondents, although it stood 11 to 1 in favor of conviction. The judge declared a mistrial without objection, and he dismissed the jury.

The judge then invited motions for judgments of acquittal. He expressed dissatisfaction with the consent decree stating that respondents had been improvident in accepting its strictures. He also stated that he believed the evidence introduced by the Government was inadequate.

Respondents accepted the invitation and six days later they filed motions for judgments of acquittal. Approximately two months later the judge granted both of those motions without writing an opinion. The United States appealed for a second time. It argued in essence that the testimony at trial established the allegations of the contempt petitions. Because the court of appeals had held on the first appeal that proof of threats and retaliatory sales campaigns would demonstrate a violation of the consent decree,

we argued that the district court's grant of a judgment of acquittal notwithstanding at least prima facie proof of threats and retaliatory sales campaigns --

QUESTION: In your view, Mr. Easterbrook, assume at the stage of trial that the jury announced it was deadlocked, was there authority in the judge to at that point direct a verdict of acquittal?

MR. EASTERBROOK: Your Honor, directed verdicts of acquittal by the jury were abolished by Federal Rule of Criminal Procedure 29(a), and therefore, in our view, he did not have such authority.

QUESTION: He had no authority at that stage to terminate the proceedings by an acquittal?

MR. EASTERBROOK: Not by a directed verdict of acquittal. He did have the authority at that stage to terminate the proceedings by entering a judgment of acquittal on his own which would represent his view that the evidence taken in the light most favorable to the Government, together with all of its legitimate inferences, was insufficient to make out a case for the jury, although in this case he did not do that. Instead, he allowed the jury to continue its deliberations and eventually discharged them, and he did not enter judgments of acquittal until two months and five days later.

QUESTION: But the motion was filed within seven days as provided by Rule 29(c).

MR. EASTERBROOK: Yes, it was, your Honor.

QUESTION: That was a motion for judgment of acquittal.

MR. EASTERBROOK: Yes.

QUESTION: And that motion was granted.

MR. EASTERBROOK: It was, indeed. And we think that that kind of decision can be appealed.

QUESTION: I know you do.

MR. EASTERBROOK: But before I come to that, I would like to discuss two issues that are lurking in the background of this case but that we think the Court need not address. The first of these issues is whether the pouble Jeopardy Clause applies to corporations. Both respondents are corporations, and unless the Double Jeopardy Clause applies to them in a way that creates principles of finality more stringent than those of res judicata, there could be no bar to a second trial here.

I will not discuss that issue here, however, because it was not raised by the parties in the court of appeals, and the court of appeals did not discuss it. The issue is squarely presented, however, in United States v. Security National Bank, in which a petition for a writ of certiorari is pending. The United States believes that the Court should address that issue in Security Bank, but that it is not necessary to do so in this case.

The second issue I will not discuss at length is the effect of mid-trial terminations, whether they are called judgments of acquittal or orders dismissing the indictment. We have discussed that problem at pages 12 to 19 of our brief, and we have shown that there is no absolute bar to a reprosecution unless the jury returns a verdict of acquittal. When a defendant requests a mid-trial termination, he has exercised his right to control the conduct of the proceedings and has voluntarily surrendered his right to receive the verdict of the jury. In such cases, no less than in cases in which the mid-trial termination is called a mistrial, like United States v. Dinitz, the Double Jeopardy Clause does not bar the second trial.

QUESTION. The argument in your brief under (a) would cover a mid-trial termination.

MR. EASTERBROOK: Yes, it would, your Honor.

QUESTION: It is only the argument under (b) that would cover this case, but not a mid-trial.

MR. EASTERBROOK: That's correct.

QUESTION: You are abandoning the argument under (a)?

MR. EASTERBROOK: We are not at all abandoning that argument. Our argument is, in the last analysis, that only a verdict of acquittal by the jury is an absolute bar to a retrial.

QUESTION: Then you are talking about a mid-trial

termination.

MR. EASTERBROOK: But we don't believe it is necessary to reach that question --

QUESTION: If we accept your argument (a), we have reached the question, haven't we, and decided it?

MR. EASTERBROOK: That is correct. But I think it is more appropriate for me to make here at greater length the narrower arguments that would avoid the necessity to reach that particular one, although I will say that the mid-trial termination problem has recently received a thoughtful and very thorough analysis in a case called United States v. Senobria? decided by the First Circuit on December 29.

QUESTION: That is involved in the Brown case, isn't it?

MR. EASTERBROOK: The same issue is involved --

QUESTION: Petition for certiorari is pending here?

MR. EASTERBROOK: Yes, your Honor. It's the same issue.

This case, however, simply does not involve a mid-trial termination. The case went to completion and ended in a mistrial when the jury was unable to reach a verdict. The difficult questions presented by midtrial terminations therefore need not be resolved here.

In our view, a single simple principle controls this case. It's a principle that has been accepted since Mr.

Justice Story's opinion for the Court in 1824 in United States v. Perez. The principle is this: The declaration of a mistrial because the jury is unable to agree upon a verdict removes any double jeopardy objection to a second trial. Once the jury has reached an impasse, the judge is entitled to set the case for a second trial because of manifest necessity.

We do not understand respondents to quarrel with this, and if the district court may set the case for a second trial without offending the Double Jeopardy Clause, then the court of appeals may direct the district court to do so. This follows, we believe, from United States v. Sanford decided by this Court on October 12 of last year. In that case the Court held that the Double Jeopardy Clause does not bar review of orders entered after a mistrial has been declared terminating the prosecution, even though in Sanford the order was based in substantial part on evidence that was heard at trial and even though in Sanford the district court concluded that the evidence at trial showed that respondents had a complete defense to the charges against them.

QUESTION: Mr. Easterbrook, before you get too deeply into the double jeopardy argument, don't you have a statutory problem? What is the statutory language that supports the appeal from a judgment of acquittal?

MR. EASTERBROOK: Our statutory authority is the first paragraph of the Criminal Appeals Act. We acknowledge

that the statutory authority does not speak in terms of judgments of acquittal, but that language was thoroughly analyzed in United States v. Wilson, and the Court held in Wilson that Congress intended to authorize appeals from orders terminating the prosecution unless those appeals were barred by the Double Jeopardy Clause. In Wilson itself the case had gone to the jury and thereafter the judge entered an order that he denominated a judgment of acquittal. And there was an argument made by respondents in Wilson that we lacked statutory authority to appeal. The Court rejected that argument in Wilson, and we think the reasoning in Wilson is dispositive here.

QUESTION: In Wilson didn't the Court in effect hold that it was a dismissal of the indictment?

MR. EASTERBROOK: The Court held that it didn't make any difference, I think. That analysis is at pages 347 or 348 to 351 of Wilson, and what the judge called it was simply immaterial. The salient factor was that it terminated the prosecution in favor of the defendant, and that was the fact that triggered the right to appeal under the first paragraph of the Act.

We think our double jeopardy proposition also follows quite strongly from United States v. Jorn in 400 U.S. In Jorn the district court declared a mistrial in mid-trial. Then it dismissed the indictment later, concluding that the

Double Jeopardy Clause would bar a second trial. This Court entertained an appeal from that decision. It ultimately held that the district court was right and that the Double Jeopardy Clause did bar a second trial, because the declaration of a mistrial in mid-trial amounted to judicial overreaching. But the Court clearly implied that if the declaration of a mistrial had been proper, then it also would have been proper for this Court to have reversed and remanded for a second trial. As the Court said in that case, at page 476, "This trial ruling contemplates reprosecution." And so it is here.

The court of appeals has the power to remand for a second trial. The Double Jeopardy Clause does not bar the way because it was proper to declare a mistrial on account of jury disagreement, and the jury's inability to agree removed the bar to a second trial.

QUESTION: In the Jorn case, the district court, as I remember, had dismissed the indictment because he thought that a new trial was not permissible under the Double Jeopardy Clause.

MR. EASTERBROOK: Yes, your Honor.

QUESTION: And that was ultimately affirmed by this Court.

In this case, by contrast, the district judge entered a judgment of acquittal, not because of any views about

the Double Jeopardy Clause, but because of his views of the case on the merits.

MR. EASTERBROOK: Yes, your Honor. What I was using Jorn for was to demonstrate the proposition that the mere fact that a second trial would follow a reversal on appeal is not necessarily an independent double jeopardy bar, if the Double Jeopardy Clause doesn't bar that second trial. In Jorn the argument was that the Double Jeopardy Clause would not bar the second trial because the declaration of the mistrial had been proper.

QUESTION: And that argument was ultimately rejected.

MR. EASTERBROOK: Right. Here the argument is that the Double Jeopardy Clause would not bar the second trial because the declaration of a mistrial because of jury disagreement was clearly proper, and respondents don't disagree.

QUESTION: Here the argument is -- I don't know whose argument you are talking about. Here your opponents' argument is that the Double Jeopardy Clause bars a new trial because there has been a judgment of acquittal, of not guilty.

MR. EASTERBROOK: Right. And that presents the question whether the Double Jeopardy Clause independently bars review of the judge's findings, even if the second trial would not by itself violate the clause.

QUESTION: What is the effect of the finding of acquittal?

MR. EASTERBROOK: Assuming that the judgment is not --

QUESTION: Does it mean not guilty?

MR. EASTERBROOK: It means in this case that according --

QUESTION: Does it mean that he goes free?

MR. EASTERBROOK: It means the defendants go free. That's right.

QUESTION: And cannot be tried again on that charge.

MR. EASTERBROOK: And cannot be tried again unless we prevail on appeal. That was, I believe, the same situation that arose in Sanford decided earlier this term in which, before trial occurred and the case went to a mistrial because of jury disagreement, the judge held that the defendant, based on evidence at trial, had an absolute defense to the charge in the indictment. The defense was governmental consent. If we had not appealed that order in Sanford, the defendants would have gone free and that would have been the end of the case. But we did appeal, and this Court held that the court of appeals could review that finding and reverse and remand for a new trial.

QUESTION: But rule 29(c), what was the purpose of it?

MR. EASTERBROOK: Rule 29(c) was to bring proceedings to a close in the case the Government did not have a case.

I would like to make one thing quite clear in case there is any misunderstanding. We do not contend that a second trial should be held automatically after there is a mistrial declared. There may be reasons in particular cases why a second trial should not be held. In the present case, for example, if the evidence was in fact insufficient as the judge believed, it is quite appropriate for the district court to enter a judgment of acquittal, and that would be the end of the case absent appellate review.

QUESTION: At what point precisely did the district judge do that?

MR. EASTERBROOK: The district judge has power under rule 29(c) to enter a judgment of acquittal at any time during the trial when the motion is made and on a motion made within seven days after trial. So the district judge's order in this case was clearly within his power. We have never contended otherwise. So was the order in Sanford clearly within the judge's power to enter. There is no doubt that he had the power to do exactly what he did. The question is whether he erred in doing so, and if he erred, whether an appeal lies to correct that error.

QUESTION: Mr. Easterbrook, you told us in the beginning that in entering the order the district court wrote

no opinion. But I can't even find a copy of the order.

MR. EASTERBROOK: A copy of the order is in our petition for writ of certiorari.

QUESTION: I didn't see it.

MR. EASTERBROOK: Toward the rear. It's at pages 40A to 43A. There are two separate orders. They are both denominated judgments of acquittal. And in both of those orders, the judge recites that the reasons stated in the motions for judgments of acquittal are good and valid and that further this defendant is not guilty.

QUESTION: He uses the phrase "not guilty," doesn't he?

MR. EASTERBROOK: That is right.

QUESTION: Mr. Easterbrook, would you be making the same argument if there hadn't been a mistrial, that the judge had just exercised his power to enter a judgment of acquittal when the jury reported that they were deadlocked?

MR. EASTERBROOK: Yes, your Honor.

QUESTION: That would be the mid-trial sort of thing?

MR. EASTERBROOK: Our position is that once the jury deadlocks, the fact of the deadlock is the manifest necessity to create the right to a second trial. Whether the judge says the formal words, "I declare a mistrial," is quite unimportant in our view. It's a functional analysis

rather than a formal one, and the important function in this case is the jury was unable to agree, that the first trial had essentially come to naught. Then the question is whether the Double Jeopardy Clause after the first trial had come to naught bars a second trial, and we think not. For that purpose it makes no difference whether the judge says, "I grant a mistrial."

QUESTION: You told us that the Federal Rules have abolished the directed verdict of acquittal, but up until recently there was such a thing as a directed verdict of acquittal, and had the district judge done that when the jury reported they were deadlocked, had he then on motion, or without motion, said, "I have considered all the evidence and I hereby direct you to reach a verdict of acquittal," that functionally would be precisely the same as this case, wouldn't it?

MR. EASTERBROOK: No, it would not, your Honor.

QUESTION: Why?

MR. EASTERBROOK: The difference is this: Suppose the jury had come back and said that it was deadlocked, and the judge, instead of saying, "I direct you to return a verdict of acquittal," had given an outrageously erroneous instruction at that point, had said --

QUESTION: Let's stick with my case first and then you can give me all the other hypotheticals you want.

MR. EASTERBROOK: I think your case is the case in which the judge sends the jury out to consider under outrageously erroneous instructions. The instruction is the defendants are not guilty, return a verdict of acquittal.

QUESTION: This is after the jury comes back and says, "We are deadlocked, we can't reach a verdict," and the judge says, "Well, there was an earlier motion of acquittal and I have had it under consideration, and I now direct you to reach a verdict of acquittal."

MR. EASTERBROOK: And he sends the jury out to do that.

QUESTION: Whenever he does it generally. He used to do it in open court, back in my experience.

MR. EASTERBROOK: At that point our argument is the same as the argument here. In our view it is --

QUESTION: Even though it's a directed jury verdict of acquittal. Why isn't that the Fong Foo case?

MR. EASTERBROOK: The Fong Foo case was a case in which that happened in mid-trial before the jury said it was unable to agree. So you had no idea in Fong Foo whether the jury was favorably disposed to defendants, whether the jury would evaluate the prosecution's evidence in such a way that it did not credit the prosecution's witnesses, as Judge Wizanski in Fong Foo had said that he did not. The judge's instruction in mid-trial in Fong Foo deprived the

defendants of their opportunity to receive that verdict from the jury. But in the hypothetical you gave, the case went unencumbered to the jury. The jury came back and said, "We are deadlocked; we can't agree." And at that point we think the manifest necessity for the declaration of a mistrial --

QUESTION: No, no, no. My hypothesis is that the jury doesn't agree and the judge at that point says, "Well, I am going to direct you to enter a verdict of acquittal."

MR. EASTERBROOK: It's our view, Mr. Justice Stewart, that what happens after the jury is unable to agree is, for double jeopardy purposes, immaterial.

QUESTION: That's what I thought, even though it's an instructed verdict of acquittal.

MR. EASTERBROOK: Even though it's an instructed verdict. But it is not this case.

QUESTION: Then you have to throw 29(c) out the window.

MR. EASTERBROOK: No, your Honor, I don't believe --

QUESTION: 29(c) says specifically that you can do it after the jury is deadlocked.

MR. EASTERBROOK: Yes, your Honor, and we agree entirely with that. The judge has the power to do what he did, and if he was right--first of all, we wouldn't appeal if we thought it was right. And if we incorrectly thought he was wrong and we appealed, the court of appeals should affirm and

that is still the end of this case, and the defendants go free.

QUESTION: If the judge gives the judgment of acquittal before the case goes to the jury, double jeopardy?

MR. EASTERBROOK: Your Honor, in our view that is a much more difficult case, because if he simply does it on his own --

QUESTION: It's answerable, isn't it?

MR. EASTERBROOK: -- it deprives the defendant of his right to receive the verdict of the jury, something he was not deprived of here.

QUESTION: He hasn't been deprived of that if he gets a directed verdict.

QUESTION: What verdict of the jury has he got here? He hasn't gotten any verdict of the jury here.

MR. EASTERBROOK: That is correct, because the jury was unable to reach a verdict, and that is the same in any mistrial case.

QUESTION: So the difference is that the jury has reported it is unable to agree. That takes it out of 29(c).

MR. EASTERBROOK: No, your Honor. In our view 29(c) is perfectly applicable, and the judge was quite within his power doing what he did.

QUESTION: Let me put it another way. If he grants a judgment of acquittal as the jury goes out, he says, "Instead of this, I will grant a judgment of acquittal." Right?

MR. EASTERBROOK: That's right.

QUESTION: Then there is nothing in the world you can do about it.

QUESTION: He doesn't agree.

MR. EASTERBROOK: We don't agree with that proposition, your Honor. In our view, under the argument that we have made at pages 12 to 19 of our brief, the Double Jeopardy Clause does not bar a second trial if the defendants asked for what they got.

QUESTION: In my hypothetical case, defendants have not opened their mouth. But as the case is ended and both sides rest, the judge says, "I will not leave this with the jury, I will go out from the jury, and I grant a judgment of acquittal."

MR. EASTERBROOK: Your Honor, in our view, we probably cannot appeal that judgment, if the defendants haven't opened their mouths.

QUESTION: Right. But what did the defendant do here?

MR. EASTERBROOK: There are two differences. One is the jury did go out and did return, and the second difference is the defendants asked for exactly what they got and they asked for it and got it when they asked for it.

QUESTION: In my case, wouldn't it normally be the defense counsel makes such a motion at the end of a criminal

trial? Doesn't he usually do that?

MR. EASTERBROOK: It is common, your Honor, but the defense counsel also has the option to ask the jury to go out first and then ask for a review.

QUESTION: But if he asks for a judgment of acquittal, he can be retried?

MR. EASTERBROOK: If the judgment of acquittal is granted and if he was not entitled to it. Those are two important preconditions in our view. If he asks for something to which he was not entitled and voluntarily asked the judge to take this case away from the jury, then in our view he has surrendered his valued right to receive the verdict of the fact-finder. In those circumstances he can be tried a second time.

QUESTION: He is not complaining about anything he has been deprived of --

MR. EASTERBROOK: I am sorry, I was dealing with Mr. Justice Marshall's hypothetical, and that again is not this case. I would like to respond --

QUESTION: Of course, a defendant asks for a verdict of acquittal from the very moment he pleads not guilty, doesn't he? That is a continuing request that is continuous throughout the trial.

MR. EASTERBROOK: But he usually has his choice of timing.

QUESTION: He is asking to be acquitted.

MR. EASTERBROOK: Mr. Justice Stewart, he usually has his choice of timing. He can ask for it from the jury, and if the jury returns it under Fong Foo and under Kepner, that is simply final. The jury has the power to return final verdicts. If he asks for it of the judge, he is asking for a purely legal ruling on the sufficiency of the evidence. And if he desires to take the case away from the jury, in our view, he is also subjecting himself to a second trial if it turns out that he was not entitled to have that case taken from the jury.

QUESTION: The Singer case is relevant here? One could analyze his motion for a directed verdict of acquittal as a position at that time. "I am now going to waive the jury and ask the judge for a judgment."

MR. EASTERBROOK: Unless the prosecution agrees to do that--the prosecution also has a right to have the case go to jury. This is what it held in Singer. We have indeed relied on Singer in this case.

QUESTION: You have?

MR. EASTERBROOK: Yes, we have.

I would like to discuss briefly the case of the United States v. Wilson, which I think addresses some of the things I have been discussing with Mr. Justice Stewart and Mr. Justice Marshall. In Wilson the Court returned a verdict

of guilty, and the judge then entered a judgment of acquittal, which he called a judgment of acquittal based on the evidence that was heard at trial. The court held that such a judgment can be reviewed and reversed, and the fact that it is called an acquittal is irrelevant. The Court summarized this in United States v. Jenkins, 420 U.S. at page 365, by saying that when "the jury returns a verdict of guilty,but the trial court thereafter enters a judgment of acquittal, an appeal is permitted." In other words, nothing in the Double Jeopardy Clause bars appellate review of the judge's decision to acquit the defendants, even based on evidence at trial, because we understand that to be the import of the statement in Jenkins.

QUESTION: Mr. Easterbrook, I have to interrupt you because you had called my attention to the Wilson case, and the court describes the order of the district court as a dismissal of the indictment in two or three places in the beginning of the opinion. Where do you find it was a judgment of acquittal?

MR. EASTERBROOK: Your Honor, the judgment entered in Wilson was denominated by the judge as a judgment of acquittal.

QUESTION: It was on the ground, was it not, that there was unreasonable delay in filing the --

MR. EASTERBROOK: Yes, it was.

QUESTION: But that certainly would normally properly be called a dismissal, wouldn't it?

MR. EASTERBROOK: We argued in Wilson that that is what it was really functionally, a judgment of dismissal, and it was not --

QUESTION: That is not true of this case, is it?

MR. EASTERBROOK: That is correct. But my --

QUESTION: Don't you have a statutory problem?

MR. EASTERBROOK: My use of Wilson for that purpose was because we have had in Wilson a very long and complicated argument about whether this document, which was called a judgment of acquittal, was in form or in function an order dismissing the indictment.

QUESTION: But everybody agrees now that it was in function an order dismissing the indictment, whereas in this case, in function we have an order acquitting the defendants.

MR. EASTERBROOK: The Court reached the conclusion in Wilson, as I read that case, though, by deciding it didn't make any difference.

QUESTION: Where do you find that in the Wilson opinion. I just read the pages you cited before, and I frankly don't --

MR. EASTERBROOK: I also refer you to 337 to 339 in which the Court discusses what Congress meant in passing

the Criminal Appeals Act. But I can go beyond Wilson, I think, because in United States v. Sanford we have the same problem we have here. In Sanford the judge entered an order saying that the defendants had a perfect defense, and on that account he dismissed the indictment. But the argument on the other side was, although that was called a dismissal of the indictment, it was really in function an acquittal, and we appealed, and this Court held that we were entitled to appeal under the Criminal Appeals Act, for the reason that the Double Jeopardy Clause did not bar the second trial.

QUESTION: That depends on whether in function the order is a dismissal or an acquittal. But how can you characterize this in function as a dismissal after the trial is all over -- that I don't understand -- on the ground that the evidence was insufficient to support a verdict of guilty. That is the reason the judge gave. How can you call that a dismissal of the indictment?

MR. EASTERBROOK: We can't call it a dismissal of the indictment. But what we can --

QUESTION: Then you can't appeal under the statute. If you can't call it a dismissal of the indictment, you can't appeal.

MR. EASTERBROOK: We can say, I think, your Honor, that Congress intended in the Criminal Appeals Act to remove all nonconstitutional bars to appeal from final orders

terminating the prosecution. The Congress used language that it thought encompassed all of those categories of final orders terminating prosecution. And although it didn't use the particular language, under the interpretation of that statute in Wilson, which goes back to the legislative history, Congress intended its language to be broad enough to cover this case.

QUESTION: Well, and maybe Congress rightly thought that a judgment of acquittal could not be appealed because a retrial would be barred by the Double Jeopardy Clause. That may be the reason it didn't use that phrase.

MR. EASTERBROOK: One more point, Mr. Justice Stevens. This Third Circuit in Wilson had held as a matter of law that the judgment in that case was in fact an acquittal and not a dismissal of the indictment, that it was an acquittal in both form and function.

QUESTION: I understand all that. But how do you get over the fact that in this case in function it's an acquittal. What else do you do when the evidence offered by the Government is insufficient to support the charge? The man is entitled to an acquittal, isn't he?

MR. EASTERBROOK: Yes, your Honor.

QUESTION: That's functionally what happened here.

MR. EASTERBROOK: And we don't dispute that.

QUESTION: You say some acquittals can be appealed,

and there is no authority that you have cited yet that supports that proposition, is there?

MR. EASTERBROOK: I think Sanford supports that proposition, absolutely, because in function the judgment in Sanford was an acquittal. It was an order based on the evidence at trial holding that the defendants had committed no crime, and the Court held that we could appeal in Sanford. Wilson supports that not because the order in Wilson was in function an acquittal based on insuffiency of the evidence but because of the Court's analysis of the legislative history and the intent of Congress to permit appeals whenever the Double Jeopardy Clause would not bar them. And that leaves, in our view, only the constitutional issue in this case.

QUESTION: That must be the equivalent under the old Criminal Appeals Act of the judgment notwithstanding the verdict, was it not? I forget the name of it, that was involved in that case, where the indictment, in effect, didn't charge a crime, taking all the evidence into consideration.

MR. EASTERBROOK: It was not a case where the indictment didn't charge a crime. The indictment charged a crime in Wilson, but the Court found that there were other reasons outside the indictment and completely apart from the face of the indictment why there should not be a trial. And if the Court had analyzed the old Criminal Appeals Act in

Sisson, the defect had to appear on the face of the indictment, which was not true in Wilson.

MR. CHIEF JUSTICE BURGER: Mr. Smith.

ORAL ARGUMENT OF J. BURLESON SMITH ON BEHALF OF THE RESPONDENTS

MR. SMITH: Mr. Chief Justice, and may it please the Court: There is a narrow and a limited constitutional question involved here, and I confess to the Court that much has been written about the problem of double jeopardy, both before and after the 1970 amendment. I won't suggest to the Court that everything that has been written in the area is consistent, nor will I suggest to the Court that there is a single case handled by this Court in which there has been a dispositive ruling, a ruling on facts on all squares with ours. I do suggest, however, that precedents and the policy of the Administration of Criminal Justice both support the affirmance of the judgments below.

Turning first to the precedents, of course the fountainhead of all decisions or all considerations in a case like this is Mr. Justice Story's opinion in the Perez case in 1824. That case ordinarily is cited for his words about the prisoner has been neither convicted nor acquitted, and therefore may be put to his defense. Similarly the words "manifest necessity," the words of "ends of public justice," but I come after those words to the words that I

think are really -- now, this is back in 1824 -- are really those that are applicable here after talking about the discretion to be exercised by the trial judge, and you remember that Perez was a hung jury case and was a capital case, and the question was what was the trial judge's power at that time.

Mr. Justice Story said, "But after all, they (the judges) have the right to order the discharge,and the security which the public has for the faithful, sound, and conscientious exercise of this discretion rests in this as in other cases upon the responsibility of the judges under their oaths of office." Now, that, it seems to me, is what we have today is to determine what the trial judge's function is in a case and how he exercised that function in this case.

The Perez case, of course, has been cited down through 1976 by this Court. Perhaps one of the most pertinent observations about it was of this Court in Wade v. Hunter where it was pointed out that the value of the Perez principles thus lies in the capacity for informed application under widely different circumstances without injury to defendants or to the public interest. That, after all, is the resolution that needs to be made in this and any other case involving the administration of criminal justice, the resolution of the problem, the public interest on the one hand, the private interest of the individuals on the other hand.

But counsel for the Government says that only the jury

can determine facts. That's not what Mr. Justice Harlan said for this Court in the Sisson case. I am not quoting the Sisson case for its decision on appealability. As you know, much has been written about that. But Mr. Justice Harlan for this Court said then, in the Sisson case, that judges, like juries, can acquit defendants and cited specifically rule 29 of the Federal Rules of Criminal Procedure.

Then in Illinois v. Somerville, this Court again recently, speaking through Mr. Justice Rehnquist for the majority, Mr. Justice White for the dissent, both acknowledged the applicability of the Perez rules, both acknowledged the flexibility of the rule of Perez that there is no fixed, mechanical formula, but rather that broad discretion is reserved to the trial judge.

Now, that is what rule 29(c) actually does. It gives broad discretion to the trial judge, and the judge here exercised that discretion. Similarly, in other cases, rule 29 cases, the trial judge has exercised that discretion similarly, particularly the Suarez case out of the Second Circuit, which relied on the Second Circuit's own opinion, and the Jenkins case which was later affirmed by this case. Suarez is on all fours. It's a white horse case insofar as the procedural posture of the case is concerned. It was a multicount indictment. Some of the counts were dismissed by the Court. It went to the jury. The jury hung up. The

trial court granted a rule 29(c) motion. He entered a judgment of acquittal. The Second Circuit said that the entry of that specifically under rule 29(c) barred appeal by the Government, that there had been a final determination. That is what the Fifth Circuit said in this case. That is what this case is all about.

Then in Robbins out of the Sixth Circuit, a rule 29(a) case that had cert denied by this Court, the court there, as one of your Honors suggested, granted a motion for acquittal at the end of the Government's case. He took it away from the jury at that juncture. The Sixth Circuit said that jeopardy had attached and that an appeal by the Government was barred by the constitutional inhibition against double jeopardy, and it came to this Court. Petition was denied. I suggest, if the Court please, that there is no difference between a rule 29(a) acquittal and a rule 29(c) acquittal.

So what we have are three circuit courts, the Second, the Fifth, and the Sixth, who have reached decisions under rule 29. Now, counsel for the Government, neither in brief nor in oral argument, has cited a single case from a circuit or any other court on a rule 29 situation that supports the Government's position here. The Government's position here is also baseless under the decision of this Court in Fong Foo. In Fong Foo, which has been reiterated in recent

opinions by this Court, he had a trial judge take it away during the course of the trial and enter a judgment on the facts as they were adduced. And this Court held that there was no right of appeal by the Government.

I reiterate that neither in oral argument or in brief has the Government supported a single rule 29 case in its support.

Now, we come -- you can't get into the precedent in this matter without getting to the famous trilogy of Wilson, Jenkins, and Serfass. Your Honors, of course, know much more about those cases than I would presume to know. Wilson was appealable because, as the Court said, there was a guilty verdict entered by the jury.

QUESTION: Mr. Smith, before you get to those cases, just so I know what your answer to this question is when you are discussing those other cases, suppose the jury returns a verdict of guilty and within seven days the judge enters an order of acquittal. Now, I take it your submission is that even though there wouldn't be a necessity for any new trial afterwards, that the mere fact of acquittal seals the case and it is unappealable.

MR. SMITH: Your Honor, I am not going to suggest that. One of the cases recently said there is no talismanic quality in the word "acquittal."

QUESTION: So you are not saying, then, I take it,

that just the fact that the judge has done what the rules entitle him to do, namely, enter a judgment of acquittal based on the evidence, automatically forbids the appeal.

MR. SMITH: I am not saying rule 29 arises to Constitutional level, if the Court please.

QUESTION: Again, I just want to know. Is it appealable or not? May the Government appeal that judgment of acquittal?

MR. SMITH: There is a jury verdict of guilty?

QUESTION: Yes.

QUESTION: Then a motion under 29(c) within seven days.

MR. SMITH: I think it could.

QUESTION: And if it is reversed, the guilty verdict is reinstated.

MR. SMITH: It's reinstated. There is no necessity for a new trial. As Mr. Justice Rehnquist said in the Jenkins case, there is no necessity for a new trial for the resolution of any --

QUESTION: Now I would like to have those cases.

MR. SMITH: We have taken the position, and I think it is perfectly supportable, that Jenkins is the controlling case. I particularly direct your Honors' attention to footnote 7 in that case where Mr. Justice Rehnquist, if you will remember, had before him the dissenting position taken by

Judge Lombard out of the Second Circuit. Judge Lombard was relying on such cases as Illinois v. Somerville, and Mr. Justice Rehnquist said Judge Lombard analogized respondent's case to mistrial cases in which the public interest in fair trials designed to end in just judgments must be weighed. That interest, he felt, would not be served by permitting a clearly guilty defendant to go free because of an erroneous interpretation of the controlling law. Speaking for this Court, Mr. Justice Rehnquist said, "We disagree with this analysis because we think it is of critical importance whether the proceedings in the trial court terminate in a mistrial, as they did in the Somerville line of cases, or in the defendant's favor as they did here." In other words, there was a judgment of acquittal in favor of the defendant. And, of course, that is the same case in which, speaking for this Court very recently, Mr. Justice Rehnquist also said -- and this gets to the heart of the double jeopardy question -- Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was or was not a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 3731, that further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged would have been required upon reversal and remand.

An ironic part about this case is that this is a criminal contempt case. Criminal contempt, any contempt, of course, is a charge of flaunting or denigrating the power, authority, and dignity of a court. Here the court against whom the contempt was supposed to have been directed has found absolutely and in unequivocal language that the defendants are not guilty, that the Government has failed to discharge its burden, the defendants are not guilty, using those words, if you please, Mr. Justice Stewart, and that they should for that reason be acquitted, and they were acquitted.

Now, Serfass. Serfass is simply a pretrail dismissal. And as the Chief Justice suggested, that really is a test of the sufficiency of the indictment.

So also is Sanford. Sanford is clearly, just as this Court held in December of this last year, is simply a pretrial dismissal. Admittedly the trial court said that the Government had consented and therefore whatever the proof was by the Government, the defendants should have been discharged.

That did not come into the trial where that evidence was introduced and produced. That trial was long gone. No rule 29 motion appears in the report. That trial was over. But as an afterthought and before the next trial, the yet-to-come trial, the defendant filed a motion for dismissal on the ground that the Government's evidence in a now completed trial

constituted a complete bar. This Court, quite properly held that that was nothing but a pretrial dismissal.

Now, if the Court please, the authorities -- or it seems to me the precedent is clearly in support of the position of the respondents here, the two corporations, but there is a very, very important consideration, a policy consideration if the Court please. And that relates to the fair accommodation between the proper administration of criminal justice on the public's behalf and an individual defendant's right to finality of judgment.

I think this is what Mr. Justice Black was talking about in Green v. United States, speaking for this Court of course, that the underlying idea, one that is deeply engrained in at least the Anglo-Saxon 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 embarrassment, 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. In other words, when he is acquitted, he is acquitted, and his trial is over.

Now, the Government counsel has said frankly that the question of whether or not corporations,and the only parties before this Court are corporations, are entitled to

the protection of the Double Jeopardy Clause is a question yet to be determined by this Court, and it will be determined on appeal, if the Court takes it, from the Security National Bank case out of the Second Circuit. He frankly said that this is a determination that need not be made by this Court in this case, but that is a position, in all candor, that the Government takes both in its brief for petition of cert and also in its main brief in this Court.

On the other hand, I cite that case and the Second Circuit's opinion in that case, to show that what Mr. Justice Black said about the rights and the public policy as to individuals applies as well as to corporations. And in this opinion, in December of 1976, the Second Circuit, the unanimous opinion, says, "No corporation, large or small, can escape the incalculable effect which a conviction may have on the public attitude toward the company. Like an individual, it must answer to the verdict of the community. No corporation, no matter how large, can pit its resources against the overwhelming might of the state so as to avoid the harassment and the increasing probability of conviction resulting from reprosecution. In this unequal contest" -- and these are the court's words -- "In this unequal contest 'fundamental fairness' requires that the Government, having had a full try at establishing criminal wrongdoing, shall not have another. The appeal is dismissed."

Now, let's turn those considerations to what we have here. Let's look at the facts of our case. First of all, counsel didn't mention that the 1969 consent decree was entered into and negotiated after extended grand jury proceedings, considerable time, expense, effort. The decree was entered in 1971. Less than two years later we were faced with ex parte show-cause orders for both criminal and civil contempt. We had been negotiating, or had been with them for at least three years, but these were entered ex parte by the Government, at the Government's motion.

Then we were faced with a prior appeal on the motion to construe. We lost that. This Court refused cert. And after that we had extensive discovery on both the criminal and the civil contempt, discovery running in tandem, in addition to discovery under the omnibus procedure which prevails in our district. And then in 1975 we got to the trial of this case. And I think it's very important for this Court to know the comments of the trial judge -- and these are all in the appendix. First of all, the Government's position in the trial, as shown on page 31 and 32, clearly shows that what it is trying to do is prosecute an industry,and we just happened to be the lucky target,for the disruptive practices that the Government talks about in the industry. We are the one -- the only one, as the record shows -- against which any charges like this have been made.

QUESTION: The merits of your case, or the Government's case, are not really before us here, are they?

MR. SMITH: No, sir, but these all go to the judge's comments, that are in the appendix, which show the state of mind of the judge when he found not guilty and acquitted.

QUESTION: But your position is that even if the judge -- when pressed, your position would be that even if the judge was quite wrong in entering the judgment of acquittal, nonetheless it's not appealable.

MR. SMITH: That's Fong Foo, if the Court please.

QUESTION: Exactly, and that has to be your position.

MR. SMITH: Yes, your Honor. Fong Foo says that very clearly. I think the whole Court thought, they probably thought the trial judge in Fong Foo had done something improvidently in dismissing or bringing to an end that particular litigation. But the fact is that the Court held --

QUESTION: There was an acquittal.

MR. SMITH: There was an acquittal and that no appeal should lie.

QUESTION: Right. And the fact really that this was a criminal contempt rather than a mine run, plain vanilla criminal case doesn't have anything basically to do with the issue before us, does it?

MR. SMITH: I think not, if the Court please. I think the Fifth Circuit determined that in the prior appeal and said that criminal contempt for purposes of our problem here is --

QUESTION: This case has been argued just as though it were a mine run, general prosecution on both sides, hasn't it?

MR. SMITH: That's right. A run of the mill. And that, of course, is one factor that shows the comprehensive effect of the Court's ruling in this case, is because there is no real reason that it shouldn't apply to other cases except for the fact that you have the judge finding -- he is the one against whom the contempt is supposed to have been -- he is the --

QUESTION: Well, that is a special little circumstance of this case, but it doesn't really affect the basic issue here, does it?

MR. SMITH: I think on that we would have to say that whatever distinctions you could make would be hard to withstand.

Then the trial court said -- and this indicates that when he dismissed the jury, he didn't intend to terminate this trial. He made some remarks from the bench, and he said, "I am open to any motion that either side would like to file." That's page 33 of the appendix. Then on that same

page, he told the Government, "I think you have had your day in court on the criminal contempt. I gave you every opportunity to convict these defendants, and you came very close on the corporate defendants, but you didn't come close on the individual. I would be inclined to bring this thing to an end at this time;" saying to the Government, "You shot your best shot and you didn't kill anybody, you didn't sustain your burden; I find the defendants not guilty, and I acquit them." This is getting over to the time when he enters orders.

QUESTION: He had two other opportunities to say the same thing, didn't he?

MR. SMITH: You mean earlier?

QUESTION: Yes, at the close of the Government's case, and he did not.

MR. SMITH: He did not. He gave the Government full opportunity, and the Fifth Circuit says this in its opinion. He gave the Government full opportunity to shoot everything they had. They shot it. And we made the motion at the end of the Government's case; we made the motion to acquit at the end of the whole case.

But now this rule 29 --

QUESTION: It convinced 11 jurors, though, didn't it?

MR. SMITH: Yes, it did. In all candor, that is one reason we don't want them to have another shot.

But also the Government has got another shot even after this, because what Judge Wood, the trial judge, was saying, he said, "Let's get on with the civil contempt. Let's get on." It's still pending, and there is nothing that the Government could get in this criminal contempt by way of penalty that it can't also get in the civil contempt which is presently pending in the trial court.

Now, what did the trial court say when he entered his judgment of acquittal? Now, each of these is dated April 22, 1975. There is a separate judgment of acquittal as to each corporate defendant. "The court finds that the grounds set forth in that motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt,that further this defendant should be found not guilty. It is accordingly adjudged that respondent Martin Linen Supply Company is not guilty of the charges against it and is hereby acquitted and discharged as to all charges herein." That is the judge's order and his opinion.

The circuit court, the Fifth Circuit, of course, held that there was no appealability and no appeal available to the Government, and it is our position, of course, that each of those judgments, or the judgments of both courts below,should be affirmed.

Now, if it's not affirmed, if those judgments are

not affirmed, how are we going to describe the function of a trial judge in the trial of a criminal case? Judge Simpson, on the panel of the Fifth Circuit that heard the argument, an old trial judge, asked Government counsel, he said, "What difference is there between the acquittal under these circumstances and the acquittal under the circumstances of Robbins where the Court took it away from the jury at the end of the Government's case?" The Government had no satisfactory answer to the court. Judge Dyer, also an old experienced trial judge, also on the panel, said, "Counsel, you would have a good argument if there wasn't anybody in that courtroom but you and the jury. But what are you going to attribute to the trial judge?"

I suggest, if the Court please, that unless this trial court's judgment of acquittal pursuant to rule 29, which had all of the effect of extending this trial in which this judgment of acquittal was entered, in which this evidence was entered and introduced, quite contrary to Sanford, that unless this judgment of acquittal is sustained and affirmed, the trial judge for practical purposes will be sterilized to the position of an impotent umpire. He will be in the trial court under these circumstances in a position quite like that of an umpire at a tennis match. If he can't do something definitive as the presiding officer of that court, then he is sitting there doing not much more than calling

"foot faults,""out of bounds," and "net balls." I suggest that the proper function of the trial court is to put him where he is to make decisions, and that is what I think Mr. Justice Story was talking about as early as 1824,and when he enters a judgment of acquittal, it's just as effective as if the jury had returned a verdict of guilty.

Thank you, sir.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:07, the oral argument in the above-entitled matter was concluded.]